REFERENCE UNDER STAMP ACT, S. 46.

JUDGMENT:—We are of opinion that these documents are partition deeds and must be stamped accordingly having regard to the provisions of section 29 (*c*) of Act I of 1879. Each member must pay according to the share which he has taken under the partition.

APPELLATE CIVIL.

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

1891. Sept. 23, 24. Oct. 19.

RAMUNNI AND OTHERS (DEFENDANTS NOS. 1, 2 AND 13), APPELLANTS,

v.

KERALA VARMA VALIA RAJA AND OTHERS (PLAINTIFFS NOS. 1—17 AND DEFENDANT NO. 16), RESPONDENTS.*

Landlord and tenant—Surrender—Limitation—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease.

The karnavan of a Malabar kovilagom executed a kuikanom lease of certain land, the jenm of the kovilagom, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land:

Held, (1) that the perpetual lease, as being of an improvident character, was *ultra vires* and void;

(2) that the original lease was not surrendered;

(3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff's kovilagom.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 26 of 1889.

Plaintiff No. 1 was the Valia Raja of the Cherikal kovilagom, of which plaintiffs Nos. 2—17 and defendant No. 16 were the junior members. They sued to recover possession of a paramba, being the jenm of their kovilagom, alleged to have been comprised in a kuikanom lease executed by a predecessor of plaintiff No. 1 to the karnavan of the remaining defendants in August 1846. The contending defendants denied the demise set up in the plaint and alleged that they were in possession under a perpetual lease executed in May 1861 by another predecessor of plaintiff No 1, and also pleaded limitation.

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* Appeal No. 45 of 1890.

The Subordinate Judge held that both the above leases were proved, but he was of opinion with reference to *Tod* v. *Kunhamad Hajee*(1) that the execution of that of 1861 was beyond the authority of the then karnavan of the plaintiff's kovilagom. With regard to the further pleas of the defendants he referred to *Aliba* v. *Nanu*(2) and *Rangasami* v. *Muttukumarappa*(3), and pointed out that the lease of 1846 specified no term for its duration and proceeded to record his rulings as follows :—

"The perpetual grant was unauthorized, ineffectual and legally "inoperative as against the kovilagom, and I certainly agree "in the soundness of the contention that the latter has the right "to treat it as altogether non-existent and to fall back on the "original lease of 1846, which was made on its behalf by Ravi "Varmah Valia Rajah and has never been since determined by any "act of the kovilagom (*Haji* v. *Atharaman*(4) and *Madhava* v. "*Narayana*(5)), and there can, of course, be no surrender, either "express or implied, without the consent of both the landlord and "tenant, and the landlord, in this case the kovilagom, is not shown "to have assented to any surrender at all (*Balaji Sitaram Naik* "*Salgavkar* v. *Bhikaji Soyare Prabhu Kanolekar*(6) and *Judoonath* "*Ghose* v. *Schoene Kilburn & Co.*(7)). I therefore find that the "paramba is now held by the 1st to 13th defendants' family "under the plaintiffs' kovilagom not under the perpetual right "evidenced by exhibit I, but under the improving lease in exhibit "A and that the suit is not barred by article 139 or any other "provision of the Limitation Act."

Defendants Nos. 1, 2 and 13 preferred this appeal.

The Acting Advocate-General (Hon. Mr. *Wedderburn* and *Sankara Menon* for appellants).

Sankaran Nayar and *Ryru Numbiar* for respondents.

JUDGMENT.—It is quite clear that the perpetual lease given by the plaintiff's predecessor in title in 1861 was a disposition of an improvident character which could not bind his successors.

It is argued that by reason of the acceptance of this lease there was a surrender of the prior lease of 1846 and that therefore the suit was barred by limitation. In our judgment, however, any

(1) I.L.R., 3 Mad., 176.
(2) I.L.R., 9 Mad., 222.
(3) I.L.R., 10 Mad., 515.
(4) I.L.R., 7 Mad., 512.
(5) I.L.R., 9 Mad., 244.
(6) I.L.R., 8 Bom., 164.
(7) I.L.R., 9 Cal., 671.

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surrender by operation of law that might have ensued on the taking of the perpetual lease was nullified by the plaintiff's repudiation of the perpetual lease. The surrender must fall to the ground with the transaction on which it is supported (*Doe d Egremont* v. *Courtenay*(1). It is contended by the Acting Advocate-General that this principle is not applicable, because the plaintiff's right to challenge the lease of 1861 was extinguished by the law of limitation more than 12 years having elapsed since the date when the defendants' possession under it began. The case is compared with *Madhava* v. *Narayana*(2). In that case it was held that possession acquired under a kanom, granted by the manager of a Nambudri family, and extending over more than 12 years, gave the holder a prescriptive title against the successor in management, who otherwise would have been entitled to repudiate the kanom and recover immediate possession.

It is clear that in such a case where the only legal title to which the defendants' possession could be referred was repudiated by the plaintiff, the possession must have been adverse to the family. But in the present case it is otherwise, because apart from the perpetual lease which the plaintiff treats as non-existent the defendants had a right to possession under the prior lease which had never been determined.

The plaintiff was never in a position to recover immediate possession from the defendant as from a trespasser. It was not competent to him at one and the same time to repudiate the perpetual lease and to take advantage of it by claiming that it operated to effect a surrender of the prior lease.

Under these circumstances, it is clear that the possession of the defendant cannot be deemed adverse and that the suit is not barred by limitation.

The appeal is therefore dismissed with costs.

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(1) 11 Q.B., 702. (2) I.L.R., 9 Mad., 244.