"a view to the interests of all parties": the portion of the decree which is objected to was, in the opinion of their Lordships, necessary for the security and preservation of the property. There is nothing in the decree to prevent the appellants, if they think fit, applying for the discharge of the receiver and manager, and there is nothing to prevent the Court putting the senior widow living in the management of the property if the Court is satisfied that she is a fit and proper person to manage it on behalf of all the persons interested.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Lawford, Waterhouse, & Lawford.*

APPELLATE CIVIL.

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

KAMALAKSHI (PLAINTIFF), APPELLANT,

v.

RAMASAMI CHETTI (DEFENDANT NO. 6), RESPONDENT.*

1895. April 10, 17, 29. December 16.

Hindu law—Devadasi—Adoption by temple dancing woman—Right of adoptive daughter—Civil Procedure Code, ss. 440, 568—Suit by infant without a next friend—Evidence taken on remand.

Suit by the adoptive daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother. The plaintiff was 17 years old at the time the suit was instituted and she did not sue by a next friend. No objection was taken by the defendants, on the ground that the plaintiff could not sue without a next friend, until the case came before the Court of first appeal at which time the plaintiff had attained majority. On second appeal, the High Court directed the return of a finding on the issue (previously framed but not tried) whether the plaintiff's adoption was valid. Fresh evidence was taken and the finding was that the adoption was made with the intention that the girl should be prostituted while she was still a minor.

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* Second appeal No. 1785 of 1894.

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Held, (1) that seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend, until after she had attained her majority, the irregularity was waived;

(2) that the Lower Court had power to take additional evidence on the issue remanded;

(3) that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 121 of 1893, reversing the decree of H. Krishna Rau, District Munsif of Madura, in original suit No. 581 of 1891.

This was a suit instituted by the plaintiff at the age of 17 without a next friend against the trustees of the Minakshi Sundareswarar pagoda. It was alleged in the plaint that one Minammal, who died in 1879, was one of the dancing women attached to the pagoda, and as such entitled to the benefit of one of the temple endowments, that Minammal had taken in adoption the plaintiff who was accordingly entitled to succeed to her office and the emoluments attached to it, that the plaintiff could not enter on to the office until a pottu-thali had been tied on her in the temple, and that the defendants did not permit this to be done. The prayer of the plaint was that the defendants be compelled to allow the thali to be tied in the temple, in view to the plaintiff performing the dancing service and enjoying the honours and endowment attached thereto.

The District Munsif passed a decree as prayed. The District Judge reversed the decree and dismissed the suit on the ground that the claim was inadmissible as being in effect a claim by the plaintiff to be enlisted as a public prostitute.

The plaintiff preferred this second appeal.

Mr. *Parthasaradhi Ayyangar* for appellant.

Sundara Ayyar and *Ranga Ramanujachariar* for respondent.

SUBRAMANIA AYYAR, J.—The first question raised in this case is whether the presentation of the plaint and the prosecution of the suit by the plaintiff (appellant) when she was yet a minor and without the aid of a next friend were void or were mere irregularities which the defendants had by their conduct waived.

In the recent case of *Doorga Mohun Dass* v. *Tahir Ally*(1), Sale, J., said:—"The reason why no proceeding can be taken by

(1) I.L.R., 22 Calc., 274.

"an infant without the assistance of a next friend is, as stated in "Daniell's Chancery Practice, 6th Edition, p. 105, 'on account of "an infant's supposed want of discretion, and his inability to bind "himself and make himself liable for costs.' And it would seem "that the rule was intended for the protection and benefit of "defendants, for it has been held that when a defendant waives "this benefit and protection, the suit may proceed without a next "friend." In *ex-parte Brocklebank*,(1) cited by the learned Judge in support of his opinion, all the Judges proceeded upon the view that an infant to whom a debt was due had a right to enforce the payment of it by means of a debtor's summons and proceedings in bankruptcy based thereon, and that the infant having sued out the writ in the action in his own name without a next friend, was an irregularity which was waived by the conduct of the defendant. There is authority, therefore, for holding that the contention of the defendants (respondents) that the proceedings in the present case were altogether void cannot be supported. It was no doubt open to the defendants to apply under section 442, Civil Procedure Code, to have the plaint taken off the file, as it appeared on the face of the plaint itself that the plaintiff was a minor at the date of its presentation. They not only omitted to do so, but throughout the trial raised no question on the point. And when the District Munsif passed a decree against them, they preferred an appeal against it to the District Court making the plaintiff respondent, without getting a guardian *ad litem* appointed as if she were not a minor, even though at the time the appeal was preferred she was still under the age of 18. It is now too late for the defendants to object to the irregularities they complain of.

The next question for decision is whether the plaintiff is entitled to the relief claimed by her, viz., that the defendants be directed to permit her to undergo the pottu-tying ceremony in the temple in accordance with the usage of the institution. The District Munsif held that she was entitled to the relief. The District Judge, being of opinion, as I understand him, that the grant of such relief would be opposed to public policy as one tending to promote immorality, disagreed with the District Munsif and rejected the claim.

Now as to the ceremony itself, it seems to be quite simple in its nature. As its very name denotes, the material portion of it

(1) L. R., 6 Ch. D., 358.

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consists of nothing more than tying within the precincts of the temple a circular piece of gold to the neck of the girl to be admitted as a temple dancer. (See the judgment of the Sessions Judge in *Regina* v. *Arunachellam*(1), a case connected with this same temple.) So far, therefore, as the performance of the ceremony itself goes, there is nothing immoral in it. The District Judge's view probably rests upon the notorious fact that women who are temple dancers generally lead the life of prostitutes. That, however, in no way proves the existence of any true connexion between the tying of the pottu and the immoral lives of those who undergo the ceremony. And it is scarcely necessary to say that, neither in theory nor in practice, is the dedication to the temple looked upon as essential to a woman of the dancing-girl caste becoming a prostitute. But, on the other hand, there is an immediate and clear connexion between the ceremony in question and the mirasi office of dancer claimed by the plaintiff, inasmuch as the former is a necessary preliminary to her entering upon the duties of that office and to her enjoying the emoluments attached thereto. It is quite true that, in *ex-parte Padmavati*(2) and in *Regina* v. *Arunachellam*(1) already referred to, tying of pottu was one of the circumstances relied upon by the prosecution against the accused. But that was, of course, not for the purpose of establishing that the ceremony by itself amounted to an offence, but to throw light on the intention of the accused as to the course of life to which the minors were to be trained. The argument was the ceremony made the girls temple dancers; temple dancers usually became prostitutes; hence the object of the accused in obtaining possession of the girls was to train them up to a life of prostitution. It seems to me therefore that the said cases are not in conflict with the proposition that no true relation exists between the ceremony and the immoral life of the dancers. Consequently, if the defendants without lawful excuse refuse to allow the plaintiff to undergo the customary ceremony said to be a pre-requisite to her entering upon the duties of her mirasi office, she is certainly entitled to redress. And I consider that we, sitting here as Judges, are not at liberty to upset any decisions admitting the right of members of the dancing-girl caste to remedy for violation of their civil rights, on the alleged ground that a change has taken place in the

(1) I.L.R., 1 Mad., 165. (2) 5, M.H.C.R., 415.

sentiments of the large mass of the Hindu community in regard to the propriety of recognizing the usages of the said caste. As observed by Lord Campbell, L.C., in *Brook* v. *Brook*(1) "change of opinion on any great question may be a good reason for the Legislature changing the law, but can be no reason for Judges to vary their interpretation of the law."

In connection with the objection that the plaintiff is not entitled to the relief claimed, we were referred to *Johnson* v. *Shrewsbury and Birmingham Railway Company* (2) where Lord Justice Knight Bruce, when dealing with the question of specific performance of agreements for personal service, said that before the Court can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement it must be satisfied that the agreement is one ascribable to a class in which the Court has been accustomed or has certainly jurisdiction to interfere. This observation is no doubt equally applicable to a case like this where specific relief of a somewhat novel description is claimed. But, as pointed out by the Lord Justice himself in the same case later on, the demand may be new specifically without being new in kind or in principle. And in my view the novelty of the relief sought here belongs to the former class and not to the latter. In support of this opinion I may, without in the slightest degree intending to suggest any invidious comparison between the menial office of a temple dancer and the dignified position of a mahant or head of a mutt, refer to *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(3), where the learned Chief Justice and Muttusami Ayyar, J., ordered the Subordinate Judge to direct the Pandara Sannadhi of Dharmapuram to invest the Tambiran who may be appointed as the head of the Tirupanandal mutt "with arukattu, sundravedam (certain ear ornaments) and cloth as usual."

For the reasons stated above I come to the conclusion that the objection raised by the defendant to the relief prayed for on the score of immorality or novelty cannot be sustained, and that the plaintiff is entitled to the decree prayed for, if her claim is in other respects good.

This leads me to consider the next and the most important question in the case, viz., whether the adoption of the plaintiff by Minammal, another female, is valid or invalid. The District

(1) 9 H.L.C., 209. (2) 3 De Gex M. & G., 924. (3) I.L.R., 10 Mad., 508.

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Munsif dealt with this question very briefly, contenting himself with the single observation, "It is perfectly valid, such adoptions being "recognized by law." The District Judge, being of opinion that the suit failed on another ground, expressed no opinion on this point. The defendant's contention, that the adoption is invalid, appears to be based on the following allegations. At the date of the adoption the plaintiff was a minor under the age of 16, the adoptive mother was a dancing woman attached to the temple and was leading an immoral life like other women of her class. She took the plaintiff in adoption with the intention of dedicating her to the temple in the customary manner and devoting her to prostitution even before the completion of her 16th year. And they argue that the party who gave and the party who received the plaintiff in adoption under such circumstances committed an offence punishable under the Indian Penal Code, which had come into force at the time, and consequently the plaintiff acquired no legal status or rights by such a violation of the public law of the country.

Now, upon these allegations, two legal questions arise for consideration. The first is, assuming the defendant's above allegations to be true, was an offence committed under the said section of the Penal Code? And the second is, if an offence was so committed, could and did such a transaction confer on the plaintiff the status of an adopted daughter and the rights claimed by her as incidents to such status?

As to the first question, in *Queen-Empress* v. *Ramanna*(1), Parker, J., was of opinion that if a dancing woman, who was herself a prostitute, took a minor girl in adoption with the intention of training up the latter to follow the same course of life as herself, an offence under section 373 would have been complete, even though the age of the adopted child prevented her immediate prostitution and allowed time for repentance, and even though one of the purposes of the adoption was that the child should inherit the property of the person adopting. Muttusami Ayyar, J., said that if, in making the adoption, the intention was that the girl should be employed as a prostitute whilst she continues to be a minor, the accused might be liable. Upon the views thus expressed it follows that the party who gave and Minammal who took the plaintiff in adoption were guilty of an offence under the provisions of the

(1) I.L.R., 12 Mad., 273.

criminal law relied upon by the defendants, if the act complained of was committed under the circumstances alleged by them, notwithstanding that the act was called an adoption, which is ordinarily not a crime.

Upon the next question whether such an adoption entitles the plaintiff to claim through the said Minammal the office of dancing in the temple, which office is said to vest hereditarily in the family of Minammal, I have not been able to find any direct Indian decision; nor have we been referred to any such authority. In *ex parte Padmavati*(1) Holloway and Innes, JJ., observed "the fact of a transaction being in violation of public law may prevent the arising of rights which would otherwise have the sanction of private law." This, however, was an incidental observation, and the point which I am now considering did not actually arise for decision there, I have therefore to deal with the question on principle. And there can be no doubt that the principle applicable to such cases is that laid down in the following words in a recent decision relating to an illegal agreement concerning property. "The general rule is that no rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred."—(*Younghusband* v. *Birmingham T. S. Co.*(2) a rule no doubt subject to certain exceptions, none of which, however, so far as I am aware, is relevant for our present purpose. I have not been able to find any case in which this principle was acted upon in respect of a transaction touching personal status entered into in contravention of law. But I fail to see any valid reason why the rule should not be applicable to such transactions also; when even such violations of private law known as unlawful agreements are rendered unactionable, it is difficult to understand how violations of public law known as crimes are to be treated differently. The object of the legislature in preventing Civil Courts from entertaining suits in the former class of cases can only be to discourage as much as possible such transgressions. And, as it would be absurd to suppose that the Legislature is less anxious to repress crimes, it would be unreasonable to hold that the prohibition against a civil suit exists in the former case only and not in the latter also. It seems to me, therefore, that if a woman who makes an adoption under circumstances which render the adoption an offence under section 373, sues to enforce

(1) 5 M.H.C.R., 415. (2) 36 American State Reports, 248.

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rights alleged to have been created in her favour by that adoption, it would be impossible, consistently with established legal principles, to allow such a suit to be maintained. The reason for disallowing such a suit, borrowing the language of Johnson, J., who delivered the judgment of the Supreme Court of the United States in *Bank of the United States* v. *Owen*(1), is "no Court of Justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of the violations of law?" On behalf of the plaintiff it was however argued that as she herself did not commit any crime, she must be taken to stand on a different footing from that occupied by the guilty parties and that as she is willing to accept her changed situation, it would be but adding to the injury already sustained by her to refuse to recognize her claim to the office and rights of Minammal who was responsible for the plaintiff's present condition. Whether, if the question arises between the plaintiff and those who did her the injury, the doctrine of estoppel may be invoked in her favour, as it has sometimes been in the case of invalid adoptions under the ordinary Hindu law, is a matter on which it is not necessary to express any opinion now. For, the defendants here are the managers of the temple, who had nothing to do with the transaction which the plaintiff wishes to take advantage of, and as against such persons how can the plaintiff rely upon a plea of estoppel? Her present claim must therefore stand or fall by the validity or invalidity of the adoption set up. And it is not possible to hold, in a suit instituted by her, that to be valid which must be treated as invalid in a suit if instituted by Minammal, as has been already shown. In this connection an observation of Searle, C.J., in *Mill and Lumber Co.* v. *Hayes*(2), though made in respect of an illegal agreement in restraint of trade, is quite in point. He said, "The illegality vitiates the contract between the immediate parties as well as in respect to third parties." The reason for this is plain. For whilst in cases of fraud and mistake the wrong is usually personal to the injured party and can be waived, it is different in cases of illegality. In these the wrong is far-reaching and is done to society. Consequently, in such cases the interests of individuals must be subservient to public welfare *McNamara* v.

(1) 2 Peters, 539. (2) 9 American-State Reports, 212.

Gargett(1). I cannot, therefore, help arriving at the conclusion that the plaintiff's adoption is a nullity if it took place under the circumstances stated by the defendants and the plaintiff is not entitled to maintain her claim based as it is upon such an illegal transaction.

It thus becomes necessary to ascertain whether the adoption was made as alleged by the defendants. That it took place after the Penal Code came into force, that Minammal who took her in adoption was a temple dancer living by prostitution, and that the plaintiff was at the date of the adoption a minor under the age of 16 are, I understand, not questioned. But whether in making the adoption the intention of Minammal was as asserted by the defendants, is a point on which there is no distinct admission, though the attempt which it is probable was made before the plaintiff completed her sixteenth year to get her registered as a temple dancer is important evidence that the original intention was to prostitute her even when she was a minor. But whether it was so or not is a question of fact upon which it is not open to us to express any opinion on second appeal. The District Judge has not, as already stated, given any finding on the matter, and I would therefore call for a finding from him upon the seventh issue in the light of the observations of Muttusami Ayyar, and Parker, JJ., in *Queen Empress* v. *Ramanna*(2) already quoted. (See also the observations of Banerjee and Sale, JJ., in *Deputy Legal Remembrancer* v. *Karuna Baistobi*(3). If the finding on this question is in favour of the plaintiff, the District Judge should also be asked to submit findings on issues 3, 4 and 5.

The finding is to be returned within six weeks after the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

BEST, J.—The suit is by a woman of the dancing-girl caste for a decree directing the trustees of a temple in Madura to cause to be tied to her the pottu or thali without which she cannot be allowed to dance in the temple or to enjoy the emoluments attached to the office of dancer. Plaintiff claims to be entitled to the office and emoluments as adopted daughter of one Minammal who died in 1879.

The District Munsif gave a decree as prayed, but that decree was reversed on appeal by the District Judge on the ground that

(1) 13 American State Reports, 361. (2) I.L.R., 12 Mad., 273.
(3) I.L.R., 22 Calc., 164.

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the suit is not maintainable, as the private right claimed by the plaintiff cannot arise except by transgression of a precept of public law. Hence this appeal by the plaintiff.

The public law here referred to by the Judge is contained in section 372 of the Indian Penal Code, which makes punishable the disposing of girls for the purposes of prostitution; and the tying of pottu to a girl under 16 years of age and enrolling her as a dancing girl in a temple has been held to be such a disposal of her and therefore an offence punishable under the section above referred to. Plaintiff, however, is not under the age of 16 years. She expressly states in her plaint that the delay hitherto in getting the pottu tied was owing to the fear that it would be criminal, but that having come of age on the 1st August 1891 this suit was instituted (in October 1891).

It is contended before us on behalf of the respondent that the Courts cannot recognize an institution such as that of dancing girls, the object of which is prostitution and the gain to be derived from that source. *Chinna Ummayi* v. *Tegarai Chetti*(1) no doubt goes to this extent, and to the same effect are also the dicta of West, J., in *Mathura Naikin* v. *Esu Naikin*(2). But the opinions of West, J., on the subject in the latter case were dissented from by Muttusami Ayyar and Parker, JJ., in *Venku* v. *Mahalinga*(3) and as remarked by Muttusami Ayyar, J., "they were not necessary for the decision of that case." And it is open to question whether *Chinna Ummayi* v. *Tegarai Chetti*(1) has not been overruled by a subsequent decision reported in the same volume *Kamalam* v. *Sadagopa Sami*(4). No doubt the latter case was sought to be distinguished from the former on the ground of its including a claim for honours and income as appurtenant to the hereditary office of dancing girl which plaintiff was seeking to recover; but, as observed by Muttusami Ayyar, J., in *Venku* v. *Mahalinga*(3), "it is not clear how, if the custom which is the source of the hereditary right to the office is an immoral custom, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right."

Both in *Venku* v. *Mahalinga*(3) and in *Muttukannu* v. *Paramasami*(5) it was held that adoptions by dancing girls must be

(1) I.L.R., 1 Mad., 168. (2) I.L.R., 4 Bom., 545. (3) I.L.R., 11 Mad., 393.
(4) I.L.R., 1 Mad., 356. (5) I.L.R., 12 Mad., 214.

recognized by the Courts, on the ground that the class of dancing women "being recognized by Hindu law as a separate class having a legal status, the usage of that class, in the absence of positive legislation to the contrary, regulates rights of status and of inheritance, adoption and survivorship." But the adoption in question in both those cases took place prior to the coming into force of the Indian Penal Code.

There is also the judgment of Sir Charles Sargent, C.J., and Candy, J., in *Tara Naikin* v. *Nana Lakshman*(1), in which occurs the following passage:—"The existence of dancing girls in connexion with temples is according to the ancient established usage of the country, and this Court would, in our opinion, be taking far too much upon itself to say that it is so opposed to "the legal consciousness" of the community at the present day as to justify the Court in refusing to recognize existing endowments in connexion with such an institution."

As observed by Muttusami Ayyar, J., in *Queen-Empress* v. *Ramanna*(2), the giving and accepting of a minor for adoption by a dancing woman is not necessarily a criminal act, and is punishable as an offence under sections 372 and 373 of the Penal Code only if the specific intent which makes the act criminal is established by cogent evidence. "It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age, she should be allowed to elect either to marry or to follow the profession of her prostitute mother."

There is thus authority for the following positions (i) that the institution of dancing women cannot be ignored by the Courts and (ii) that adoption by such women is not necessarily illegal.

The case last cited is also authority for the position that, if the adoption was made with the intention of training the child to a life of prostitution, the act would be criminal, and I agree with my learned colleague in holding that the Courts cannot recognize as against the temple trustee rights claimed as arising from a criminal act.

I concur, therefore, in the order proposed by my learned colleague.

It has been further contended on behalf of respondent that the suit being brought by plaintiff when a minor without a next

(1) I.L.R., 14 Bom., 90. (2) I.L.R., 12 Mad., 273.

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friend was opposed to section 440 of the Code of Civil Procedure and should have been dismissed by the District Munsif on that ground. The objection was not taken in the Court of First Instance —not in fact till appeal was preferred against the decree passed in plaintiff's favour. This was too late, see *ex-parte Brocklebank*(1) and *Beni Ram Bhutt* v. *Ram Lal Dhukri*(2). Plaintiff is now a major and was so also at the hearing of the appeal by the District Judge, and though she was a minor when defendant's appeal was preferred, he took no steps to have a guardian *ad litem* appointed for her. This objection must therefore be disallowed.

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

"The seventh issue, upon which I am directed by their Lord-"ships of the High Court to submit a finding, is whether the plaintiff "is the adopted daughter of Padmasani's daughter, Minammal, "and whether the adoption of the plaintiff is valid?

"As to the fact of adoption there is no longer any dispute and "the evidence of Padmasani, examined as the plaintiff's first wit-"ness, shows that the plaintiff was two or three years old when she "and her elder sister Gnanambal were adopted by Minammal, who "was 20 or 25 years of age at the time and died a few years after "the adoption was made.

"The validity of the plaintiff's adoption depends on the in-"tention with which it was made, and, if the intention was that "the plaintiff should be prostituted while she was still a minor, then "under section 373, Indian Penal Code, the adoption was a criminal "act out of which no private rights can flow.

"On receipt of the order of remand from the High Court, I "gave notice to the parties to produce evidence necessary for deter-"mining the question at issue, and my reason for so doing was, "that the evidence already on record was insufficient for the pur-"pose. It was objected, on behalf of the plaintiff, that I had no "power to take additional evidence, since I had not been autho-"rized to do so by the order of remand. In support of this objec-"tion, reference was made to section 562, Code of Civil Procedure, "but that section relates only to cases which are remanded by an "Appellate Court to Court of First Instance for trial upon the merits

(1) L.R., 6 Ch. D., 358. (2) I.L.R., 13 Calc., 189.

"and implies that additional evidence is to be taken if necessary. "Hence it is in no way applicable to the present case, in which "the order of remand did not alter the position of this Court as "an Appellate Court deciding an issue which it had not decided "before. An Appellate Court is empowered by sections 568 and "569, Code of Civil Procedure, to take additional evidence for the "substantial cause that the evidence on record does not enable it to "arrive at a decision. Hence four documents have now been "filed as exhibits IV to VII, on behalf of the defendant-appellant, "who has also recalled and examined as his seventh and eighth "witnesses the persons whom he examined as his third and second "witnesses before the District Munsif, while the plaintiff has re-"called her sixth and fourth witnesses before the District Munsif "and examined them as her ninth and tenth witnesses."

* * * *

"I find, therefore, that Minammal's intention in adopting the "plaintiff was to prostitute her while she was still a minor, that "the adoption was therefore a criminal act, and that it is conse-"quently invalid."

This second appeal having come on for final hearing after return to the order of this Court, the Court (SUBRAMANIA AYYAR and DAVIES, JJ.) delivered the following judgment :—

JUDGMENT.—We agree with the Judge that he had the power to take additional evidence on the issues of fact remanded for trial. These were issues that had been framed but not tried, and we see nothing in section 566, Code of Civil Procedure, that prohibits the Lower Court from taking evidence on such issues under section 568 so long as he complies with the requirements of that section.

The District Judge's finding on the question of fact as to intention is supported by legal evidence. Accepting the finding, we dismiss the second appeal with costs.