

NARAYANA-
SAMI
GRAMANI
v.
PERIATHAMBI
GRAMANI.

kind to a legatee and dies possessed of a greater number, the legatee and not the executor has the right of selection. The same view was taken in *Tupley v. Eagleton*(1) where the testator who possessed three leasehold houses in King Street, bequeathed two houses in that street without mentioning which two houses the legatee should take. Jessel, M.R., held that the legatee was entitled to elect which two he will take.

There is thus clear authority for holding that the decree of the courts below is correct. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

1895.
February 15.

KRISHNA PILLAI AND OTHERS (DEFENDANTS NOS. 1, 3 AND 6),
APPELLANTS,

v.

RANGASAMI PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS
NOS. 2, 4, 5 AND 7 TO 13), RESPONDENTS.*

Mortgage—Redemption—Mortgage sued on not proved—Admission by defendants of mortgage right.

The plaintiff sued to redeem a kanom of 1859. The kanom was not proved, but it appeared that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. The Subordinate Judge held that the kanom to which the admissions related could not have been executed before 1823 which was less than sixty years from the date of some of the admissions and he passed a decree for redemption:

Held, that the plaintiff having failed to establish the kanom on which the suit was based should not have been allowed to fall back upon some other as to which the defendants had made the admissions in question.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 657 of 1893, reversing the decree of V. Kelu Eradi, District Munsif of Palghat, in original suit No. 452 of 1892.

Suit to redeem a kanom for Rs. 25 dated 1859. The District Munsif found that the land was held on kanom and that the plaintiff was the assignee of the jennm title: but he was of opinion

(1) L.R., 12 Ch. D., 683.

* Second Appeal No. 1430 of 1894.

that the kanom of 1859 was not proved, and also that there was no proof that the kanom under which the defendants held the land had been granted within sixty years of the date of the suit. On the last-mentioned finding he dismissed the suit as barred by limitation. The Subordinate Judge agreed with the District Munsif except as to the last-mentioned finding. He held that the kanom under which the defendants held the land must have been dated not earlier than 1823 and that it had been admitted by the defendants within sixty years of that date, and therefore ruled that the suit was not time-barred. He passed a decree as prayed.

The defendants preferred this second appeal.

Subramania Sastri for appellants.

Sankaran Nayar for respondent No. 1.

JUDGMENT.—The Subordinate Judge has agreed with the District Munsif in finding that the kanom sued on is not proved to be genuine. But he has, nevertheless, given plaintiff a decree on the ground that exhibits A., B., C. and D. contain admissions of first defendant and his brother being kanomdar under those through whom plaintiff claims, and that these are admissions made within the statutory period so as to prevent the plaintiff's claim to redeem being time-barred. We agree with West, J., in *Govindrav Deshmukh v. Ragho Deshmukh*(1) in holding that a plaintiff failing to establish the mortgage on which the suit was based should not be allowed to fall back upon some other as to which admissions may have been made by the defendants in other proceedings. In *Unnian v. Rama*(2), the decree was passed on a mortgage expressly pleaded and relied on by the defendant; so also in *Kunhi Kutti Nair v. Kutty Maraccar*(3).

We therefore set aside the decree of the Lower Appellate Court and restore that of the District Munsif.

Respondents must pay appellants' costs in this Court and in the Lower Appellate Court.

(1) I.L.R., 3 Bom., 543.

(2) I.L.R., 3 Mad., 415.

(3) 4 M.H.C.R., 359.