the view we have taken that defendants' liability in this suit is the same as it would have been in execution proceedings, viz., to pay the decree amount; that they are also liable for the costs awarded by the decree.

On the whole the appeal fails and is dismissed with costs.

Plaintiff has filed a memorandum of objections in respect of that part of his claim which has been disallowed. It is not pressed except as to a sum of Rs. 304-15-6, the difference between the total claim in the plaint under the heads 1, 2, 3 and 4 and that which the Subordinate Judge finds would be the correct total. The Subordinate Judge, though he says plaintiff's total is founded on a mistake, gives him only what he claims. It is admitted that it is a purely arithmetical mistake. We shall modify the decree by decreeing to plaintiff Rs. 4,307-14-7 and costs proportionate instead of Rs. 4,002-15-1. In other respects, the memorandum of objections is dismissed with costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VIRAPERUMAL.*

1892.
Oct. 17.
Nov. 18.
Dec. 5.

Oaths Act—Act X of 1873, *ss.* 5, 6, 7, 13—*Examination as witness of a child of tender years—Intentional omission to administer affirmation.*

A child, aged about six years, was called as a witness in a sessions court. The Judge satisfied himself of his intellectual capacity to give evidence, but intentionally omitted to administer an affirmation on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practically operative. The Judge did not examine the child for the purpose of eliciting whether he knew it was wrong not to tell the truth, or whether he knew the differences between right and wrong, but he told him to tell the truth and permitted him to be examined as a witness:

Held, that the child should have been affirmed.

Quœre, whether the omission to affirm the child having been intentional on the part of the Judge, the case came within the provisions of Oaths Act, s. 13.

---

* Referred Trial No. 36 of 1892.

QUEEN-EMPRESS v. VIRAPERUMAL.

CASE referred under Criminal Procedure Code, s. 374, by T. Weir, Sessions Judge of Madura.

Mr. *J. G. Smith* for the prisoner.

Mr. *K. Brown* for the crown.

At the first hearing their Lordships directed the further examination of certain witnesses. This examination having taken place, the case now came on again for disposal.

The further facts of this case and the arguments adduced at the hearing appear sufficiently for the purposes of this report from the judgment.

Oaths Act, 1873, ss. 5, 6, 7 and 13 are as follows:—

Section 5.—"Oaths or affirmations shall be made by the following persons:—

(*a*) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having, by law or consent of parties, authority to examine such persons or to receive evidence;

(*b*) Interpreters of questions put to, and evidence given by, witnesses; and

(*c*) Jurors.

Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Section 6.—Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall instead of making an oath, make an affirmation. In every other case the witness, interpreter or juror shall make an oath.

Section 7.—All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may, from time to time, prescribe.

And, until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

Section 13.—No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in, or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

The form of affirmation directed by the High Court under section 7 to be administered to children is as follows :—

"I affirm that what I shall state shall be the truth, the whole truth and nothing but the truth."

COLLINS, C.J.—The accused Viraperumal Asari has been convicted of the murder of a boy named Vellayan, aged three years, on the 3rd June 1892 and sentenced to death. Viraperumal Asari was on a visit to the boy's parents and had been living in their house for some weeks.

On the 3rd June the father of Vellayan went to work at a village some miles from his home. His wife brought him his meals at midday, and at three naligais after sunset he returned to his village. On his way home he was met by his wife, who informed him that the child was missing. He searched for the child that evening, but with no result. Next morning he renewed the search and passing by a well some three-quarters of a mile from his house discovered the body of his son floating in the water. He took the body from the well and discovered that the jewels usually worn by the child were missing, viz., a kapu, silver waistcord and a toe-ring. The neighbours soon assembled at the place, and the police being sent for arrived about noon. An inquest was held that same afternoon, apparently at some place near the well where the body was found, and the corpse was afterwards sent to the Hospital Assistant at Dindigul, who was examined before the Sessions Judge and who had no doubt that the cause of death was drowning.

At the inquest the police examined a boy named Arumugam, aged about six, a cousin of the deceased and he said that he saw the accused taking Vellayan along the path to the dhobi's house towards the north, and he pointed out the accused who was standing near. The accused was then arrested and remained in the custody of the police that night. Early the next morning the police brought the accused to the Village Munsif. The Village

QUEEN-EMPRESS v. VIRAPERUMAL.

Munsif, in the presence of the police, questioned him, and the accused then said the jewels were at Tandavan Asari's stack and he would produce them. The accused accompanied by the Village Munsif, the police and others went to this stack and took out a knot of cloth from the stack. The cloth upon being opened by the Munsif contained a silver bangle, a silver waistoord and a toe-ring. These articles were identified as those worn by the deceased boy.

The fourth and fifth prosecution witnesses say that, on the afternoon the child was missed, they were working at a forge and they saw the accused with the child Vellayan pass by about 4-30 P.M. and going in the direction of the well where the body was found, and the seventh and eighth prosecution witnesses say that they also saw the accused and the child a little further on than the place spoken of by the fourth and fifth prosecution witnesses. The Sessions Judge says that this group of witnesses is of a class not unfrequently open to suspicion and he further says that the object is to complete what is regarded by the police or prosecution as links in a chain of evidence. If this suspicion is correct, viz., that the police obtained the evidence of these witnesses by improper means for the purpose above mentioned, of course their evidence is worthless; but I am inclined to believe the witnesses, more especially as the Sessions Judge is not under the circumstances of the case prepared to reject it as unreliable. The other witness for the prosecution is Arumugam, said to be six years of age, who is described by the Sessions Judge as a "very young child—seems unusually intelligent." This witness was told to tell the truth, but was not affirmed or examined for the purpose of eliciting whether he knew it was wrong not to tell the truth or whether he knew the difference between right and wrong, and the Sessions Judge says the witness was of too tender years to render any attempt to bind his conscience expedient or practically operative. The printed copy of the evidence of this little child is, if reliable, conclusive of the fact that on the day in question between 4 and 5 P.M. the accused took the deceased boy from his playmates and led him away. It would have been more satisfactory to me, however, if Arumugam's evidecen had been taken down by way of question and answer. This is practically the case on the part of the prosecution. The accused stated before the Committing Magistrate that on the day in question he was working with his aunt's husband Thandavan Asari at smith's work until sunset and denied that he took the

silver articles named from the stack. The accused called Tandavan Asari before the Sessions Judge. This man was the father of Arumugam and the owner of the stack where the jewels were found, and he denies that the accused was working with him on the day named and in cross examination he states that the accused did produce the jewels from the stack.

The counsel for the accused in the High Court argued that the evidence of the Village Munsif, ninth prosecution witness, and the police constable, tenth prosecution witness, to the effect that Arumugam stated at the well that Viraperumal took the deceased child away and pointed out accused as Viraperumal and after that the Mahazar was written, ought not to be believed as the Mahazar states in answer to question 11, "If any persons are suspected who? and why?"—A. "Suspicion not known"; and it was impossible to believe that if Arumugam made the statement alleged and pointed out the accused and in consequence the accused was taken into custody that fact would not appear in the Mahazar; and that the prosecution witnesses 4, 5, 7 and 8 are not trustworthy and the details of their evidence as to distances are not in accordance with the facts. It was also urged that Arumugam not having been affirmed, his evidence was not admissible. The High Court directed the case to be sent back to the Sessions Judge to re-examine some of the witnesses for the prosecution as to the time the Mahazar was written, the distances spoken to and to enquire whether Arumugam affirmed before he gave his evidence and to give his opinion upon the additional evidence. The re-examination of the witnesses does not throw much more light upon the case, but I think that the Sessions Judge's opinion is right that the Mahazar was made out before, but not signed until after the witness Arumugam had made his statement. The Mahazar is on the common printed form, and, as the proceedings took place under a tree and a heavy shower of rain came on, the witnesses got away as quickly as possible and are not strictly accurate as to the sequence of events. With regard to the evidence of some of the witnesses as to how far one spot is from another, the Sessions Judge points out that uneducated witnesses in this country, especially in Madura, have little idea of distance or time, usually pointing to an object to determine the one and the heavens to determine the other.

The other point to be considered is whether the evidence of Arumugam is admissible, the Sessions Judge having intentionally

QUEEN-EMPRESS v. VIRAPERUMAL.

declined to affirm the boy on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practically operative. Act X of 1873, commonly called the Oaths Act, is the Act that governs the procedure as to administering oaths and affirmations, and by section 5 it is enacted that oaths or affirmations shall be made by all witnesses, *i. e.*, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court . . . . . having by law . . . . . power to receive evidence, and by section 7 all oaths or affirmations made under section 5 shall be administered according to such forms as the High Court shall, from time to time, prescribe. The High Court of Madras has directed certain forms to be used and especially one form of affirmation to be administered to children of tender age. Section 13 enacts that no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place.

In *Queen* v. *Mussamut Itwarya*(1) the question decided on this point was whether the evidence of a witness taken on simple affirmation only was admissible, and Kemp and Birch, JJ., held, *inter alia*, that the Sessions Judge being of opinion that the witness was not aware of the responsibility of an oath, examined her on simple affirmation and the omission to examine the witness on oath or solemn affirmation was an omission which was knowingly made by the Judge and it cannot be said that because the omission was knowingly made it renders the evidence inadmissible under section 5, for section 13 says no omission of any kind shall render the evidence of a witness inadmissible. But the same learned Judges in the case of *Queen* v. *Anunto Chuckerbutty*(2) held as appears by the report as follows:—"It does not appear to me that this section (section 13) would render the evidence of a child nine years old, whose evidence as in this case has been advisedly, and not by omission, recorded without any oath or affirmation, admissible as evidence." In consequence of this decision *Queen* v. *Sewa Bhogta*(3) was referred to a Full Bench and Couch, C.J., Kemp, Phear and Markby, JJ., held—the case being decided

(1) 14 Beng. L.R., 54. (2) 14 Beng. L.R., 295. (3) 14 Beng. L.R., 294.

without argument—that the word "omission" in section 13 of Act X of 1873 includes any omission and is not limited to accidental or negligent omission. Jackson, J., dissented from the other members of the Bench. The judgment of the Chief Justice is very short and simply says that the word "omission" in section 13 includes any omission and is not limited to accidental or negligent omissions. Jackson, J., was of opinion that section 13 was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the court, and not to give a power to Judges or Magistrates to render the whole Act as it were ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation.

In a very recent case *Queen-Empress* v. *Shava*(1) at a trial on a charge of murder one of the prosecution witnesses was a girl, ten years old. The Sessions Judge allowed her to be examined without administering any oath or affirmation. Jardine, J., held that although the girl ought not to have been examined as a witness until she had made the proper affirmation, yet that the irregularity was saved by section 13. Parsons, J., declined to deal with this question at all, but, as there was other evidence, concurred in confirming the conviction for murder.

The Judges of the Allahabad High Court differ from the decision of the Calcutta Full Bench. Mr. Justice Mahmood in *Queen-Empress* v. *Maru*(2) in a very able judgment in which the English as well as the Indian cases are reviewed, came to the conclusion that section 6 of the Oaths Act, 1873, imperatively requires that no person shall testify as a witness, except upon oath or affirmation, and notwithstanding section 13 of the same Act the evidence of a child, 8 or 9 years of age, is inadmissible if it has been advisedly recorded without any oath or affirmation; and in *Queen-Empress* v. *Lal Sahai*(3) Straight and Tyrrell, JJ., agreed with Mahmood, J., that the evidence of a witness is inadmissible if the court advisedly declines to administer to such witness an oath or affirmation. In *Queen-Empress* v. *Perumal*(4) the same

(1) I.L.R., 16 Bom., 359. (2) I.L.R., 10 All., 207. (3) I.L.R., 11 All., 183.

(4) Referred Trial No. 40 of 1892: JUDGMENT.—"The Sessions Judge reports "that the omission to administer an affirmation to the second witness Kuliammal "was deliberate, as he thought the child was of too tender years to render any "attempt to bind her conscience expedient. We have, no doubt, that the Sessions "Judge was in error and that the girl Kuliammal ought not to have been examined "as a witness until she had made the necessary affirmation. But we agree with "the Calcutta and Bombay Courts that section 13 of the Oaths Act includes any "omission and that the irregularity was saved thereby."

QUEEN-EMPRESS v. VIRAPERUMAL.

point arose, and Sir T. Muttusami Ayyar and Wilkinson, JJ., held that, although the Sessions Judge was in error in not administering an oath or affirmation, the irregularity was cured by section 13 of the Oaths Act. This judgment was delivered during the time the present case was under the consideration of Parker, J., and myself.

Section 118 of the Indian Evidence Act, 1872, enacts that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. Every person, with the above exceptions, is therefore competent to give evidence.

The Oaths Act X of 1873 by section 5 enacts that oaths or affirmations shall be made by the following persons:—(*a*) "all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having, by law or consent of parties, authority to examine such persons or to receive evidence." The law then stands thus. All persons are (with certain exceptions) competent to give evidence: all witnesses who may lawfully be examined shall make an oath or affirmation. But it is said that section 13 of the Oaths Act absolutely cures any omission or refusal to administer any oath or affirmation, and a Judge may advisedly refuse to administer to any competent witness any oath or affirmation and such evidence although not given upon oath or affirmation is admissible in evidence. I am of opinion that a witness' evidence taken under such circumstances as in the present case is not admissible. The Sessions Judge refused to administer any oath or affirmation, and it cannot, therefore, be said that he merely omitted to administer such oath or affirmation. That the action of the Sessions Judge in not administering an oath or affirmation was irregular admits of no doubt, but the question is was the irregularity cured by section 13 of the Oaths Act.

I agree with Jackson, J., that the Judge having been directed by law to examine the witness in question upon affirmation and having determined that he would not administer such affirmation, the witness has been examined contrary to law and the evidence is inadmissible (*Queen* v. *Sewa Bhogta*(1)). It may be argued that

(1) 14 Beng. L.R., 294.

it is the policy of the Indian legislature not to allow any technicality or mere omission to interfere with the decision of a competent court, *e.g.*, section 195 of the Code of Criminal Procedure enacts that certain offences shall not be cognizable by a court unless a previous sanction, as therein defined, is given, yet section 537 says that no finding or sentence ..... passed by a court of competent jurisdiction shall be reversed ..... by the want of any sanction required by section 195 unless a failure of justice is occasioned thereby; but can it be said that a conviction would be legal if a previous sanction had been asked for and refused on the ground that no such sanction was necessary? It is clear that there is a difference between acts of omission and acts of commission, and as section 13 only mentions acts of omission, I decline to extend the section to acts of commission.

I am, however, of opinion that the evidence in the case, apart from that of the child Arumugam, justifies the conviction of the accused for the murder of Vellayan, and I would, therefore, confirm the conviction, but, taking into consideration the youth of the accused, and that it is possible the murder was not a premeditated one, but was committed on account of a sudden temptation to possess himself of the boy's jewels, I would alter the sentence to one of transportation for life.

PARKER, J.—The Sessions Judge has re-examined prosecution witnesses 4, 5, 9 and 10 as to the omission of the mention of suspicion against the prisoner in the inquest report, and has also re-examined the seventh witness as to the exact spot where he alleges he saw the accused and the boy. The Mahazur filled up was the usual printed form supplied to Station House Offices, and I am of opinion that the Judge is right in his opinion that this must really have been filled up before the boy Arumugam pointed out the prisoner. Had such not been the case there is no reason whatever why the fact should not have been recorded in the Mahazur. The truth seems to be that the boy was questioned after the Mahazur was written and before it was signed,—but just at that moment heavy rain came on, so the Mahazur was hastily signed and the information given by the boy recorded on a separate piece of paper.

Nor do I see sufficient reason to doubt the evidence of the two dhobies. They are uneducated people and their inaccuracy in calculating and expressing distances in English measurements is

QUEEN-EMPRESS v. VIRAPERUMAL.

not a sufficient reason for discrediting the general truth of their testimony.

The third ground of objection taken by the learned counsel was as to the admissibility of the evidence of the boy Arumugum on the ground that he had not been affirmed. In answer to our inquiry the Sessions Judge has explained that he intentionally omitted to administer an affirmation, as it appeared to him that the child was of too tender years to render any attempt to bind his conscience expedient or practically operative. By this I understand the Judge to mean that he believed the child too young to understand the nature of an oath or affirmation and the consequences attaching to a breach thereof. The Judge did enjoin the child to tell the truth and in that manner attempt to impress upon him his obligation as a witness.

The Judge states that he fully satisfied himself of the intellectual capacity of the child to give evidence, and the child was, therefore, a competent witness under section 118 of the Evidence Act. Under section 5 of the Indian Oaths Act an affirmation should have been administered, and the question for consideration is whether, with reference to section 13, Act X of 1873, the omission or irregularity renders the child's evidence inadmissible. The earliest case on the question is *Queen* v. *Mussamut Itwarya*(1). That was a case in which the Sessions Judge examined a little girl on simple affirmation being of opinion from the answers given by her that she was not aware of the responsibility of an oath. It was held by the Court (Kemp & Birch, JJ.) that the evidence was not rendered inadmissible, because the omission was knowingly made, and that the credibility of the evidence had been rightly left to the Jury.

A few months afterwards a similar case occurred and the question was referred to the Full Bench by Couch, C.J., and Ainslie, J., whether the word "omission" in section 13 included any omission and was not limited to accidental or negligent omissions. It was held by the Full Bench (Couch, C.J., Kemp, Phear and Markby, JJ.) that the word included any omission, but Mr. Justice Jackson dissented from this opinion (*Queen* v. *Sewa Bhogta*(2)).

In 1888 the question was raised at Allahabad before a single

(1) 14 Beng. L. R., 5. (2) 14 Beng. L. R., 294.

Judge (Mr. Justice Mahmood), who held (*Queen-Empress* v. *Maru* (1)) that a witness who, by reason of tender age or want of previous instruction, had no conception of the obligations of an oath, whether with respect to a future life or to the punishment for perjury, could not be regarded as competent to give evidence legally admissible. On this ground he held the evidence of the child-witness to be inadmissible, though he also dissented from the view of the Calcutta Full Bench in *Queen* v. *Seva Bhogta*(2).

This opinion of Mr. Justice Mahmood was considered by a Divisional Bench of the Allahabad High Court in *Queen-Empress* v. *Lal Sahai*(3) (Straight and Tyrrell, JJ.). It was then held (contrary to the opinion of Mahmood, J.) that in determining the question of the competency of a witness under section 118 of the Evidence Act, it was not necessary to enter into inquires as to the witness' religious belief or his knowledge as to the consequences of falsehood in this world or in a future state. It was held that if a child was possessed of sufficient intellectual capacity to give a rational and intelligent account of what he had seen or heard or done on a particular occasion, his competency as a witness was established and the question of the credibility to be attached to his statements only arose when he had given his evidence. In that case the child had stated to the Sessions Judge that he knew the difference between truth and falsehood, but did not know the consequences here or hereafter of telling lies,—but he promised to tell the truth. The High Court held that the Sessions Judge ought to have solemnly affirmed him, but without expressly deciding the question as to the effect of section 13 of the Oaths Act sent for the witness and took his evidence afresh.

In Bombay the point came recently before a Division Bench (Jardine and Parsons, JJ.). The former concurred with the view of Chief Justice Couch and his colleagues at Calcutta that the irregularity, though intentional, was covered by section 13. He pointed out, however, that the irregularity was serious inasmuch as it might lead to the Judge failing to make proper inquiry into the intellectual capacity of the child. Mr. Justice Parsons abstained from expressing any opinion inasmuch as he considered there was sufficient evidence, independently of that of the child, to prove the guilt of the accused.

---

(1) I.L.R., 10 All., 207. (2) 14 Beng. L.R., 294. (3) I.L.R., 11 All., 183.

QUEEN-EMPRESS v. VIRAPERUMAL.

Finally there is the judgment of this High Court (*Queen-Empress* v. *Perumal* (1)), in which it was held by Sir T. Muttusami Ayyar and Wilkinson, JJ., that though a girl-witness ought to have been affirmed the irregularity was covered by section 13.

I do not myself feel any doubt that the evidence is admissible and the weight of judicial authority appears strongly to support this view. Section 13 of the Oaths Act is only one of many instances indicating the settled policy of the Indian legislature to prevent justice being defeated by a technical irregularity. It maintains the legal obligation of a witness to speak the truth, while at the same time it provides against the possible failure of justice through a technical irregularity. Under section 118 of the Indian Evidence Act no sort of religious belief or knowledge of temporal penalties is required from a witness. All that is necessary is rational understanding and power to answer rationally, and though an oath or solemn affirmation is prescribed, the omission to take it will not relieve the witness of the legal obligation to state the truth. It is obvious that it may be impossible for the witness to know whether the omission to affirm him is intentional or an oversight, and if the mental perversity of the Magistrate (of which the witness may know nothing) does not destroy his legal obligation to state the truth, why should it render his evidence inadmissible and thus defeat the ends of justice? What could have been the object of the legislature in maintaining the obligation to state the truth if the statement when made was not to be used as evidence? In the present case the Judge was careful to satisfy himself as to the competency of the witness under section 118 of the Evidence Act, and though he, for a mistaken reason, omitted to affirm him, I do not think the evidence is thus rendered inadmissible.

This evidence is material also,—for though there is other evidence that the deceased boy was in company with the prisoner,—the witness Arumugam is the only one who speaks to the prisoner having led him away. The statement by the boy appears to have been made quite spontaneously and naturally, and it would have been difficult if not impossible to have tutored the child to make such a statement. It was his statement which led to the arrest of the prisoner and to the pointing out of the jewels.

(1) Referred Trial No. 40 of 1892.

It is the evidence on this latter point which appears to me to fix the guilt upon the prisoner. Had he not been really guilty, the discovery of the jewels by his agency would seem to have been impossible.

As to the sentence the accused is a mere youth and a relative. The murder does not appear to have been premeditated, and I am inclined to think the prisoner may have yielded to sudden impulse and temptation when he found himself alone in the company of his little cousin. Having regard to his youth and the time that has elapsed, I think we may perhaps be justified in commuting the sentence to transportation for life and I would order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ATCHAYYA (PLAINTIFF), APPELLANT,

v.

BANGARAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1892. March 29. April 12.

Civil Procedure Code, ss. 13, 272—*Execution proceedings*—Res judicata—*Matter which ought to have been raised as a ground of defence.*

A and B obtained a decree against X and Y, on which about Rs. 9,000 was due. Z obtained a decree against A and B, on which about Rs. 6,400 was due, and in execution attached the first-mentioned decree. A and B alleged in the matter of the execution of their decree for the first time, that the suit against them had been instituted really by X though in the name of his son Z, and consequently contended that the decree amount, which they paid into court, was the property of X and so liable to satisfy their claim. The above allegation was substantiated and Z's claim on the money in court was disallowed on appeal:

Held, (1) that A and B were not precluded from asserting their claim to the money in court by reason of the above allegation not having been made by way of defence to the suit of Z;

(2) that A and B were entitled to enforce any claim, which X might enforce, for the purpose of satisfying their decree, and accordingly that Z's claim on the money in court was rightly disallowed.

APPEAL against the order of H. R. Farmer, District Judge of Vizagapatam, dated 19th February 1891, and made on civil mis-

* Civil Revision Petition No. 238 of 1891 and Appeal against order No. 95 of 1891.