I am of opinion that it was neither a claim to property attached under Order XXI, rule 58, nor an application for rateable distribution under section 73. The Official Receiver was therefore not bound to institute a suit within one year, and his suit is not barred under article 11 of the Limitation Act. Neither is it barred under article 13, seeing that the Subordinate Judge's order of December 21, 1915, was a proceeding in a suit.

This is the only point arising in the Appeal. As it must be found in the appellant's favour, the decree of the lower Court is set aside and the plaintiff will get a decree for the amount of Rs. 7,310 with interest at 6 per cent from December 21, 1915, the date when the cause of action arose, till realization and costs as stated in my learned brother's judgment in this and the lower Court.

N.R.

APPELLATE CIVIL.

Before Sir William Ayling, Offg. Chief Justice, and Mr. Justice Krishnaswami Rao.

KUTHIRAVATTATH KONGASSERI MOKSHATH THOTTAMMA *alias* AMMA NEITHIYAR (FIRST DEFENDANT), APPELLANT,

1921, July 27.

v.

C. S. SUBRAMANIYYAN AND ANOTHER (PLAINTIFF AND THIRTY-SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXVI—Appointment of successive Commissioners for one valuation, legality of—Duty of Court on receipt of objections to a Commissioner's report.

Unless a Commissioner appointed under Order XXVI, Civil Procedure Code, has so totally misconceived his duties as to render

*Second Appeal No. 671 of 1919.

THOTTAMMA v. SUBRAMANIYYAN.

his report and valuation useless as a basis for decision, in which case his report should be superseded and a new Commissioner appointed, the duty of the Court, whenever a Commissioner's report is objected to, is to hear objections in open Court and to decide with the aid of such evidence as it may take whether the valuation should be varied and if so in what direction. Once a report is superseded it cannot thereafter be used as a basis for a valuation.

The practice in Malabar of appointing successive Commissioners, whenever objections are filed to their reports, deprecated.

SECOND APPEAL against the decree of ANANTANARAYANA AYYANGAR, Temporary Subordinate Judge of Palghat at Calicut, in Appeal Suit No. 309 of 1917, preferred against the decree of C. S. DEVARAJA AYYAR, District Munsif of Ottapalam, in Original Suit No. 399 of 1917.

The facts are set out in the Judgment.

S. Srinivasa Ayyangar and *C. Unikanda Menon* for appellant.

C. V. Ananta Krishna Ayyar, *P. V. Parameshwar Ayyar* and *C. R. Mahadev Ayyar* for respondent.

The Court delivered the following JUDGMENT:

The defendant had a mortgage in 1889 of certain properties belonging to the Cochin Government in British territory. Proposals for its renewal were made in the beginning of 1911. As the District Munsif points out in paragraph 14, "the purapad was collected, the demise was renewed, renewal fee was paid and accepted, kanom deed was written and executed on stamp paper supplied, by the tenant, and the kychit was prepared on a similar stamp paper." But there was no registered instrument. There can be little doubt that the first defendant objected to the new terms, though apparently the circar did not consider the door was closed for reconsideration. But eventually, the circar gave a melcharth to the plaintiff in 1913. He sues to redeem the old kanom of 1889.

The District Munsif held that the contract was complete and that the only course open to the circar was to have sued for specific performance to compel the first defendant to accept the mortgage with the new terms. The Subordinate Judge held that the contract was repudiated by the first defendant and that it gave her no right to resist possession.

Mr. Srinivasa Ayyangar contended before us that, as the plaintiff took with notice of the agreement of the first defendant, he was in a fiduciary position towards her and that therefore his suit should fail.

Reliance was placed on section 91 of the Trusts Act. This argument proceeded on the assumption that there was an enforceable contract. Even on this assumption, it seems to us that, as in the written statement she repudiated the contract, it is not open to the first defendant to plead that the plaintiff was a *quasi* trustee for her. This disposes of the main question argued.

Now comes the question relating to the appointment of three successive Commissioners by the first Court. As the procedure followed by the lower Court appeared to us to find no support in law, and as we were informed that the practice followed in this case is typical of what happens in valuing improvements in almost every Malabar suit, we think it desirable to express our emphatic disapproval of the course followed. What happened was apparently this: at first a Commissioner was appointed to make the valuation. His conclusions were objected to by both the parties. Thereupon, the first defendant asked for the appointment of a second Commissioner. The plaintiff consented to this course. Once again objections were raised to the report. A third Commissioner was appointed with the consent of the parties. He sent in his report and valuation. Again objections were raised. The Munsif then said that he preferred the valuation

THOTTAMMA v. SUBRAMANIYAN.

of the first Commissioner as he was a respectable vakil, and the Subordinate Judge has agreed with him.

This procedure seems to us to be wholly wrong. Ordinarily, when the report of a Commissioner is objected to, the Court should hear the objections in open Court and decide with the aid of such evidence as it may take whether the valuation should be varied and if so in what direction. This is the obvious duty of the Court. There may be cases in which the Commissioner had so totally misconceived duties as to render his report and valuation useless as a basis for a decision. In such cases, no doubt, a new Commissioner may be appointed. This would mean that the old report and valuation were superseded. But to regard the reports and valuations of the three Commissioners as available data from which the option of the District Munsif to choose any one of them is to be exercised is opposed to every principle governing Courts in such matters. It means that the Court abdicates its function of deciding the matter on hearing the objection and reserves to itself the privilege of selecting one of the reports as its decision.

It certainly encourages a haphazard and careless selection of Commissioners. It subjects parties to unnecessary and avoidable expense, and encumbers the records with useless papers. In our opinion this practice should be put an end to at once. We want it to be distinctly understood that the filing of objections to a report is no ground for appointing another Commissioner and that in all cases where a second Commissioner is appointed to do the same work, the reasons for adopting such a course must be recorded in writing to enable the appellate Court to see whether the judicial discretion has been properly exercised.

In the present case in law there is only one possible meaning that can be attached to the procedure followed.

It must be assumed that the Court regarded the work done by the first Commissioner to be so bad as to entail the rejection of his report, and that with the consent of the parties it appointed a second Commissioner. Similarly, it must be taken that the Court rejected the second valuation also and asked for a third valuation from another Commissioner to which the parties consented. In this view, the District Munsif was not justified in regarding the first valuation as still alive and in basing his judgment upon it. What he ought to have done is to hear objections to the third valuation and report in open Court and to decide whether any and if so what modification should be made in that report, taking evidence if necessary. We must now direct the Subordinate Judge to do this. He will pass a fresh award regarding the value of improvements claimed by the first defendant in the light of the above observations and submit fresh findings thereon to this Court in six weeks. Seven days for objections.

N.R.