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admitted to exclude such a construction. No case has been cited which lays down that the *primâ facie* inference in such a case must be taken to be that the note was executed for the benefit of the person described as agent of another.

We dismiss the petition with costs.

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## APPELLATE CIVIL.

*Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Phillips.*

1911. September 21.

V. RAMADOS AND TWO OTHERS (DEFENDANTS), APPELLANTS,

*v.*

K. HANUMANTHA RAO (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (Act XIV of 1882), sec. 539—Decree, effect of, for scheme under, bar to private rights—Specific Relief Act (I of 1877), sec. 42, consequential relief—Suit for recovery of office of trustee and injunction substantially valued—Actual possession with tenants who were willing to pay to whomsoever was a trustee—Prayer for possession unnecessary.*

Where the lands of a temple were in the actual possession of tenants who were willing to pay rent to whomsoever was the trustee, a suit which merely prays for the recovery of the office of trustee and for an injunction against the defendants who were in possession of the office, which injunction was valued at a substantial figure, viz., Rs. 2,600, does not offend against the proviso to section 42 of the Specific Relief Act (I of 1877) as the plaintiff had asked for such possession as he could under the circumstances and as the possession of the tenants would not be adverse to the plaintiff after his recovery of office.

*Kunj Biharji* v. *Keshavlal Hiralal* [(1904) I.L.R., 28 Bom., 567], followed.

*Rathnasabapathi Pillai* v. *Ramasami Aiyar* [(1910) I.L.R., 33 Mad., 452], *Abdul kadar* v. *Mahomed* [(1892) I.L.R., 15 Mad., 15], *Narayanan* v. *Shankunni* [(1892) I.L.R., 15 Mad., 255] and *Jagannatha Charry* v. *Rama Rayer* [(1905) I.L.R., 28 Mad., 238], distinguished.

*Subramanyan* v. *Paramaswaran* [(1888) I.L.R., 11 Mad., 116] and *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* [(1905) I.L.R., 32 Calc. 129 (P.C.)], referred to.

Where an office of trustee was held by the members of a certain family for nearly a hundred years and by nobody else the office must be held to be hereditary in that family.

Section 539, Civil Procedure Code (Act XIV of 1882), corresponding to section 92, Civil Procedure Code (Act V of 1908), is not applicable to a suit to enforce a private right such as an hereditary trusteeship of a certain family, and it is no bar to such a suit.

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* Appeal No. 264 of 1909.

*Budree Das Mukim* v. *Chooni Lal Johurry* [(1906) I.L.R., 33 Calc., 789], referred to.

A scheme once settled by a court cannot be altered except by the court and then only on substantial grounds. *Attorney-General* v. *Worcester (Bishop)* [(1851) 9 Hare, 328], *In re Betton's Charity* (1908) 77 L.J. Ch., 193], *Re Browne's Hospital* v. *Stamford* [(1889) 60 L.T., 288] and *Re Sekeford's Charity* [(1861) 5 L.T., 488], followed.

A scheme framed under section 539, Civil Procedure Code, is binding on all (whether worshippers or not) including even one who might have claimed a hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme; and a decree framing a scheme is a bar to a suit by such a person, even though the denial of such a right of suit might act very prejudicially to his interests and even though his application to be made a party to the scheme suit might have been rejected.

Section 539 confers upon the courts in this country the same powers that the courts in England possessed at the time of its enactment, and the principles of English law are applicable.

*Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru* [(1905) I.L.R., 28 Mad., 319 at p. 324], *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* [(1891) I.L.R., 15 Bom., 612], *Annaji* v. *Narayan* [(1897) I.L.R., 21 Bom., 556] and *Prayag Doss Ji Varu* v. *Tirumala Srirangacharla Varu*, [(1907) I.L.R., 30 Mad., 138(P.C.)], referred to.

APPEAL against the decree of A. C. DUFT, the Acting District Judge of Kistna at Masulipatam, in Original Suit No. 32 of 1908.

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

The Hon. Mr. *P. S. Sivaswami Ayyar*, the Advocate-General and *T. Prakasam* for the appellants.

*P. Nagabhushanam* for the respondent.



JUDGMENT.—The plaintiff's suit is for a declaration that he is the rightful Dharmakarta of the plaint temple and for reinstatement in the office and also for an injunction restraining the defendants from interfering with him in that office. The plaintiff's father was dismissed from the office of Dharmakarta in 1902 and died in 1905. In 1903 a suit was filed by the first defendant and another under section 539, Civil Procedure Code, and a scheme of management was framed in December 1903 under which the defendants were appointed trustees of the temple (Original Suit No. 10 of 1903 in the District Court of Kistna). The plaintiff has filed this suit on attaining majority. In this appeal three points arise for determination.—

(1) Is the suit maintainable without a prayer for possession of the property belonging to the temple?

(2) Can the plaintiff bring this suit in view of the scheme framed under section 539, Civil Procedure Code?

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(3) Has plaintiff a hereditary right to the office of Dharmakarta?

No definite issue was framed on the first point as it was not specifically taken in the defendants' written statement but there is an issue (No. 9) "whether the plaint is properly stamped" which is said to cover this point. We think from the District Munsif's reference to the rulings in *Govindan Nambiar* v. *Krishnan Nambiar*(1) and *Sonachala* v. *Manika*(2), that his attention was chiefly directed to the question of stamp duty and not to the question of the maintainability of the suit, but the latter having been very definitely raised in appeal must now be decided. The Advocate-General for appellants contends that the ruling in *Rathnasabapathi Pillai* v. *Ramasami Aiyar*(3), passed since the decree appealed against concludes the question. We think however the present case is distinguishable. In *Rathnasabapathi Pillai* v. *Ramasami Aiyar*(3), the suit was for a declaration that the plaintiff's dismissal was invalid, for an injunction and for damages, the injunction being valued at a nominal sum of Rs. 10. In the present suit the plaintiff asks for reinstatement in office, that is, he sues for the office and for an injunction and values his relief at Rs. 2,600 which is a very substantial relief. He further states in his plaint that the temple properties are in the possession of tenants "who will pay the rents to whomsoever holds the office of Dharmakarta." This statement is not traversed in the written statement and must be accepted as correct. If therefore plaintiff gets possession of the office of Dharmakarta, the tenants will pay rent to him and the plaintiff will obtain all the possession to which he is entitled, *i.e.*, the right to collect rent. The cases relied on in *Rathnasabapathi Pillai* v. *Ramasami Aiyar*(3), *i.e.*, *Abdulkadar* v. *Mahomed*(4), *Narayanan* v. *Shankunni*(5) and *Jagannatha Charry* v. *Rama Rayer* (6), can all be distinguished from the present case as in all those cases the possession of the property may be said to have been adverse to the plaintiff and would have continued to be adverse even after the plaintiff had obtained the declaration sued for. Here it is admitted that the lands are in possession

(1) (1882) I.L.R., 4 Mad., 146. (2) (1885) I.L.R., 8 Mad., 516.
(3) (1910) I.L.R., 33 Mad., 452. (4) (1892) I.L.R., 15 Mad., 15.
(5) (1892) I.L.R., 15 Mad., 255. (6) (1905) I.L.R., 28 Mad., 238.

of persons who are willing to pay rent to the plaintiff as soon as he recovers the office of Dharmakarta and consequently the success of his suit for the office will involve his recovery of the temple property so far as it is possible for such recovery to be obtained. In a similar case *Kunj Biharji* v. *Keshavlal Hiralal*(1), JENKINS, C.J., remarked "How would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up," and this is very applicable in the present case. The lands attached to a temple do not belong to the Dharmakarta who is merely the manager but belong to the temple or idol, the Privy Council having held that an idol may be regarded as a juridical person capable of holding property.—*Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(2). If the plaintiff in this suit were to get a decree for possession of the office and also of the lands belonging to the temple, what possession of the lands could be given by the court other than what plaintiff will admittedly obtain on recovering the office, *i.e.*, the right to collect rent from the tenants in possession. Assuming also that the consequential relief referred to in section 42, Specific Relief Act, is a relief against the defendants in the suit and not against third parties—*vide Subramanyan* v. *Parameswaran*(3), the defendants in this suit could not give the plaintiff physical possession of the temple property as the physical possession is outstanding in the tenants. We think therefore that the proviso to section 42 is no bar to the present suit.

As regards the third question we think the Subordinate Judge's finding that the office of Dharmakarta is hereditary in the plaintiff's family is correct. Members of the plaintiff's family have held the office continuously since 1797 and there is no evidence that it was ever held by any other family. This is, we think, sufficient to prove the hereditary right which was in effect put forward in 1870 (Exhibit A) and does not seem to have been denied.

The only remaining question is whether the plaintiff can bring this suit in view of the scheme framed in Original Suit No. 10 of 1903.

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(1) (1904) I.L.R., 28 Bom., 567. (2) (1905) I.L.R., 3 Calc., 129 (P.C.).
(3) (1888) I.L.R., 11 Mad., 116.

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The plaintiff's guardian applied to be made a party to that suit but his application was opposed by the plaintiffs in the suit of whom the first defendant is one and was dismissed. In that suit, therefore, the defendant's claim to the office of Dharmakarta was not considered, but notwithstanding this the Advocate-General contends that no suit will now lie except one under section 539, Civil Procedure Code, to modify the scheme already framed. The plaintiff's present suit is one to enforce a private right and consequently is not one contemplated under the provisions of section 539, Civil Procedure Code—*Budree Das Mukim* v. *Chooni Lal Johurry*(1). Even if the suit could by a stretch of language be considered to allege a breach of the trust by the Court which framed the scheme the plaintiff could not bring the suit under section 539 for he alone is interested in his own claim and under that section the suit must be brought by two or more persons having an interest in the trust and there is no reason to suppose that any one would join plaintiff in a suit framed to benefit the plaintiff alone. In this view the plaintiff cannot sue under section 539 merely to establish his right as hereditary trustee. Then arises the further question where the decree under section 539 takes away the plaintiff's right to bring a suit which he could certainly have brought before such a scheme was framed. It is contended for the appellants that the scheme framed under section 539 is binding on the world or at least on all worshippers of the plaint temple. If by 'worshippers' we mean all persons who may happen to worship in the plaint temple then the term will include not only the regular worshippers but a large number of outsiders who profess the same religion. If the scheme is binding on all worshippers it practically means that it is binding on the world. Can it be said that decrees under section 539 have that effect? Reference has been made to the English law on the subject and we were at first doubtful whether that law could be applied to suits under section 539, but in *Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru*(2), we find the following observations: "The enactment of section 539 . . . was long after the passing of the English Trustees Act of 1850. Presumably, therefore, that section may be taken as intended to

(1) (1906) I.L.R., 33 Calc., 789. (2) (1905) I.L.R., 28 Mad., 319 at p. 324.

confer upon the Courts in this country the same power that the Courts in England possessed at the time of its enactment . . . That the High Court and the District Courts in this country to which the jurisdiction is confirmed possess the same practically unlimited jurisdiction as the Court of Chancery in matters relating to the administration of public charities, religious or otherwise was taken for granted in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*(1) and *Annaji* v. *Narayan*(2). . . ." This case went upon appeal to the Privy Council [see *Prayag Doss Ji Varu* v. *Tirumala Srirangacharla Varu*(3)], and no exception was taken to the above remarks in Their Lordships' judgments. We may take it therefore that Courts in India have the powers possessed by the Court of Chancery and we may apply the principles of English law in this case. In *Attorney-General* v. *Worcester (Bishop)*(4), it was held that schemes settled by Court are not altered except upon substantial grounds and in *In re Betton's Charity*(5), it was held that a scheme remains in force only until further order or the establishment of a new scheme. Provisions in schemes may also be varied such as the number of Governors [*Re Browne's Hospital* v. *Stamford*(6)] and in *In re Sekeford's Charity*(7) it was held that a Court will not, upon the motion of one of the interested parties, alter a scheme which it has settled with the approval of the Attorney-General. The principle adopted is apparently that a scheme once settled by Court cannot be altered except by the Court and then only on substantial grounds. This would seem to preclude suits between parties to establish a private right which if established would interfere with a charitable scheme settled by Court. No doubt it seems a hardship that the plaintiff shall be precluded from seeking to establish his private right, for ordinarily every person can be granted the relief to which he is entitled, but this principle cannot override the claims of the public and a charitable scheme settled by Court must be considered to have been settled for the benefit of the public. We must hold therefore that the plaintiff cannot maintain the present suit against the trustees appointed under the scheme. The District Judge ought not to have refused the plaintiff's guardian's application to be made a

(1) (1891) I.L.R., 15 Bom., 612. (2) (1897) I.L.R., 21 Bom., 556.
(3) (1907) I.L.R., 30 Mad., 138(P.C.) (4) (1851) 9 Hare, 328.
(5) (1908) 77 L.J., Ch., 193. (6) (1889) 60 L.T., 288.
(7) (1861) 5 L.T., 488.

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party to the scheme suit and the plaintiff may have been seriously prejudiced thereby. In any case his inclusion as a party would have finally decided his right to the trusteeship one way or the other. The erroneous order of the District Judge cannot however affect the plaintiff's right to sue and although it may be prejudicial to the plaintiff it cannot give him a right to sue which he otherwise would not have had. If plaintiff's present suit were decreed it would have the effect of very materially altering a scheme framed by the Court without impleading the other persons interested in the scheme and would be as inequitable towards them as the refusal to entertain the plaintiff's suit is to him. The plaintiff's only remedy, if any, would seem to be to induce the Collector to ask for a modification of the Court's scheme by taking action under section 539 or rather section 92 of the new Civil Procedure Code We therefore think that the plaintiff's suit is not maintainable in view of the scheme settled in Original Suit No 10 of 1903 and would in allowance of the Appeal dismiss this suit with costs throughout.

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## APPELLATE CIVIL.

*Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.*

1911. September 21, October 5 and 6.

KARUTHAPPA ROWTHAN (PLAINTIFF), APPELLANT,

*v.*

BAVA MOIDEEN SAHIB (DEFENDANT), RESPONDENT.*

*Promissory-note or acknowledgment—Deed, construction of—Unconditional undertaking and the document styled as promissory-note.*

It is no doubt true that the question whether an instrument is a promissory-note or not should be judged by the words used, and that the instrument must contain in words an unconditional undertaking to pay a sum of money, and it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money.

*Held*, that the following document wherein the executant not only made an unconditional undertaking to pay but also styled it a promissory-note was a promissory-note and not a mere recital of a liability, and as such was not admissible in evidence for want of a proper stamp.

* Second Appeal No. 478 of 1910.