The plaintiff now sued to recover the amount due by the deed of the 16th October 1879 by the sale of the properties thereby mortgaged.

The only defence necessary to be mentioned for the purposes of this report was the defence of the first defendant to the effect that the mortgage sued on was subsequent to the mortgage deeds on which he had sued and obtained a decree.

The Subordinate Judge decreed in favour of plaintiff.

Defendant No. 1 appealed.

Sundara Ayyar for appellants.

Subramania Ayyar for respondent No. 1, plaintiff.

JUDGMENT.—The only point urged is the question of priority raised in the third issue. It is contended that the principle laid down by the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*(1) is applicable only to the case of a purchaser of the equity of redemption. There is no ground for limiting the principle to that case only. It is true that that is the only case provided for by section 101 of the Transfer of Property Act, but that is a—if not the—very extreme case where otherwise an extinguishment of the charge would ordinarily be presumed. This Court has, in several instances, applied the principle to cases like the present. *Rupabai* v. *Audimulam*(2), *Seetharama* v. *Venkatakrishna*(3), and see also judgment in appeal No. 113 of 1895.

The Subordinate Judge was, therefore, right in holding that, by the mere execution of A, the security under E in respect of the plaint debt was not given up.

The appeal accordingly fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

MANA VIKRAMA (PLAINTIFF), APPELLANT,

v.

RAMA PATTER (DEFENDANT), RESPONDENT.*

1897. March 26.] April 14.

Contract—Usage imported as term of a contract—Practice on a particular estate.

In order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be

(1) I.L.R., 10 Calc., 1035. (2) I.L.R., 11 Mad., 346. (3) I.L.R., 16 Mad., 94.

* Second Appeal No. 1878 of 1895.

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shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract: and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract.

SECOND APPEAL against the decree of J. A. Davies, District Judge of South Malabar, in Appeal Suit No. 844 of 1894, confirming the decree of V. Rama Sastri, District Munsif of Temelprom, in Original Suit No. 245 of 1893.

The facts necessary for the purposes of this report appear sufficiently from the judgment of the High Court.

Bhashyam Ayyangar, *Sankaran Nayar*, and *Govinda Menon* for appellant.

Sundara Ayyar and *Subramania Ayyar* for respondent.

JUDGMENT.—The appellant, the Zamorin of Calicut, sued for Rs. 541-2-6, said to be the amount of renewal fees due by the respondent, in respect of certain lands held by him under a permanent grant known as *anubhavom*, made long ago by a predecessor of the appellant to a predecessor in title of the respondent who is an assignee for value. The original grant was made many years ago, but it was renewed or confirmed by exhibit I in 1873. Exhibit I stipulates for the yearly rent and the amount of a certain fee which the grantee was to pay, but contains no reference to any renewal fee payable to the grantor.

The appellant's claim was based on an express agreement by the respondent as well as upon custom. The Lower Courts held that the agreement was not proved, and that no binding custom was made out.

It was contended by the learned Advocate-General on behalf of the appellant that the District Judge was in error in applying to the case the rule that a party setting up a custom, having the force of law, should prove the antiquity, uniformity and certainty of the custom, inasmuch as what was set up here was not a custom of the district but the special custom prevailing in his own estate with reference to lands held under *anubhavom* tenure.

But in the plaint the custom was referred to as the "custom of the country." The Lower Court cannot, therefore, be said to have erred in dealing with it as a general custom. This consideration is sufficient to justify the dismissal of the appeal.

It is, however, desirable to point out that even upon the ground on which the claim was sought to be based before us, the appellant

could not succeed. For, assuming for argument's sake that the evidence in the case is, as suggested on behalf of the appellant, sufficient to prove a well-established practice, according to which persons holding under the Zamorin lands on *anubharom* tenure make periodical payments similar to that here claimed, it is clear that such practice cannot affect the respondent's right under the assignment. Now a practice of the kind in question is not in law a '*usage*,' with reference to which the Courts are at liberty to import into a contract incidents not excluded by the terms of such contract, even though a party to the contract was not *actually* cognizant of the usage. "To constitute a usage," as was observed in *Adams* v. *Otterback*(1) by the Supreme Court of the United States when referring to a contention similar to that in the present case and which was founded on the practice of a particular bank, "it must apply to a place rather than to a particular "bank; it must be the rule of all the banks of the place or it "cannot consistently be called a usage. If every bank could estab- "lish its own usage, the confusion and uncertainty would greatly "exceed any local convenience resulting from the arrangement." In order, therefore, to render the practice, even though invariable of particular persons, as in the present instance, relevant, as the same Court pointed out in a later case, "mere knowledge of such "a usage would not be sufficient, but it must appear that the cus- "tom actually constituted a part of the contract." (*Bliven* v. *The New England Screw Company*(2).) In the case just cited, a screw company being the sole manufacturers of wooden screws were unable to supply the demands of all their customers as fast as needed. The company adopted the system of apportioning their articles as fast as produced among their customers, having regard to the date of their orders. It was held that, the practice being well known to the plaintiffs who had ordered such goods, proof of the practice and of the company following it in complying with plaintiff's orders was admissible as a defence in a suit for failing to deliver in time. The same principle was recognized in *Scott* v. *Irving*(3). There evidence was given of a practice prevailing at Lloyd's in London of setting off in account between the broker employed by the assured to recover the loss and the underwriters the amount of premium due by the broker to the underwriters

(1) 15 Howard, 545. (2) 23 Howard, 431. (3) 1 B. & Ad., 612.

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against the loss and that such set off and adjustment were treated as payment to the assured. It was held that the assured was not bound by the practice. Lord Tenterden observed, "Such a usage "however can be binding only on those who are acquainted with "it and have consented to be bound by it. There may possibly be "cases proved where an assured being cognizant of such usage may "be supposed to have assented to it and therefore may be bound." *Womersay* v. *Dally*(1) is perhaps even more analogous to the present case. There the plaintiff had been a tenant of a farm belonging to an extensive estate, the property of a family named Thornhill, and the defendants had purchased certain parts of the estate including portions of the farm. It was proposed to offer evidence of a usage on the Thornhill Estate that in all lettings it should be understood that the tenants should keep one-third of their farms arable and two-thirds in grass and pay £5 an acre on leaving, for any excess beyond the proportion of arable over grass. Martin B refused to admit the evidence, it not appearing that the plaintiff was not cognizant of the usage. On a motion for a new trial, it was contended that the evidence was admissible on the same principle as that on which the evidence of the "custom of the country" is admitted. But Pollock, C.B., replied to the contention: "No. The law takes cognizance of the divisions of "the country into counties or parishes which are legal and public "divisions; but not into properties or estates which are purely "private in their nature. Estates may be very small and if large "are only accidentally so. It would be impossible to draw any "legal distinction between an 'estate' of 100 acres and 100,000, "and there would be no legal presumption of notoriety arising "from the fact of usage as to terms of letting a particular estate. "*Non Constat* that the party becoming a tenant for the first time "would hear of it." And eventually the whole Court held that the evidence was clearly inadmissible, since it was as to the practice of a particular person on letting his farms—a practice not proved to have been known to the tenant.

No doubt the present case is distinguishable from those above cited, for while in them the person, who was sought to be bound by the practice, was a party who originally entered into the contract, here he is an assignee for value. But that distinction makes the

(1) 26 L.J. Exch., 220.

appellant's position only more onerous. For it is clear that the party relying on the practice should show before an assignee for value is held affected by the practice, not only that it originally entered into and formed a part of the contract, but also that the assignee, and if there have been more assignments for value than one, every prior assignee was, before he took the assignment, aware of that fact. To hold otherwise would, it is obvious, often result in injustice to assignees for value, who are certainly liable to be misled as to the nature and extent of their obligations under grants or contracts assigned to them, the written instruments evidencing which (like exhibit I in the present case) contain no reference to the practice relied on and the incidents said to be annexed thereby. Such being the rule applicable to the appellant's case, as presented in this Court, we must hold that the appeal fails, since it is not even alleged by the appellant that the respondent had knowledge that the practice formed part of the contract. It is therefore unnecessary to enter into the other questions as to the existence of the practice and as to its forming part of the contract.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SANGILI VEERA PANDIA CHINNA TAMBIAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

1897. July 5, 6, 9.

v.

SUNDARAM AYYAR AND OTHERS (DEFENDANTS NOS. 1 to 3), RESPONDENTS.*

Madras Forest Act, ss. 10 and 11—Claim to uninterrupted flow of natural stream—Jurisdiction of Forest Settlement officer.

A Forest Settlement officer appointed under section 4 of the Madras Forest Act, 1882, has, under sections 10 and 11 of that Act, jurisdiction to decide a claim by a riparian owner to the uninterrupted flow of the water of a natural stream.

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevelly, in Original Suit No. 40 of 1893.

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* Appeal No. 191 of 1895.