The owner of land could alter the character of any part of the land or of things attached to the land by severance and then the things severed became personal goods. Stone and minerals quarried by the owner and trees or other produce of the earth severed from it by the owner, were always treated as personal goods; and I see no reason why clay (part of the earth) dug up by the owner and set apart for removal and use, in a loose state, should not also be considered as movable property.

But if a person severed things attached to the earth and if he *immediately* took them away, such taking was not, at Common Law, considered larceny.(1)

However, Explanation 2 to s. 378 meets this point as regards things *attached* to land, by providing that a moving effected by the same act which effects the severance, may be theft.

But the case where a thief quarries stone or minerals or digs up part of the earth is not provided for by s. 378.

In my judgment, the conviction for theft should be set aside and I order accordingly. The fine, if paid, to be refunded.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

SÍTAYYA (PLAINTIFF), APPELLANT,

and

RANGAREDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887. March 22. April 20.

Indian Limitation Act—Act XV of 1877, *s.* 19, *sch. II, art.* 85—*Acknowledgment —Mutual open and current accounts.*

A acted as commission agent for B and C. A furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to arbitration: for which purpose in March 1880 a "Memorandum of items to be settled" was drawn up and signed by B and C, in which they denied that any balance would be found due to A, but admitted that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880 B signed and supplied to the arbitrator an account on behalf of himself and C, which contained a similar admission. The arbitrator made an award which was set aside. A filed a suit against B and C in September 1882 for a balance due to him:

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(1) 3 Co. Inst., 109.

* Appeal No. 111 of 1885.

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Held, that the accounts were mutual open and current accounts; that B and C had made an acknowledgment of their debt to A; and that the suit was not barred by limitation.

APPEAL against the decree of L. A. Campbell, District Judge of Kistna, in Original Suit No. 7 of 1883.

This was a suit to recover the sum due on an account stated between the plaintiff and defendants Nos. 1 and 4. Defendants Nos. 2 and 3 were merely made parties to have the accounts taken in their presence.

The plaintiff acted as commission agent for the defendants Nos. 1 and 4, and bought and sold goods on their account and occasionally received goods from them on his own account.

In February 1878, the plaintiff furnished them with an account up to 20th January 1878, showing a sum due to him. The defendants paid a certain sum on account, but said the accounts were incorrect. On the 25th September 1878, defendant No. 4 wrote a letter to the plaintiff (filed as exhibit B), in which the following passage occurred:—

"Had you come with him (meaning the plaintiff's brother) the accounts could have been looked into in our presence, and it would have been convenient to settle all disputes personally. Though R wrote to you to come in that manner, you did not do so. Therefore the following discrepancies have been found on comparing with the telegrams and your letters which are here."

It was subsequently agreed to submit the disputes to arbitration, and on 31st March 1880, defendants Nos. 1 and 4 signed a document (filed as exhibit A) headed "Memorandum of items to be settled" between them and the plaintiff, as to the contents of which see the judgment of the Court *infra* p. 262.

On the 14th June 1880, defendant No. 4 by the direction of the arbitrator made out an account (filed as exhibit RR) on behalf of himself and defendant No. 1, giving a list of shipments and prices of goods sent by and to the plaintiff, and alleging that a balance would ultimately be found due from the plaintiff. The arbitrator made an award which was subsequently set aside by the Court.

The plaint was filed on the 5th September 1882. The District Judge dismissed the suit on the ground that it was barred by limitation, holding that the accounts between the parties were not mutual accounts within the meaning of the Indian Limitation Act,

sch. II, art. 85; that the defendants never admitted indebtedness to the plaintiff; and that consequently there was no acknowledgment of the debt by the defendants.

The plaintiff appealed.

Bháshyam Ayyangár and *Désikacharyar* for appellant.

Rámá Ráu for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Kernan and Muttusámi Ayyar, JJ.).

JUDGMENT.—The plaintiff sues to recover a balance of Rupees 22,751-15-4 alleged to be due by the defendants Nos. 1 and 4 to the plaintiff on account of mutual dealings between them. The District Judge dismissed the suit as being barred by limitation.

The facts are—

The plaintiff who lives at Masulipatam agreed in 1876 with the defendants Nos. 1 and 4 who live at Nellore to buy grain, oil-seeds, &c., and to forward the goods to the defendants, and the defendants agreed to pay the plaintiff therefor by remittances in cash or in hundies or drafts, and to pay him commission on the amount of such goods.

The plaintiff, during the year 1877, forwarded to the defendants Nos. 1 and 4 large quantities of grain and other goods, and received from time to time large remittances from the same defendants. In the month of December 1877, the defendants Nos. 1 and 4 forwarded to the plaintiff a quantity of "horns" at a price of Rupees 1,734-9-4 purchased by the defendants at the plaintiff's request to be paid for by the plaintiff. In the month of December 1877, the defendants Nos. 1 and 4 forwarded to the plaintiff 3,000 gunny bags to be sold for the account of the defendants.

In January 1878, the plaintiff sold on account of the defendants 1,508 gunny bags at, it is said, Rupees 227.

In February 1878, the plaintiff furnished to the defendants an account, up to the 26th January 1878, of the goods sent by him to the defendants, and of moneys received therefor, and of the sale of the 1,508 gunny bags, showing an alleged balance, on the accounts due to the plaintiff, of Rupees 19,915-6-10.

That account did not debit the plaintiff or credit the defendants with the residue of the 3,000 gunny bags, nor did it debit the plaintiff or credit the defendants with the price of the horns sent by the defendants to the plaintiff at his request. In 1878, plaintiff's brother

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went to Nellore in reference to the plaintiff's account so furnished, and received about Rupees 4,000 from the defendants, but the defendants objected to the account. In a letter dated the 25th September 1878 (exhibit B) to the plaintiff from defendant No. 4, the latter refers to the account sent by plaintiff and to the absence of the defendant No. 1 at Madras and to the fact that the plaintiff's brother and gumasta had not the plaintiff's vouchers, and says that the accounts could not then be settled. He says, "Had you come with him (the plaintiff's brother) the accounts could have been looked into in our presence, and it would be convenient to settle all disputes personally." He then points out many objections made by the defendants to the plaintiff's accounts, and amongst others the omission to introduce into the account to the debit of the plaintiff the price of the horns supplied.

The difference between the plaintiff and the defendants related to large sums, and it was agreed in 1880 that accounts between the parties should be, and they were, referred to Koka Alasangari Naidu as mediator. On the 31st of March 1880, the defendants Nos. 1 and 4 signed the exhibit A, which is headed "Memorandum of items to be settled between Sítayya (the plaintiff) and the defendants Nos. 1 and 4, presented to K. Alasangari Naidu (mediator) residing in Nellore, by Burla Ranga Reddi and Muttarazu Venkata Row (defendants)." This document refers to the letter of the 25th September 1878 already mentioned, and states that the plaintiff did not reply, and that the items specified in that letter should be recovered. It concludes that "according to what Sítayya (plaintiff) has mentioned in the cash account, proper vouchers have to be looked into in person. As it is not convenient to mention all those items in this memorandum, we will look into and settle the same on the day which may be appointed by you in respect of this. You should receive proper vouchers from us and Sítayya (plaintiff) in respect of the items of difference of prices mentioned above and in respect of all the items which should be allowed and is due, and settle the same."

That memorandum was delivered by the defendants Nos. 1 and 4 to the mediator; and the parties on the 11th of November 1881 proceeded to have their mutual accounts examined by the mediator. The mediator made an award which was set aside by the District Court, and afterwards by High Court.

This suit was filed on the 5th of September 1882, stating the

substance of the matter above stated, but alleging that an account was furnished by him to the defendants down to the 25th January 1878, and another account to the 23rd of March 1881, taking up the prior account and crediting in 1879 and in 1881 certain sums received by plaintiff on the sale by him of the residue of the gunny bags and other items and showing a balance of Rupees 19,820-11-7 due to plaintiff. In the plaint, the letter of the 25th September 1878 and the memorandum of the 31st of March 1880 are stated, and the plaintiff prayed for a decree that the sum claimed, amounting to Rupees 22,751-15-4 and costs, should be paid to him. The defendants pleaded that the suit was barred by limitation; that there were no mutual accounts between plaintiff and defendants. At the trial, the plaintiff proved amongst other things the furnishing of the accounts to the defendant in February 1878 and in March 1881, and the letter of the 25th September 1878, and memorandum of the 31st of March 1880, and also an account (exhibit RR) made out on behalf of the defendants Nos. 1 and 4 by the defendant No. 4 by direction of the mediator, signed the 14th of June 1880. In this account (exhibit RR), the defendants gave a list of the shipments of grain, seed, &c., and the value and expenses and remittances, and also of the money received by plaintiff, Rupees 231, for gunnies sold in 1878, and of Rupees 1,734-9-4, the price of the horns supplied to the plaintiff by the defendants. In a note to that exhibit RR., defendant No. 4 remarks that it is not convenient to make any kind of entry in the head "balance of accounts" and disputes the correctness of the plaintiff's allegation and alleges that there will not be under any circumstances any thing found due by them, but there will be a balance found due to them by the plaintiff. To that list is added an explanation as to very many items, supporting the contention of defendants and showing a balance of Rupees 13,946-7-4 due to defendants.

The third issue framed was, "Is the plaintiff's suit barred by limitation?" On this issue, the plaintiff put forward two answers—

First, that the dealings between the plaintiff and defendants were mutual accounts under sch. II, art. 85 of the Limitation Act, 1877; and the last item admitted or proved in that account was in 1879 and 1881, and therefore the suit is not barred.

Second, that there was an acknowledgment under s. 19 of the Limitation Act, 1877, by the defendants Nos. 1 and 4 in 1880, of

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liability by them in respect of plaintiff's right to have any balance due to him paid.

The District Judge held that the accounts between the parties were not mutual accounts within art. 85. In this he is clearly wrong.(1) Plaintiff had a claim against the defendants for the value of the goods bought by him and shipped to the defendants, and pending that account, the defendants had a claim against the plaintiff for the value of horns supplied to plaintiff at his request, and for the price of gunny bags consigned by the defendants to plaintiff for sale. The account never was settled between the parties, and it was open and current, and there were reciprocal demands between the parties. But the Judge did not credit the plaintiff's allegation that the last item in the account either admitted or proved was in January 1879 or March 1881, and he held the plaintiff's suit was barred. On the evidence before the Judge, we cannot say he was wrong as to the facts. This subject will be referred to hereafter.

As to the acknowledgment. The District Judge observed that the letter of the 25th September 1878 (exhibit B) and the memorandum signed by the defendants on the 31st of March 1880 (exhibit A) pointed out that the accounts furnished by the plaintiff were incorrect and that many discrepancies existed between his telegrams and letters, and that the accounts had to be settled between the parties in person. He held that there was no acknowledgment in exhibit A or admission that anything "is due" to the plaintiff. He says that it renewed exhibit B and the defendants' objections thereon, and that from first to last the defendants "never admitted indebtedness" to the plaintiff.

But the Limitation Act of 1877 does not require as an essential of an acknowledgment an admission of money being due, or an admission of indebtedness, as was required in s. 4 of Act XIV of 1859, and in s. 20 of Act IX of 1871. Both of which Acts have been repealed. Under the Acts last mentioned, the operation of an acknowledgment to bar limitation was limited to suits to recover debts and legacies, and for redemption of mortgages, and pledges of property and to certain execution proceedings. But in the Act of 1877, s. 19, the operation of an acknowledgment extends to any "suit or application in respect of any property or right." That section provides that if, before the expiration of

(1) (Reporter's Note) see *Lakshmayya* v. *Jagannathan*, *ante* p. 199.

the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, a new period of limitation according to the nature of the original liability shall be computed from the time when the acknowledgment was so signed. Such acknowledgment may be made to a person other than the person entitled to the property or right—see s. 19, explanation 1. In s. 19, explanation 2, it is declared that "signed" in that section means either personally or by an agent duly authorised in that behalf.

The right claimed by the plaintiff was, and is, a right to recover from the defendants Nos. 1 and 4 a balance which he alleges to be due to him on the accounts between them. The defendants in exhibit A, though they deny that any balance is or shall be found due by them, acknowledge that the accounts must be taken, and that they are liable in respect of plaintiff's right to pay him any such balance, if any, that might be found due to him—see concluding paragraph of exhibit A, *ante* page 262, and see exhibit RR. Such acknowledgment of liability is a clear inference from the terms and provisions of exhibit A. When exhibit A was signed, there was no doubt that limitation had not applied and there was no difficulty in each side admitting liability for any balance found due.

For the purpose of an acknowledgment of right to bar limitation the fact that the defendants in the acknowledgment contended that nothing would be due to plaintiff on taking the accounts is immaterial—see *Prance* v. *Sympson*(1) and *River Steamer Company* re.(2) The acknowledgment is of the plaintiff's right to have the accounts taken and of the defendants' liability to pay any balance that might be found due to the plaintiff. What was the balance must depend upon the taking of their accounts. The acknowledgment contained in exhibit A, dated 31st March 1880, was made within time under s. 19 of the Limitation Act, 1877. The result is the decree of the District Judge must be reversed and the case remanded for trial, as the Judge disposed of the case on the preliminary issue of limitation which excluded evidence on the record.

(1), Kay p. 678. (2) L.R., 6 Ch. App., 822.

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No relief is sought by the plaintiff against the defendants Nos. 2 and 3, as they are merely made parties to have the accounts taken in their presence. No objection has been taken by them or on their behalf.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muthusámi Ayyar.

1886. October 11. November 13.

PADAKANNAYA (DEFENDANT No. 2), APPELLANT,

and

NARASIMMA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Rent Recovery Act—Act VIII of 1865—Mulageni lease—Encumbered tenancy—Sale for arrears of rent.

A demised land to B on a mulageni lease. B mortgaged his tenancy to C. The rent under the mulageni lease fell into arrears, and A obtained a decree against B for the amount:

Held, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant—*Rájágopál* v. *Subbaráya* (I.L.R., 7 Mad., 31) followed.

APPEAL against the decree of H. M. Winterbotham, District Judge of South Canara, confirming the decree of A. Venkatarámayya, District Múnsif of Mangalore, in Original Suit No. 40 of 1884.

The plaintiff was the mulagár or proprietor of certain lands of which defendant No. 1 was the tenant under a mulageni or permanent lease granted by the plaintiff's father. The lease reserved a certain annual rent which subsequently fell into arrears. The plaintiff sued defendant No. 1 to recover the arrears of rent and obtained a decree for the amount in Original Suit No. 302 of 1881 on the file of the District Múnsif of Bantval, and in execution of the decree attached the mulageni right of defendant No. 1. But, long before the suit, defendant No. 1 had mortgaged his mulageni right to the father of defendant No. 2 under exhibit II of which the material parts are set out in the first paragraph of the judgment of the Court, see *infra*. Defendant No. 2 accord-

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* Second Appeal No. 13 of 1886.