APPELLATE CIVIL.

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

1894. March 21. October 18.

DAMODARA MUDALIAR AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

SECRETARY OF STATE FOR INDIA (PLAINTIFF), RESPONDENT.*

Contract Act—Act IX of 1872, *s.* 70—*Repairs by Government to a tank in which zamindar is interested—Suit against zamindars for share of cost.*

The Government repaired a certain tank from which were irrigated lands in the zamindari of the defendants and also raiyatwari villages held under Government which had been severed from the Zamindari. It was found that the defendants knew that the repairs, which were necessary for the preservation of the tank, were being carried out and did not wish to execute them themselves except as contractors and that they had enjoyed the benefit of the work done, and further that Government had carried out the repairs not intending to do them gratuitously for the defendants. It was not found that there was any request, either express or implied, on the part of the defendants to the Government to execute the repairs. In a suit by the Secretary of State to recover from the defendants their share of the cost incurred:

Held, that the plaintiff was entitled under Contract Act, s. 70, to recover part of the cost incurred, estimated with reference to the irrigable area of the villages owned by the plaintiff and defendants, respectively.

APPEAL against the decree of S. Russell, District Judge of Chingleput, in original suit No. 10 of 1892.

Suit by the Secretary of State to recover from two zamindars their respective shares of the cost of repairing a certain tank by which were irrigated certain lands of the defendants as well as raiyatwari lands held under Government. The District Judge passed a decree for a portion of the plaintiff's claim against which the present appeal was preferred by the defendants.

Sankara Menon and *Masilamani Pillai* for appellants.

Mr. *K. Brown* for respondent.

JUDGMENT.—The question raised by this appeal is whether the defendants being the proprietors of certain villages irrigated by the Parayankulattur tank, can be made liable for the costs of repairs of that tank incurred by the Government. Inasmuch as other villages held under Government are irrigated by the same tank

* Appeal No. 38 of 1893.

the Government were under an obligation to make the repairs, and it is found as a fact, and not disputed, that the repairs were necessary for the preservation of the tank. There are no definite findings by the District Judge, and the evidence is not clear as to the circumstances under which the repairs were undertaken by Government. But it seems clear from the defendants' own statements that they were aware that the repairs were being executed (see BB). The averment to that effect made in the plaint is not denied in the written statement, and it is not the defendants' case that they were themselves anxious to execute the repairs except in the capacity of contractors, or that the act of the Government in undertaking the work was in any way wrongful or improper. The contention on the defendants' part is that the Government were bound to do the repairs at their own expense and not entitled to charge the zamindar. A further point of minor importance is also taken, viz., that the District Judge has not made a fair apportionment of the cost of the work, having regard to the interests of the Government villages and zamindars' villages in the irrigation secured by the tank.

On the part of the defendants it was argued that, as there was no contract between them and the Government and no joint liability such as could give rise to an action for contribution, the present action could not be maintained; and the case of *Leigh* v. *Dickeson*(1) was relied on. In that case the parties were tenants-in-common of a house, and the claim made was in respect of money expended on substantial and proper repairs. In this view of the facts the present case may be distinguished, and another ground of distinction is that in the present case the remedy of partition is not available. In his judgment, Pollock, B., expressly distinguished case from those in which "it has been held that, where an outlay "is in the nature of salvage, all interested in the thing saved are "bound to contribute."—*Leigh* v. *Dickeson*(2). But in the Court of Appeal where the judgment of Pollock, B., adverse to the claim was affirmed, the decision was put upon grounds which cover cases in which an outlay necessary for the preservation of the thing in which the parties are interested, has been made. Indeed, Cotton, L.J., starts by assuming "that the house was in a bad state "of repair" and that the repairs executed by the defendant were

(1) L.R., 15 Q.B.D., 60. (2) L.R., 12 Q.B.D., 194.

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necessary.'—*Leigh* v. *Dickeson*(1). His decision amounts to this, that, in the absence of a request and in the absence of a common obligation to repair, no action for contribution will lie at the suit of one tenant in common against another, and that was the judgment of the Court of Appeal. No reference is made by any of the Lords Justices to the doctrine of salvage. In a later case where the question related to a policy of life insurance and the claim was made in respect of a premium paid by the mortgagor, the Court of Appeal distinctly held that the doctrine of salvage, as understood with reference to maritime cases, had no application, and Bowen, L.J., states as the general principle that work and labour done or money expended by one man to preserve the property of another do not, according to English Law, create any obligation to repay the expenditure. In the course of the argument (page 239) he observes that the law is laid down too widely in the notes to *Lampleigh* v. *Brathwait*(2). It follows also from these decisions, which after all only re-affirm what has been said in earlier cases, that the statement of law made by Chancellor Kent and cited in *Leigh* v. *Dickeson*(3) cannot be accepted as correct according to English authorities (see Kent's Commentaries). As a general rule, a man cannot be made liable for good services rendered under circumstances giving him no option of declining or accepting.

In the present case it is clear that the facts do not bring it within either of the two exceptions above mentioned. There was no common obligation to repair the tank, the zamindar and the Government are liable to their tenants, respectively, and the tenants of the one could not, it is conceived, make the other responsible for mere neglect to maintain the tank. The exception which covers the case of joint debtors, one of whom pays the whole debt, cannot apply, and it is at least doubtful whether on any principle of contribution or indemnity the plaintiff could recover—*Leigh* v. *Dickeson*(1), *Dering* v. *The Earl of Winchelsea*(4), *Moule* v. *Garrett*(5). Again, there was no request on the part of the zamindars, and though it is possible that if the facts were properly ascertained, a request might have been implied, the District Judge has not found that such implication ought to be made. According to

(1) L.R., 15 Q.B.D., 60.
(2) 1 Smith's Leading Cases, 160.
(3) L.R., 12 Q.B.D., 194.
(4) 2 B. & P., 270.
(5) L.R., 7 Ex., 101.

the English authorities it would seem, therefore, that the action must fail.

But the plaintiff's Counsel relies on section 70 of the Contract Act and invites us to hold that a rule of law, differing from that found in the English cases has been there laid down. By that section three conditions are required to establish a right of action at the suit of a person who does anything for another. The thing must be done lawfully; it must be done by a person not intending to act gratuitously; and the person for whom the act is done must enjoy the benefit of it. There can be little doubt that the statement of the law is derived from the notes to *Lampleigh* v. *Brathwait*, and perhaps indirectly from the Roman law (see Stokes' Introduction to Contract Act). The learned authors of Smith's Leading Cases, when enumerating the instances in which the request necessary to constitute a cause of action in the case of an executed consideration may be implied—gives as the second instance "where the defendant has adopted and enjoyed the benefit of the consideration."—*Lampleigh* v. *Brathwait*(1). That is the very statement of law which, according to Bowen, L.J., is too wide—nevertheless it is the law we have to apply and we ought not to be deterred from doing so, because the rule is not in harmony with English decisions (see Lord Herschell's observations—*Bank of England* v. *Vagliano Brothers*(2)) or because the application of it may be difficult.

Certainly there may be difficulties in applying a rule stated in such wide terms as is that expressed in section 70. According to the section it is not essential that the Act shall have been necessary in the sense that it has been done under circumstances of pressing emergency, or even that it shall have been an act necessary to be done at some time for the preservation of property. It may therefore be extended to cases into which no question of salvage enters. It is not limited to persons standing in particular relations to one another, and except in the requirement that the Act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done.

In the present instance the relations of the parties are peculiar. Formerly as it appears all the eleven villages irrigated by the tank were zamindari villages. Seven of them have been severed

(1) 1 Smith's Leading Cases, 160. (2) 1891, App. Cas., p. 145.

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from the zamindari and become ordinary raiyatwari villages. As a consequence of the severance the duty to maintain the tank has, so far as concerns these latter villages, devolved on Government. As has already been observed the remedy which is open to tenants-in-common who cannot agree about the enjoyment of property is not available to persons situated as are the parties in the present case. In their relation to the tank their position may be compared to that of the owners of two houses supported by a party wall (see Story's Eq. Juris.), in respect of which, if partition is legally possible, it is at any rate in fact, impracticable. See *Watson* v. *Gray*(1), Bell's Commentaries (1085).

Now taking the terms of section 70, we have to see first whether an act was done by the plaintiff for the defendants not intending to do so gratuitously. Here are two questions of fact involved. First, were the repairs executed for the defendants? In a case where the plaintiff has himself no interest in the matter as in the case put in the illustration of A saving B's property from fire, there can hardly be any doubt as to the answer to be given to the question. The case is that to which in the first instance the rule of Roman law giving a right of action to the *negotiorum gestor* was applicable.

The fact that the plaintiff had an interest in the matter may show that he was acting on his own account only. *England* v. *Marsden*(2) affords an illustration. But it is obvious that a person doing an act in which he is himself interested may, at the same time, intend to act for another. Section 69 and the cases on which it is founded (see *Moule* v. *Garrett*(3)) make it clear that a payment made by a party interested may be recovered and it would be inconsistent to hold that services done would not equally give a right of action. Having mentioned section 69, we ought to add that the plaintiff cannot rely directly upon it, because the interest of the plaintiff and the duty of the defendants related to the doing of work and not to the payment of money.

The question whether the act was done for the defendants is one which must be determined according to the circumstances of the case, for one of two persons having a common interest in property may or may not intend to act for the other in the execution of

(1) L.R., 14 Ch. D., 192. (2) L.R., 1 C. P., 529.
(3) L.R., 5 Ex., 132 on appeal, L.R., 7 Ex. 101.

work upon the property. The fact that the latter was benefited by the work does not necessarily show that it was done for him. We think there must be a finding upon this question. There must also be a finding on the question of intention whether or not the intention of Government was to do the repairs at their own cost without making any charge on the zamindar.

Then comes the question whether in executing the repairs the Government acted lawfully. It is clear that actual consent or request on the part of the defendants need not be proved. It is because the party interested is absent and had given no mandate that the right of action on the part of the *negotiorum gestor* accrues—Justinian Institutes Lib. III., Tit. XXVII. On the other hand, if the Roman law is to be followed it must be shown that the act done is one to which the party to be charged would have assented had he been consulted and the doing of which he had not forbidden. (See Colquhoun Roman Civil Law, § 1766, &c.)

It is plain that the section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered.

In the present case there can be no doubt that the Government acted lawfully in repairing the tank. The act was lawful whether done with a view of benefiting all the villages under the tank or the Government villages only, and whether or not done with the intention of charging the zamindars. Having regard to the fact that the zamindars knew of the intention to execute the repairs and did not disapprove, we think that if the repairs were done for the zamindars, they were done lawfully for them.

The final condition required by the section is that the person charged should have enjoyed the benefit of the act done. On this question an issue was raised, but the finding on it is not satisfactory. Indeed the District Judge does not purport to deal with it exactly. Seeing that the greater number of the villages irrigated by the tank are raiyatwari villages, *primâ facie*, we should suppose that the benefit derived by the zamindars from the repairs was less than that derived by Government. Regard must be had to the irrigable area of the villages owned by Government and the zamindars, respectively. The fact that kist is paid by the zamindars has nothing to do with the matter. If the cultivated area belonging to the Government villages and

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watered by the tank is larger than that of the zamindar's villages the Government has in the same proportion been the greater gainer by the preservation of the tank. There must be a distinct finding on the fifth issue.

The finding is to be submitted within one month from the date of the re-opening of the Court after the recess, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

In compliance with the above order, the District Judge submitted the finding in the following terms :—

I find that the plaintiff did not intend to do this work gratuitously for the defendants.

There can be no doubt defendants have enjoyed the benefit of the work.

This appeal came on for final disposal, and the Court delivered the following

JUDGMENT :—The finding on the first issue is not questioned.

As to the second issue there is some evidence that the plaintiff did not intend to do the work gratuitously, and there is certainly no evidence to the contrary.

We must accept the finding and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1894. September 10. November 15.

SRINIVASACHARIAR (PLAINTIFF), APPELLANT,

v.

RANGAMMAL AND OTHERS (DEFENDANTS NOS. 1, 2 AND 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 171, 568 *and* 582—*Remand—Direction by Appellate Court for the taking of further evidence.*

In a suit on a hypothecation bond the plaintiff relied in bar of limitation on endorsements of part-payments appearing on the bond. The Court of First Instance held that the endorsements were genuine. The Court of First Appeal remanded the suit for further evidence to be taken with regard to the endorsements and

* Second Appeal No. 1575 of 1893.