APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

SUBBA CHARIAR (PETITIONER, DECREE-HOLDER), APPELLANT,

v.

MUTHUVEERAN PILLAI AND SIX OTHERS (RESPONDENTS, JUDGMENT-DEBTORS), RESPONDENTS.*

1912. January 12 and 31 and March 6.

Limitation Act (XV of 1877), arts. 178 and 179—Article 179 applies to initiate proceedings—Previous orders in execution, effect of, as res judicata*—Civil Procedure Code (Act XIV of 1882), attachment under, when ceases, a question of intention—Erroneous order on a question of law, when* res judicata.

Previous orders passed in execution and allowing execution on a construction of a decree, as to mesne profits or as to interest or the like, have the force of *res judicata*, though the later application be in respect of a different subject-matter. Thus if under the old Civil Procedure Code (Act XIV of 1882) attachment of several properties had been made, and more than three years after such attachment, sale of some of those properties was ordered, on the supposition that the attachment was then subsisting, that order to sell will act as *res judicata* when a subsequent application for sale is made within three years thereafter to sell other properties originally attached under the old Civil Procedure Code. The question whether a particular attachment subsists at a certain time was a question of intention.

Ram Kirpal v. *Rup Kuari* (1884) I.L.R., 6 All., 269 (P.C.), *Venkatanarasimha Naidu* v. *Papammah* (1896) I.L.R., 19 Mad., 54 and *Subbarama Ayyar* v. *Nagammal* (1901) I.L.R., 24 Mad., 683, followed.

The rule that an erroneous decision on a question of law has not the force of *res judicata* does not apply to such a case.

Palaniappa Chettiar v. *Savari Naidoo* (1908) 18 M.L.J., 548, and *Mangalathammal* v. *Narayanaswami Ayyar* (1907) I.L.R., 30 Mad., 461, distinguished.

It is well established that an application intended to revive and carry through a pending execution is not covered by article 179 of the Limitation Act (XV of 1877) as it is not an application to initiate a new execution.

Qamar-ud-din Ahmad v. *Jawahir Lal* (1905) I.L.R., 27 All., 334 (P.C.) and *Suppa Reddiar* v. *Avudai Ammal* (1905) I.L.R., 28 Mad., 50 (F.B.), followed.

The right to apply to continue execution in such cases accrues from day to day and will not be barred until three years have elapsed after the proceedings have ceased to be pending. So the application is not barred under article 178 either.

Chalavadi Kotiah v. *Puloori Alimelammah* (1908) I.L.R., 31 Mad., 71, followed.

* Civil Miscellaneous Appeal No. 78 of 1910.

SUBBA CHARIAR v. MUTHUVEERAN PILLAI.

APPEAL against the order of R. D. BROADFOOT, the District Judge of Coimbatore, in Execution Petition No. 15 of 1909 in Original Suit No. 40 of 1896.

The following facts are taken from the judgment of the Lower Court:—

"This is an application for sale of part of the property attached in Execution Petition No. 2 of 1904.

"The property was attached on 19th and 20th April 1904. In Execution Petition No. 5 of 1908, dated 30th September 1907, the sale of some items was asked for and sale was ordered (in my view this order was wrong).

"Execution Petition No. 2 of 1904 contains a prayer for sale which was not ordered as the decree-holder omitted to produce encumbrance certificate and draft proclamation for sale.

"On 26th July 1904 my predecessor dismissed the petition for want of prosecution. On 12th July 1909 the sale of some other items is asked for.

"Counter-petitioner urges that the attachment lapsed three years after it was made or anyhow three years after dismissal of the petition on 26th July 1904.

"Petitioner's pleader says that *Chalvadi Kotiah* v. *Poloori Alimelammah*(1) means that an attachment continues for ever, or at the lowest for six years, *i.e.*, three years after the expiration of the period of three years. The latter seems to me to be the real meaning of the ruling.

"But this concession seems to be held in the above ruling to apply to cases in which the Court was bound to Act and failed to do so and not to cases in which the party was bound to do something and failed to do it. *Ambica Pershad Singh* v. *Surdhari Lal*(2).

"I think in the present case the proper limitation is three years from the date of the order dismissing the petition for failure to produce draft proclamation, *i.e.*, the limitation terminated on 27th July 1907.

"It follows that the present petition is barred and is dismissed. No costs as the rulings are conflicting."

The decree-holder appeals.

N. Rajagopalachariar for appellant.

(1) (1908) I.L.R., 31 Mad., 71. (2) (1884) I.L.R., 10 Calc., 851 at p. 856 (F.B.).

T. Rangachariar and *T. Narasimha Ayyangar* for the respondents.

JUDGMENT.—The District Judge of Coimbatore has held that the application of the appellant decree-holder, dated 12th July 1909, praying for an order directing sale of the properties set out in the schedule appended to the application which along with some other items were attached in pursuance of a previous petition No. 2 of 1904 is barred by limitation because the application was made more than 3 years after an order, dated 26th July 1904, by which the petition No 2 of 1904 was dismissed for non-prosecution inasmuch as that petition not only contained a prayer for attachment which was in fact granted but also a prayer for sale and the appellant failed to produce a draft proclamation. It appears, however, that on 30th September 1907 some of the items attached under Execution Petition No. 2 of 1904 were brought to sale on an application made sometime in 1908 on the footing that the attachment still subsisted in spite of the order of dismissal passed on 26th July 1904. The present application is within 3 years of the application of 1908. The learned Judge thinks that the order allowing the application of 1908 is wrong; in his opinion it ought to have been dismissed inasmuch as the attachment according to him had ceased to operate on 26th July 1904 and he would not therefore give the application of 1908 or the order thereon any effect. We are unable to uphold this view. In the first place the judgment-debtor is estopped from contending that the attachment does not subsist. His learned vakil argues that the question whether the attachment made in 1904 continued or not in spite of the order of 26th July 1904 is one of law and therefore the order of 1908 allowing sale of some of the properties under attachment being a wrong decision on a question of law cannot preclude him from showing that the attachment came to an end by the order of 26th July 1904. But the question whether an order dismissing an application for execution put an end to the attachment is one of intention as pointed out in *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (1) and has to be determined upon the circumstances of each case. No doubt Order XXI, rule 57 of the present Code, lays down that where any property

(1) (1906) I L R., 33 Calc., 666.

SUBBA CHARIAR v. MUTHUVEERAN PILLAI. — BENSON AND ABDUR RAHIM, JJ.

has been attached but by reason of the decree-holder's default, the Court is unable to proceed further with the application for execution and dismisses the application, the attachment shall cease on such dismissal. But this is a new provision which found no place in the Code of 1882 and the effect of the decisions under the old law which we do not think it is necessary to review on this occasion supports the proposition laid down in the Calcutta case. None of the cases cited by Mr. Rangachari such as *Palaniappa Chettiar* v. *Savari Naidoo*(1) and *Mangalathammal* v. *Narayanswami Aiyar*(2), which lay down that an erroneous decision on a question of law has not the effect of *res judicata* when the subsequent proceeding relates to a different subject-matter, have therefore any application to the present case.

On the other hand this case is covered by *Ram Kirpal* v. *Rup Kuari*(3), where it was held that a question as to whether upon proper construction of a decree *mesne* profits could be recovered under it was concluded by previous orders in execution and by *Venkatanarasimha Naidu* v. *Papammah*(4) and *Subbarama Ayyar* v. *Nagammal*(5), where the principle of *res judicata* was applied to similar questions relating to the construction of decrees.

The learned vakil for the respondents next argues that even if the attachment be held to be subsisting the application is barred under article 178 which allows three years for applications for which no period of limitation is provided elsewhere counting from the date on which the right to apply accrues. This he says is the date of attachment.

We may take it as well established that an application like this which is intended to revive and carry through a pending execution is not covered by article 179 as it is not an application to initiate a new execution. See *Qamar-ud-din Ahmad* v. *Jawahir Lal*(6) and *Suppa Reddiar* v. *Avudai Ammal*(7). It does not follow however that under article 178 the application will be barred because it was made 3 years after the date of attachment. This question which is not free from difficulty was fully considered in a recent decision of this Court by MILLER and

(1) (1908) 18 M.L.J., 548.
(2) (1907) I.L.R., 30 Mad., 461.
(3) (1884) I.L.R., 6 All., 269 (P. C.).
(4) (1896) I.L.R., 19 Mad., 54.
(5) (1901) I.L.R., 24 Mad., 683.
(6) (1905) I.L.R., 27 All., 334 (P.C.)
(7) (1905) I.L.R., 28 Mad., 50 (F.B.).

MUNRO, JJ., in *Chalavadi Ketiah* v. *Poloori Alimelammah*(1), and we agree with them that where an application is made to continue proceedings in a pending execution the right to apply accrues from day to day and will not be barred until 3 years have elapsed after the proceedings have ceased to be pending. This proposition is deducible as pointed out in that case from the course of decisions on the subject. See *Venkatappiah* v. *Jagannatha Rao*(2), *Chowdhry Paroosh Ram Das* v. *Kali Puddo Banneriee*(3), *Kedernath Dutt* v. *Harra Chand Dutt*(4) and *Qamar-ud-din Ahmad* v. *Jawahir Lal*(5).

The appeal must therefore be allowed and the District Judge will be directed to dispose of the Execution Petition No. 15 of 1909 according to law. The respondents must pay the cost of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

1912. July 23.

K. R. MANICKA MUDALIAR (PLAINTIFF), APPELLANT,

v.

T. CHINNAPPA MUDALIYAR AND ELEVEN OTHERS (DEFENDANTS NOS. 2 AND 4 TO 11 AND PARTY, RESPONDENTS), RESPONDENTS.*

Landlord and tenant—Lease until lessee requires or wishes—Tenancy at will on both sides.

A lease by which the lessees are to hold for such time as they require or wish is a tenancy at the will of the lessee which in law is a tenancy at the will of the lessor also.

"Coke on Littleton," page 55 (a), and Halsbury's Laws of England, volume 18, page 434, referred to.

APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Original Suit No. 9 of 1905.

The facts of this case are clearly stated in the judgment.

T. Rangachariyar, S. S. Venkataramana Ayyar, V. Viswanatha Sastri, (Messrs. *Venkatasubba Rao* and *Radakrishnayya*) for the appellant.

(1) (1908) I.L.R., 31 Mad., 71. (2) (1902)12 M.L.J., 25.
(3) (1890) I.L.R., 17 Calc., 53. (4) (1882) I.L.R., 8 Calc., 420.
(5) (1905) I.L.R., 27 All., 334 (P.C.).
* Appeal No. 53 of 1907.

MANICKA v. CHENNAPIA. — MILLER AND ABDUR RAHIM, JJ.

C. V. Ananthakrishna Ayyar for respondents Nos. 2, 4 and 6.

JUDGMENT.—We find ourselves unable to differ from the conclusion of the District Judge on the facts. We think the plaintiff is bound by the lease evidenced by Exhibit C. By that document the lessees are to hold for such time as they require, or wish, and it is argued that the contract is thus expressed to be a tenancy at the will of the lessee and so by implication of law a tenancy at the will of the lessor also. This contention is supported by reference to "Coke on Littleton," page 55 (*a*), and is in accordance with the law of England as laid down in 18 "Halsbury," page 434.

We agree that the lease is expressed as creating a tenancy at the will of the lessees and we have not been shown sufficient reasons for refusing to adopt the English law on the point. We think therefore that the plaintiff was entitled to terminate the tenancy, and he has done so.

The District Judge's decision must be modified and the plaintiff must have a decree for recovery of possession of the market in addition to the decree for rent given by the District Judge, for *mesne* profits at the rate of Rs. 18 a month till delivery of possession from date of plaint.

Each party will bear his own costs throughout.