law that the plaintiff cannot recover upon the written contract, because it has been altered in a material part.

Nor can the document be received in evidence of the debt. As remarked by Muttusami Ayyar, J., in the Full Bench case "In all the English cases in which there was judgment for the plaintiff upon the instrument in its original condition there was a separate count which did not refer to the instrument in its altered condition as the cause of the obligation which it was desired to enforce."

In the present case, the suit is not based on any antecedent transaction for which the instrument was given as security, nor did the execution of the instrument vest in the plaintiff any estate or right of the existence of which the deed would be evidence.

For these reasons, we are of opinion that the alteration of the document sued on, while it was in the custody of the plaintiff, vitiated the instrument, and we reverse the decree of the lower appellate Court and restore that of the District Munsif.

Respondent will pay appellant's costs in this and the lower appellate Court.

PRIVY COUNCIL.

SIVARAMAN CHETTI AND OTHERS (PLAINTIFFS)

and

MUTHAYA CHETTI, AND OTHERS (DEFENDANTS).

P.C. 1888. Nov. 24. Dec. 12.

[On appeal from the High Court at Madras.]

Village property—As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.

A village tank, on the site of an ancient one, was the common property of and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses:

Held, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done

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Present: Lord HOBHOUSE, Sir RICHARD COUCH, and Mr. STEPHEN WOULFE FLANAGAN.

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at the common cost; the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs.

APPEAL from a decree (4th December 1882) of the High Court(1), reversing a decree (7th April 1880) of the Subordinate Judge of Madura, East.

The parties, both described in the record as traders, Nattukottai Chetti caste, residing in the village of Karakuddi in the Shivaganga zamindari, disputed the right to repair a village tank, constructed on the site of an ancient one. The plaintiffs, four in number, were of one family, and the defendants, originally twenty-one in number, were of different families, all inhabiting the village.

In their plaint the plaintiffs stated :—

"That their common ancestor, one Meyyappa Chetti, about 70 or 80 years ago, with the consent of the Miras Ambalagars of the Karakuddi village, dug and constructed, at his own expense, the tank known as Kalkattu urani in the village, and thereupon he and his descendants became hereditary Hakdars of the urani.

"That the ancestors of the plaintiffs, and after them, plaintiffs, as hereditary Hakdars, had, up to date, been in possession of the urani, and at their own exclusive cost maintained the urani charity, by constructing stone-works round the urani, by digging supply and surplus channels, building flight of steps, building a large matam on the western bank of the urani, and by laying out a flower garden open to the public.

"That in the year 1842, on a complaint being made by Chidambaram Chetti, one of the plaintiffs' ancestors against the ancestors of the defendants 1 to 7, for wrongful interference with the urani, the then Collector of Madura, after inquiry, passed an order, dated 9th May 1842, to the effect that the urani was constructed at the exclusive cost of the ancestors of these plaintiffs, that they should therefore be allowed to make the repairs to the urani at their own cost according to mamul, and that the interference with the urani by the ancestors of the defendants Nos. 1 to 7 was wrongful.

"That subsequently, on the 2nd September 1842, Chidambaram Chetti and certain other Chettis of Karakuddi, executed a Kararnama before the Collector, to the effect that all the tanks and

(1) *Mutiaya* v. *Sivaraman* (I.L.R., 6 Mad., 229).

uranis of the Karakuddi Ilaka Nagarattars should henceforward be common to the whole community of the Nagarattars, but that the repairs, even though they should have to be made by the general contributions of the Nagarattars, should be made by the Hakdars who have right to the urani respectively by virtue of their ancestors having originally constructed the same.

"That the terms of the Kararnama were, however, never acted upon, but it was in fact virtually abandoned so far as this urani was concerned, and that since its date, plaintiffs and their ancestors, as Hakdars, had retained exclusive control of the urani and carried on repairs at their own cost."

Then followed the complaint that, in the year 1878, when they were about to repair the tank, they were stopped by the defendants, who claimed to take part in the work. They asked for a declaration of their sole right to repair, at their own cost, and for an injunction on the defendants; also claiming Rs. 350 as damages for previous interference.

The defendants, who severed in their defences, denied that the plaintiffs' ancestors had excavated the tank, which they alleged to have been made for charitable purposes by a former inhabitant, on whose death, without heirs, it had become the common property of the "Nattars" and "Nagarattars" of the village; and was appurtenant to a temple on its bank, in which temple all the inhabitants were interested, all the latter contributing to its cleaning and repairs. Some of the defendants also alleged that certain flights of steps had been built, some by the plaintiffs, but others by the defendants, at a time prior to the disputes, which arose in 1842.

The following issues were recorded: 1st, whether the plaintiffs had the exclusive right claimed by them, or the urani was the common property of the villagers; 2nd, whether the flight of steps which defendants, Nos. 1 to 4 and 6 and 7, alleged to have been constructed by their ancestors, had been so made, or by the plaintiffs' ancestors; 3rd, whether the flight of steps, which the 15th defendant claimed as having been constructed by his ancestors, had been made by the latter, or by the plaintiff's family; 4th, whether the right of maintaining and repairing the steps existed in the parties constructing them, or that right resided in the village community; 5th, whether the plaintiffs were entitled to any relief; and, if so, to what relief?

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The Subordinate Judge held that the tank was common property in the sense that the public could use the water; but that the right claimed belonged to the plaintiffs, because their family, though not the actual founders of it, had spent upon it large sums of money and improved it, "with the sanction of a few and the sufferance of many persons who could claim an interest in it." The Subordinate Judge, having referred to the Kararnama of 1842, and the other evidence, found that the plaintiffs for more than 30 years before disputes arose in 1878, had the exclusive superintendence of the tank, and cleaned it at their own expense. He held that thus "an easement" had arisen, and that the plaintiffs had thereby "acquired an exclusive right to conserve and improve the tank."

On issues 2 and 3 he held that the ancestors of defendants Nos. 1, 2, 3, 4, 6, 7 and 15 had originally constructed the steps, as alleged by these defendants.

On the fourth issue he apparently held that the defendants had lost by non-user their original right of repairing the steps constructed by their ancestors, and that the plaintiffs had acquired that right.

He refused to give the plaintiffs the damages asked for by them, but declared their sole right to repair the tank at their own cost, and enjoined the defendants from entering on the tank for the purpose of repairing it.

On appeal, the Judges of the High Court (Innes and Muttusami Aiyar, JJ.) gave the judgment, which is reported at length in *Mattaya* v. *Sivaraman*(1).

They considered that there was not any exclusive right of property in the tank itself, even alleged by either party; and it did not appear to them that there was any authority for saying that the construction of substantial adjuncts to the property of another could give the constructor a right of property therein. They held, accordingly, that the construction of certain masonry works, without opposition, did not give the plaintiffs any right to exclude others from interfering with the conservancy of the tank generally. If it did so, then some of the defendants, viz., Nos. 2 to 4 and 7, who constructed one set of steps, and the defendant No. 15, who constructed another, would equally have a right to exclude the

(1) I.L.R., 6 Mad., 229.

plaintiffs from taking any part in the general conservancy of the tank. It was not necessary to consider whether the plaintiffs who had always repaired the steps built at their exclusive cost might not have had a right to exclude others from interfering with the repairs of that particular set of steps. The relief now sought was something far beyond this, and no ground for it had been made out. Accordingly, the High Court dismissed the suit with costs.

On this appeal,—

Mr. *J. Graham*, Q.C., and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *T. H. Cowie*, Q.C., and Mr. *R. V. Doyne* for the respondent.

For the appellant it was argued that the tank was used for the benefit of the village community, being, when the improvements had been made, a charitable institution, and therefore subject to the laws regulating such establishments as temples, dharmsalas, and other things. *Primâ facie*, the management and supervision of such an institution, and the exclusive duty of providing for, and of executing, all necessary repairs, would devolve upon the founder and his heirs. The evidence established that here such was, in fact, the prevalent usage.

[Sir Richard Couch inquired if there was shown to be any legal obligation on the appellants to undertake the repairs at their sole expense]. So far only as that the appellants' family were hereditary and exclusive managers of the tank, as representing the villagers. That family were entitled to do all acts in the management, discharging the duties of managers. Thus it was that they became "Hakdars" in respect of the tank. The villagers might have sued the family, either to retire from the management, or maintain; and thus the latter had a right, corresponding to the duty to maintain, to repair exclusively. The succession to the management of a temple ordinarily depended on similar rights—See the judgment in the *Rajah Muttulinga Setupati* v. *Perianayagum Pillai*(1).

Moreover the plaintiffs relied on a uniform usage of three-fourths of a century that, in this respect, the plaintiffs' family should represent the community. The permission accorded to the

(1) L.R., 1 I.A., 209, at p. 228.

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ancestors of the defendants to construct two flights of steps into the tank would not give them a general right of interference in its management, nor any right, except, perhaps, that of keeping those particular steps in repair. Reference was made to *Churton* v. *Frewen*(1), and the *Duke of Norfolk* v. *Arbuthnot*(2) cited in the argument, and in the judgment, on the appeal to the High Court.

Counsel for the respondents were not called upon.

Their Lordships' judgment afterwards, on 12th December, was delivered by

Lord HOBHOUSE.—The plaintiffs and defendants are all inhabitants of the village of Karakuddi, and the subject of dispute is a tank belonging to that village. The plaintiffs claimed in their plaint to be hereditary Hakdars, which the High Court interpret to mean rightful owners of the tank, and they prayed for a declaration that they have the sole right to repair it at their own exclusive cost, and for other relief flowing from that right and from the defendants' interference with it. The Subordinate Judge gave the plaintiffs a decree establishing their sole right to repair the tank at their own exclusive cost. Upon appeal the High Court dismissed the suit. Their Lordships are now asked to say the High Court was wrong.

The plaintiffs do not now assert that they are owners of the tank in any full or proper sense of the word; they admit that the villagers at large have full right to the enjoyment of it; but they contend that the function of cleaning, repairing, and generally managing and protecting the tank is an hereditary possession of their family, which they have a right to retain so long as they bear the cost of it. It may be that for generosity and public spirit their attitude deserves all that has been said of it by their counsel. But the defendants object to it; and the only question for a Court of Justice is on which side the lawful right is to be found.

Though the various classes and divisions of villagers are called by local and unexplained names, this much is clear, that the tank in dispute is on the site of an old village tank; that about the beginning of the century it was improved at the cost of the plaintiffs' family upon the request of at least some leading villagers,

(1) L.R., 2 Eq., 634. (2) L.R., 4 C.P.D., 290; L.R., 5 C.P.D., 390.

and with the general acquiescence of the village; that since the year 1842, when there was a quarrel and a settlement, the plaintiffs' family have executed the general repairs and cleansing, and have on one occasion interfered to protect the tank from encroachment; and that some of the defendants have constructed and kept in repair flights of steps leading down into it. These matters, to which the greater part of the oral evidence relates, are not conclusive either way. But the proceedings of 1842 are of great importance and repair to be carefully looked at, not because they resulted in any decree or contract binding the present parties, but because they furnish the best evidence of the true relations and legal position of the disputants.

On the 1st of April 1842 Chidambaram, who was the head of, or in some way represented, the plaintiffs' family, presented a petition to the Collector of Madura, in which he alleged that when his predecessor improved the tank, it was agreed that his family should have charge of all the affairs appertaining thereto, and maintain it for ever. Then, after stating that their opponents in the village had prevented them from cleansing the tank, he prayed, "that an order may be passed allowing us to remove the mire and maintain the said urani charity for ever as we have been usually doing, prohibiting interference on the part of the persons who are endeavouring wrongfully to trouble us, and enabling the continuance of the charity in perpetuity."

The Collector referred the matter to the local Ameen, who took evidence and made a report; and on the 9th May 1842 the Collector declared that the opponents were not justified in interfering, and gave directions to the Ameen to issue orders for the complainants to carry on the work according to custom. It is noticeable that neither in the evidence adduced to the Ameen, nor in his report, nor in the judgment of the Collector, does there appear anything to support Chidambaram's allegation of an agreement that his family should have charge of all the affairs of the tank and maintain it for ever.

The order of May 1842 was no sooner issued than the opposite party, represented by one Lakshmanan Chetty, began to petition against it. They insisted that the tank was a common charity, and denied both the right of the plaintiffs' family to maintain it solely and the fact that they had done so. And they prayed a direction "that the charity which has, according to custom, been

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maintained by our Nagarattar community in common shall continue to be maintained in common henceforth." The immediate result of this petition was that the Collector directed that action on his previous order should be suspended till he himself came to the spot. The ulterior result was a compromise of the dispute, which for the time put an end to it.

The Kararnama which embodies the compromise is the most important document in the case. It was entered into before the Collector himself very formally. It was prepared by the Head Sheristadar of the district. It was signed by Chidambaram and Lakshmanan, the principal disputants, and by two others, apparently a partisan of each side; and it was attested by the signatures of the Collector and the Assistant Collector. It runs as follows :—

"On Chidambaram Chettiar commencing repairs to the Kalkattu Amman urani, Lakshmanan Chettiar and others said that they also would give money for digging that urani. Chidambaram Chetti objected that it ought not to be so received, and both parties resorted to the authorities. Chidambaram Chettiar contended that, as (his) father originally built the Kalkattu urani, he was the owner. The authorities (said) that uranis dug for charitable purposes are common property, and Chidambaram Chettiar urged that other uranis in the village should be likewise common, which statement the authorities accepted as just, and Lakshmanan Chettiar and others also admitted it as right. Therefore, both the parties having agreed that all the tanks and uranis of the Nagarattars of Karakuddi are common property, we have, with our mutual consent, agreed in the presence of the authorities, that in future, on occasions of removing mud from the urani and doing other repairs, all the Nagarattars should collect the money in common, hand over the said money to the person who may be in management as the original proprietor of the urani, have the work done, and adjust the accounts in common, and that there shall be no dispute whatever about this in future. Therefore we have executed this to be held as a deed of Kararnama for the same. We will henceforward abide by this alone."

The inferences to be drawn from this document are clear enough. The tank is the property, not of Chidambaram, but of the villagers, and the repairs are to be effected by common collections through the person in management, who is to account for his receipts and expenses. The only obscurity is in speaking of the person in

management as the original proprietor of "the urani." Whatever may be the meaning of that expression, it cannot detract from the clear statement that all the tanks and uranis are common property. The terms of the Kararnama are fatal to the claim of the plaintiffs that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to show that these terms are erroneous; nor anything in the subsequent evidence to show that the position of the parties has been altered. The circumstances that the plaintiffs' family have in fact executed subsequent repairs without dispute, and that they have stood forward to protect the tank when threatened with injury, are quite insufficient for that purpose.

Moreover, it is very difficult to understand how such a right as this can be claimed without a corresponding obligation, and the plaintiffs' counsel are unable to show in what way any obligation is imposed on their family. There is no endowment to support the tank, and no right of taking tolls or fees. It is confessedly at the option of the plaintiffs' family whether they will execute the repairs or not. In their Lordships' opinion, it is equally at the option of the other villagers to permit the repair to be executed by the plaintiffs, or to insist on the work being done at the common cost.

It seems a great pity that there should be litigation on such a ground. Disputes for the purpose of avoiding a charge are much more common than disputes for the purpose of bearing one. But as we have a dispute of the latter kind, it must be settled, like any other, by law. And that compels their Lordships to hold that the tank remains the common possession of the village, and that no class of the villagers has any right to exclude the rest from contributing to the repair. The appeal fails, and must be dismissed, with costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants—Messrs. *Lawford, Waterhouse and Lawford.*

Solicitors for the respondents—Messrs. *Frank Richardson and Sadler.*