We are accordingly not prepared to dissent from the decision of *Krishtraya* v. *Venkatramayya*(1) and we allow the appeal and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Sir Ralph Sillary Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

GODA COOPOORAMIER (PLAINTIFF), APPELLANT,

v.

SOONDARAMMALL (DEFENDANT), RESPONDENT.*

1909. September 1, 21.

Civil Procedure Code Act XIV of 1882, *ss.* 366, 371 *and Act V of* 1908, *order XXII, Rules* 2, 9—*Judgment passed after death of party not absolute nullity—Such judgment not liable to collateral attack but must be set aside only by proper proceedings and unless so set aside bars a fresh suit.*

A decree was passed in favour of a deceased plaintiff on the day of his death, which occurred before the case was taken up for disposal and heard. In a suit brought by the representative of the plaintiff on the same cause of action and for the same relief, it was urged that the decree so passed was a nullity and that the subsequent suit was maintainable:

Held, that the suit was barred. It is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that a suit abates under order XXII, rule 2 of Act V of 1908 or that the Court could have passed an order under Section 366 of Act XIV of 1882 that the suit shall abate. A decree passed after death is not therefore an absolute nullity.

The intention of the Legislature in enacting section 371 of Act XIV of 1882 and order XXII rule 9 of Act V of 1908 is clearly that where a suit has abated, no fresh suit shall be brought on the same cause of action, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending.

APPEAL against the decree of C. V. Kumaraswami Sastri, City Civil Judge, Madras, in Original Suit No. 132 of 1907. The facts of this case are sufficiently set out in the judgment.

T. Ethiraja Mudaliar for appellant.

T. Rangachariar and *T. Varadappa Nayakar* for respondents.

JUDGMENT.—A decree was passed by the High Court on the 8th September 1891 in favour of the plaintiff in Civil Suit No.

(1) Appeal No. 170 of 1901 (unreported).

* City Civil Court Appeal No. 2 of 1908.

BENSON, C.J., AND SANKARAN-NAIR, J.

GODA COOPOORA-MIER v. SOONDAR-AMMALL.

186 of 1891, one Ramakkamall against Appukutti Chetti, the defendant in that suit. The present plaintiff, the representative of Ramakkamall now sues the defendant, the widow of Appukutti Chetti, on the same cause of action, for the same relief, that was therein granted. The plaintiff alleged and proved in the lower Court that Ramakkamall, the plaintiff died in the morning of the 8th September 1891 and the suit was taken up, heard and disposed of the same day after her death. He alleges that the decree is therefore a nullity and not a bar to this suit. The finding that the plaintiff in the prior suit died before the hearing is not contested before us. The question for decision is whether the suit is maintainable or not. Under the English Common Law the death of a plaintiff or a defendant causes an action to abate. After the death of either of them, therefore, no judgment can be passed, and no execution can issue. Where, however, the death of the party occurred after the hearing of the case, then in the Courts of Common Law the judgment was entered as of the date when the judgment was reserved on the principle that a party ought not to be prejudiced by the delay arising from the act of the Court. Similarly where a judgment was signed at 11 A.M., the usual hour, and the defendant died at 9-30 the same morning the judgment was held regular on the principle that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are held. *Wright* v. *Mills*(1). In Bombay it has been held that this procedure ought to be followed and that a decree speaks from the day the judgment was reserved and binds all parties then before the Court and the representatives of those dying in the interim (see *Narna* v. *Anant*(2) and *Ramacharya* v. *Anantacharya*(3)), and the entry of the date of delivery was only treated as an irregularity. Sections 202 and 205 of the Code of Civil Procedure (Act XIV of 1882) seem to be opposed to this view. But Act V of 1908 properly enacts that the judgment is to bear the date of delivery but effect is to be given to it as if it had been pronounced before the death took place (order XXII, rule 6).

The Code of Civil Procedure provides that "the death of a plaintiff or defendant shall not cause the suit to abate if the right

(1) 4 H. & N., 488. (2) (1895) I.L.R., 19 Bom., 807.
(3) (1897) I.L.R., 21 Bom., 314.

to sue survives," and it is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that the suit abates under order XXII, rule 2 of Act V of 1908 or that the Court could have passed an order under section 366 of Act XIV of 1882 that the suit shall abate. The decisions of the English Courts which proceed on the ground that the suit has abated do not therefore apply in all cases in India.

In America, "the great preponderance of authority is to the effect that, where the Court has acquired jurisdiction of the subject matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack." "Black on Judgments", section 200, page 294. And the case of a judgment for a deceased plaintiff, it is said, "cannot be distinguished in principle from that of a defendant dying while the action is pending, where, as already shown (section 200) the great preponderance of authority sustains the rule that the judgment is at least impervious to collateral attack and must be vacated or reversed by proper proceedings." Section 204, page 300. To hold that the representative of a party is bound by the decision passed after the death of the party would probably lead to fraud. It would also be opposed to the well-established principle that a judgment should not be passed against a person without hearing him or giving him an opportunity to be heard. In the cases of *Imdad Ali* v. *Jagan Lal*(1) and *Janardhan* v. *Ramchandra*(2), relied upon by the appellant, decrees were passed against a person after his death. But the case of the representative of a plaintiff suing on the same cause of action after having obtained a decree stands on a different footing. After the abatement of a suit, it is not open to his representative to bring a fresh suit on the same cause of action. Section 371 of Act XIV of 1882 and order XXII, rule 9 of Act V of 1908. His only remedy under the same provision of law is to apply for an order to set aside the abatement and the abatement shall be set aside only if it is proved that he was prevented by any sufficient cause from continuing the suit. The intention of the Legislature is clear that no fresh suit on the same cause of action is to be permitted, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which

(1) (1895) I.L.R., 17 All., 478. (2) (1902) I.L.R., 26 Bom., 317.

BENSON, C.J., AND SANKARAN-NAIR, J.

GODA COOPOORA-MIER v. SOONDAR-AMMALL.

the suit was pending. This is consistent with the American authorities holding that the validity of such a decree is impervious to collateral attack. We are also of opinion that a decree passed in favour of a deceased plaintiff is only voidable at his instance and not void at any rate when the record does not show the fact and time of death. A revivor at the instance of the plaintiff's representative would ordinarily result only in a needless repetition of the proceedings with the same result. It might be harassing to the defendant. This conclusion is consistent with the principle that a party should not be allowed to contend that a solemn judgment passed by a competent Court to which his predecessor in title was a party is a nullity and does not bind his estate. Any other view may lead to injustice as it would enable a plaintiff long after the date of the decree and after it was barred by limitation in the case before us the suit was filed about 16 years after the first decree—to come to Court and give evidence about an event which, in practice, it would be difficult for the defendant in many cases to meet. We are, therefore, inclined to adopt the view stated to be generally adopted in the United States of America. The provisions of the Indian Codes seem to be in harmony with it; and we are not deterred from adopting it by considerations arising from the theory of the abatement of suit by death of a party which influenced the English decisions and we have seen that the English Judges attempted to mitigate the severity of this rule in various ways.

The suit is, therefore, not maintainable and we dismiss the appeal with costs.