file and is not a copy but an original rough draft. It has been kept for record in the Vakil's office, bears the number of the suit, and the decision in the suit has been endorsed upon it. The plaint actually put in was a copy of this draft. We hold therefore that it is admissible and shows that in August 1869 Kunhi Soopi Haji admitted having alienated the property in a manner which would be adverse to the claim of his tarwad.

The razi decree in that suit was in favor of the present appellant (exhibit 190, dated 6th November 1869) and on 2nd September 1869 the tenant attorned to her (exhibit 189). The evidence of the 70th defendant's second witness proves that the 71st defendant held possession since 1869.

We are of opinion, therefore, that the plaintiff's claim to item No. 55 is barred. The appeal of the 71st defendant must be allowed and the plaintiff's claim as against the property in her possession (item No. 55) be dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

CHENNAPPA (APPELLANT),

v.

RAGHUNATHA (RESPONDENT).*

1891. March 31. May 6.

Civil Procedure Code, s. 111—*Set-off—Character in which claim is made—Court Fees Act—Act VII of* 1870, *ss.* 6, 28—*Levy of stamp due.*

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference:

Held, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly;

(2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded;

(3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.

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* Referred Case No. 36 of 1890.

CHENNAPPA v. RAGHUNATHA.

CASE referred for the decision of the High Court under section 617 of the Code of Civil Procedure by W. J. Tate, District Judge of South Canara, in the matter of appeal suit No. 14 of 1890 on the file of his Court.

The plaint in the suit in which this reference was made, set out (1) that the defendant borrowed Rs. 50 from the plaintiff's father and gave him a promissory note for that amount; (2) that the defendant borrowed Rs. 150 from the plaintiff's father, pledged certain jewels with him and executed a karar undertaking to repay the same in two months, with interest at $12\frac{1}{2}$ per cent.; (3) that plaintiff's father was dead, and plaintiff, who was his heir, had "been enjoying all his estate" and prayed for a decree for the sums due on the note and the karar respectively.

The defendant pleaded that the suit was barred by limitation so far as the claim founded on the promissory note was concerned, and as to the rest of the claim his allegation was as follows:—

"I executed the plaint karar reposing confidence (in him) "because he had agreed to deduct the amount due to him by me "from the amount realized by him on my account, and only "because he had just then no time to square accounts;" and the written statement proceeded to state that "a sum exceeding the "amount of the karar" executed on the pledge "of the jewels, "that is, Rs. 182-8-3, recovered in execution taken out through "the plaintiff's father (who was a pleader) is remaining with him "and is due to me," and he prayed for a decree for the difference between the last mentioned sums.

The case as stated by the District Judge, after summarising the pleadings, proceeded as follows:—

"The District Munsif disallowed the set-off on the ground "that the parties did not fill the same character within the mean- "ing of section 111, Civil Procedure Code.

"It is now contended for the appellant that the requirements "of the section are complete, for the amount to be set off is "ascertained and legally recoverable, and the parties fill in the "matter of set-off the same character as they fill in the suit, inas- "much as the plaintiff sued on the promissory note and bond "simply as his father's representative, and it is as such represen- "tative that the monies due to defendant would have by him to "be disbursed; further, that there is no legal distinction between "money received by plaintiff's father in his capacity of pleader,

"and money received by him in a private capacity. It is also "argued that what has to be looked to is the position of the "present parties, and that *quâ* both sets of transactions the plain- "tiff stands to the defendant in an identical position.

"On the other hand, it is urged that although paragraph 6 of "the plaint sets up plaintiff's heirship to his father in respect of "all his property, it does not state that the plaint amounts are the "father's own (self-acquired) property; that the set-off is asked "for from plaintiff himself (last paragraph of the written state- "ment), and that he is entitled, now that it has been pleaded, to "dispute his liability to pay it in this suit, on the ground that "it has not been stated, or proved, in what capacity he is to be "saddled with the liability, *i.e.*, whether as his father's heir in "respect of self-acquired property, or by virtue of his right of "survivorship, in which case there would be no separate estate.

"The case is not one of equitable set-off, and so governed by "the then Chief Justice's judgment, in *Clark* v. *Ruthnavaloo* "*Chetti*(1).

"It falls, as seems to me, within the stricter limits of section "111, inasmuch as the *transactions* were different. And, on the "analogy of illustration (b) to section 111, I am, not without great "doubts, of opinion that, because the plaintiff virtually (the plaint "being taken as a whole) chose to bring himself forward as his "father's representative in respect of the money due on the promis- "sory note and the bond, and because such assumption of charac- "ter was not objected to by the defendant, it is not necessarily "open to defendant to say that any other sums due to him by "plaintiff's father are payable by plaintiff in such character, *i.e.*, "really to say that on the face of his plaint in this suit plaintiff "must be taken to represent his father in respect of all property "and for all purposes.

"I also consider that if plaintiff is to be taken as representing "his father in respect of the set-off he represents him only in "his fiduciary capacity, he being, on a species of implied contract, "trustee of the defendant's money. If this view be correct, the "set-off amount would not be recoverable as such from plaintiff's "father were he suing on the promissory note and bond. Much "less is it recoverable as set-off from the plaintiff.

(1) 2 M.H.C.R., 296.

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"Then, on the authority of two rulings, one of the Allahabad, "and one, following it, of the Bombay High Court, *Amir Zama* v. "*Nathu Mal*(1) and *Bai Shri Majirajbai* v. *Narotam Hargovan*(2), "it is said for the respondent that court-fee should have been "paid on the amount of the set-off. On the other side, it is urged "that there is no provision in the Court Fees Act authorizing "the charge, and that, by section 111, Civil Procedure Code, the "set-off has to be pleaded in a written 'statement' which is not, "*per se*, chargeable at all; moreover, that Government has already "received full court-fee on the plaint amount, of which the set-"off only, on the pleadings, forms a fraction, so that, at any rate, "where the amount of set-off is less than the amount in suit, the "dues of the State have been already satisfied by the court-fee "paid on the plaint. I incline, on the whole, to the latter view; "but as two High Courts have held the contrary, think it right to "ask for a ruling which shall govern the procedure in Madras.

"The appellant further urges that no interest was due on "the promissory note A until the date of demand. I think this "contention correct. A contains no mention of interest, and "interest could only be made payable, therefore, as damages. "The contract to pay was only broken at the date of the demand, "so that defendant would only, from that date, be liable in "damages.

"But the appeal-memorandum is only stamped with the "court-fee payable on *the amount of the set-off*. And the "respondent relying on the Allahabad full bench ruling in "*Balkaran Rai* v. *Gobind Nath Tiwari*(3) contends that court-fee "cannot now be admitted on this other sum objected to. If the "learned Judges of the Allahabad Court have interpreted the law "correctly, and I am bound, in the absence of a contrary ruling "of the High Court of this Presidency, to think that they have "done so, it seems to follow that *quâ* the second relief sought, the "appeal-memorandum in this suit is so much waste paper, it being "a 'document' incapable of being received or filed in any Court "under section 6 of the Court Fees Act, and of no validity under "section 28, and incapable under the same section of being vali-"dated. I have felt myself compelled to follow in another case "the strong authority of the full bench ruling, and would do so

(1) I.L.R., 8 All., 396. (2) I.L.R., 13 Bom., 672. (3) I.L.R., 12 All., 129.

"here, but that I have (speaking respectfully) great doubts "whether that ruling is correct, *i.e.*, whether the word document "should be held to include, plaint or memorandum of appeal, see- "ing that section 54 (*b*), Civil Procedure Code, permits a plaint "to be returned for the affixing of the proper stamp (it is true "that the chapter including this section refers to the institution "of suits), and whether the 'mistake or inadvertence' mentioned "in section 28 of the Court Fees Act refers only to mistake or "inadvertence on the part of the Court or its officers, or may be "held to include inadvertence on the part of the party or his "vakil.

"And the last question, which follows the above, for the "answer to it seems deducible from the same view of the law, "is whether, if the statement pleading set-off should have been "stamped, and the proper stamp is tendered now, that stamp can "be received, and the statement thus become validated."

Pattabhirama Ayyar for appellant, (defendant).

Narayana Rau for respondent, (plaintiff).

JUDGMENT.—We are of opinion that the parties to the present suit fill the same character as regards both the subject-matter of the claim and of the set-off. The debt which the plaintiff sues for he seeks to recover as the heir and representative of his father, and the debt which the defendant pleads as a set-off is one which, according to him, the plaintiff is bound to pay as the heir and representative of his father. It may be that if the debts due on the promissory note and the pledge-bond are proved to be ancestral which survived to the plaintiff on his father's death, and if it appears further that he inherited no separate property from his father, and that the debt pleaded as a set-off is not one which, as a son, he is bound to pay under Hindu law, the set-off will have to be disallowed. But a distinction ought to be made between the character in which a liability is sought to be enforced and the conditions of the liability in that character. Section 111 premises two things as necessary to allowing a set-off, viz., (1) that the matter of set-off must be an ascertained sum legally recoverable by the defendant from the plaintiff, and (2) that the character in which the debt is claimed by, and from, the plaintiff must be the same. In the case before us, the character is the same, viz., the plaintiff is the heir and representative of his father. But if it turns out on enquiry that the plaintiff is not liable to pay the

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debt claimed by the defendant on the ground that he inherited no separate property from his father, the set-off will fail because the sum is not recoverable legally from the plaintiff by the defendant, and not because the character which the plaintiff fills as regards the debt sued for and the subject-matter of set-off is not the same.

Unless the defendant admits that the debt he seeks to recover is not legally recoverable from the plaintiff, the plea of set-off must be allowed to be set up and proved, and ultimately allowed or disallowed according as the cross-debt is or is not shown to be recoverable from the plaintiff.

As regards the second question, we are of opinion that a written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off. Having regard to the language of the concluding paragraph of section 111 and of section 216, we think that the Legislature intended that it should be treated as a plaint for the cross-claim. The same view was taken of the effect of those sections by the High Courts at Allahabad and Bombay (*Amir Zama* v. *Nathu Mal*(1) and *Bai Shri Majirajbai* v. *Narotam Hargovan*(2)).

As to the third question, we consider that when the memorandum of an appeal is not sufficiently stamped, it is competent to the Court to levy the deficient stamp duty. This view is in accordance with the principle laid down by the Privy Council in *Skinner* v. *Orde*(3), and the wording of section 4 of the Limitation Act and section 54 of the Code of Civil Procedure appear also to support it. We do not concur in the opinion expressed in *Balkaran Rai* v. *Gobind Nath Tiwari*(4).

Our answer to the fourth question is also in the affirmative.

Costs to follow the result.

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(1) I.L.R., 8 All., 396.
(2) I.L.R., 13 Bom., 672.
(3) I.L.R., 1 All., 230.
(4) I.L.R., 12 All., 129.