& Co. in this case did not obey the instructions of the settlor, they would be guilty of breach of trust and would have to make good any loss that might accrue to the trust from such derilection. If, therefore, the settlor chose to make it a term of his settlement that the money should be lent to the trustees themselves hoping to get a profitable return, then it is the misfortune of the beneficiaries if the trustees become bankrupts and they must be content to rank as ordinary creditors. I think the words of Bacon, C.J., *in re Beale Ex-parte Corbridge*(1) where he says " No proof can be admitted in respect of a trust which is inconsistent with the application of the money which the lender has pointed out " are applicable to the present case. This appeal should therefore be allowed and the application of B. Krishnaswami Naidu and others dimissed with costs.

Messrs. *Short* & *Bewes*—attorneys for appellant.

APPELLATE CIVIL.

Before Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

GANAPATHY MOODELLY AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MUNISAWMI MOODELLY (PLAINTIFF), RESPONDENT.*

1909. August 27. September 2.

Contract Act IX of 1872, *s.* 25, *cl.* (3)—*Not necessary that the agreement should in terms refer to the barred debt.*

A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt, the recovery of which was barred by the Statute of Limitations:

Held, that the promissory note was a contract enforceable under section 25, clause (3) of the Indian Contract Act.

A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within section 25, clause (3) of the Indian Contract Act is no exception to this rule. The agreement will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt.

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(1) (1876) 4 Ch.D., 246. * City Civil Court Appeal No. 2 of 1907.

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

Appa Rao v. *Suryaprakasa Rao*, [(1900) I.L.R., 23 Mad., 94], considered.
Vasudeva v. *Narasimma*, [(1882) I.L.R., 5 Mad., 6 at p. 8], referred to.
Kumara v. *Srinivasa*, [(1888) I.L.R., 11 Mad., 213 at 215], referred to.

GANAPATHY MOODELLY *v.* MUNISAWMI MOODELLY.

APPEAL against the decree of C. V. Kumaraswami Sastriar, City Civil Judge at Madras, in Original Suit No. 69 of 1906.

The facts for the purpose of this case are fully set out in the judgment.

T. M. Krishnaswami Ayya for *G. Krishnaswami Ayyar* and *S. Venugopal Chetti* for appellants.

E. V. R. Sarma for respondent.

JUDGMENT.—The suit is brought to recover the amount due, Rs. 582, on two promissory notes executed by the defendant's father and in default of payment for the sale of certain properties, the title-deeds whereof were deposited with the plaintiff as security by way of equitable mortgage.

The execution of the promissory notes is not denied and the finding of the City Civil Judge that the discharge alleged, has not been proved, is not disputed before us.

We agree with the City Civil Judge that the title-deeds were deposited with the plaintiff as security. They are produced by the plaintiff. The defendant's explanation that he got them by fraud and in collusion with Varadaraja Mudaliar is not supported by reliable evidence. No weight can be attached to the statement of Varadaraja Mudaliar that D^1 and D^2 were never given to him.

It was then argued before us that as exhibit A, dated the 1st December 1904, is admitted to be a renewal of a prior promissory note, dated the 1st January 1889, it is not enforceable as the debt had become barred before it was renewed and there is no reference in exhibit A to a barred debt or no promise to pay the debt to bring it within the terms of clause (3), section 25 of the Contract Act.

Exhibit A runs thus: "On demand I promise to pay to O. Munisawmy Mudaliar or order the sum of Rupees (325) three hundred and twenty-five only with interest at 12 per cent. per annum for value received in cash."

The City Civil Judge held that the debt was not barred as the whole interest due under the earlier promissory note and a portion of the principal has been discharged at the time of exhibit A. But there is no evidence that any amount at any time before the expiry of the period of limitation was paid for interest as such. Nor does the part payment of the principal appear in the

hand-writing of the debtor as required by section 20 of the Limitation Act. We must, therefore, hold that the debt under the promissory note of 1899 was barred in 1904 at the time of exhibit A.

It is then argued as there is no reference in exhibit A to that debt there is no promise to pay a barred 'debt' under clause (3), section 25 of the Contract Act, and therefore there is no consideration. There is clearly a reference to a debt contracted by receipt of cash, though it is not stated when it was received. It is no doubt true that in *Appa Rao* v. *Suryaprakasa Rao*(1), the learned Judges, while deciding that it is unnecessary that a document should refer to the fact that the debt is no longer recoverable owing to the law of limitation, say that the debt itself which is in fact barred must be referred to therein. But these observations were unnecessary for the decision.

It has been decided by the Madras High Court and also by the other High Courts that a party to a contract may prove that the actual consideration was something different to that recited in the document itself, and effect must be given to the real consideration (*Vasudeva* v. *Narasamma*(2) and *Kumara* v. *Srinivasa*(3)).

These decisions proceed on the view that the recitals are not in themselves conclusive and do not therefore preclude the Courts from ascertaining and giving effect to the intention of the parties.

Section 25 of the Contract Act provides that an agreement made without consideration is void unless it is a promise to pay a debt of which the creditor might have enforced payment but for the law of limitation.

The section indicates what must be deemed to take the place of "consideration" in an ordinary contract. Full effect is given to the words of the section by taking it to mean that when a man promises to pay what in fact is proved to be a debt which is barred, that agreement will be enforced. This is consistent with the decisions that hold that consideration may be proved when not recited in the document or a different consideration may be proved from that recited therein. To hold otherwise would be to confine the parties to the recitals in the instrument in cases that are

(1) (1900) I.L.R., 23 Mad., 94. (2) (1882) I.L.R., 5 Mad., 6 at p. 8.
(3) (1888) I.L.R., 11 Mad., 213 at p. 215.

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

GANAPATHY MOODELLY v. MUNISAWMI MOODELLY.

governed by section 25. We see no warrant in that section for doing so.

We hold accordingly that the agreement is a contract under section 25, clause (3), and dismiss the appeal with costs.

The plaintiff's vakil's fee not included in the decree of the lower Court, viz., Rs. 29-1-6 will be inserted in the decree. The memo. of objections is allowed without costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1909. August 25. September 1.

MOYIL KOTTA KUNCHUNNI NAIR AND OTHERS (PLAINTIFFS NOS. 2 TO 4), APPELLANTS,

v.

SUBRAMANIAN PATTAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Principal and agent—Agent with irrevocable authority may be removed for misconduct—Suit, abatement of.

In every contract of service there is an implied condition that if the services be not faithfully performed, the employer is entitled to put an end to the contract; and an irrevocable contract of agency is no exception to this rule.

An agent appointed under an irrevocable contract of agency may be removed if he is guilty of misconduct in the performance of his duties.

The above principle will apply whether the person employed be a servant or agent or a person occupying a fiduciary position. A suit brought against such an agent for his removal and for recovering damages for his misconduct does not abate with the death of such agent.

APPEAL against the decree of S. Raghunathiya, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 31 of 1904.

The first defendant (since deceased) was appointed by the plaintiffs and others under a karar to manage their landed properties for a fixed term of eighteen years, in consideration of the first defendant undertaking to pay off plaintiffs' debts and making them an advance of money. The deed provided that the first defendant should recoup himself such amounts with interest out of the moneys collected by him. The plaintiffs brought a suit to remove the first defendant on the ground that they had revoked

* Appeal No. 211 of 1905.