APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

MARAKARUTTI AND THREE OTHERS (DEFENDANTS), APPELLANTS,

1923, March 12.

v.

VEERAN KUTTI AND FIVE OTHERS (PLAINTIFFS, DEFENDANTS AND LEGAL REPRESENTATIVES OF SECOND RESPONDENT), RESPONDENTS.*

Practice—Records of Court lost in rebellion—Inherent power of Original and Appellate Courts to reconstruct records—Methods of reconstruction—Onus on appellant.

When a Court loses its records, e.g., by accident, it has inherent power to reconstruct them and a Court hearing an Appeal from the judgment of the first Court, has also inherent power to reconstruct the records lost in the first Court, or the Appellate Court can, in such a case, call for a finding from the first Court as to what the records were; the method of reconstruction being by means of affidavits, counter-affidavits, hearing of witnesses, the admission of copies, etc. *Douglass* v. *Yellop*, (1759) 2 Bur., 722; 97 E.R., 532. *McLendon* v. *Jones*, (1845) 42 Am. Dec., 640 and *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree*, (1867) 7. W.R., 18, followed.

On a Reference by a District Judge as to the course of action to be taken by him in an appeal pending before him, the records wherein were destroyed by a rebellion, before they were sent to the District Court, but the judgment of the first Court was available, their Lordships ordered the District Judge to hear the Appeal and if necessary to reconstruct the records for the purposes of the Appeal and observed (1) that the judgment of the first Court was for the purpose of reconstruction good evidence as a contemporaneous statement of what took place before that Court, and (2) that in the event of the Appellate Judge being unable to reconstruct the record to his satisfaction the onus was on the Appellant to establish his grounds of Appeal and on the respondent his cross objections if any.

* Referred Case No. 17 of 1922.

MARAKARUTTI v. VEERAN KUTTI.

CASE stated under section 113 of the Code of Civil Procedure, by C. G. Austin, the District Judge of South Malabar, in Appeal Suit No. 525 of 1921, preferred against the decree of T. R. VENKATESWARA AYYAR, the District Munsif of Parappanangadi, in Original Suit No. 674 of 1920.

In this case the plaintiff obtained judgment in his favour in the District Munsif's Court of Parappanangadi and the defendants filed an Appeal in the District Court but the Munsif's Court-house and all the records of the case had been destroyed by the Mappilla rebellion, before the latter could be sent to the District Court. As there were several cases of the kind the District Judge referred to the High Court as to the course of action to be taken by him in hearing the Appeal.

K. P. Ramakrishna Ayyar for the plaintiff (respondent before the District Court). Every Court has inherent power to reconstruct its own records and an Appellate Court has similar power with reference to records lost in the Court of first instance. Of course the reconstruction must be without prejudicing the successful party; see *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree*(1), a case exactly similar to this; *Kamakshamma* v. *Emperor*(2), *Venkatamma* v. *Manikkam Nayani Varu*(3), *Raj Gir Sahaya* v. *Iswardheri Singh*(4), *Douglass* v. *Yellop*(5), *Sanderson* v. *Walker*(6). The Appellate Court can call for a finding from the District Munsif as to what the records were.

The other side was not represented.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This case is referred to us by the District Judge of South Malabar. It is an appeal from

(1) (1867) 7 W.R., 18.
(2) (1913) 25 M.L.J., 445.
(3) (1915) 26 I.C., 244 at 248.
(4) (1910) 11 C.L.J., 243, 247 and 248.
(5) (1759) 2 Bur., 722; 97 E.R., 532.
(6) (1836) 1 Myl. & Cr., 359; 40 E.R., 413.

the District Munsif of Parappanangadi. Difficultly has arisen owing to the fact of the District Munsif's court having been destroyed in the Mappilla rebellion and the records in this case at the same time destroyed. We are informed that there are many cases similarly affected, and the learned District Judge asks our direction as to what is the proper course to adopt.

The respondent only has been represented before us, but his vakil, Mr. K. P. Ramakrishna Ayyar, has assisted the court very much by placing before us fully everything that he could find whether it was for him or against him in the matter. I think that one can safely start with the proposition that there is inherent power in every Court to reconstruct its own records, and I think it follows that there is inherent power in the Appellate Court to reconstruct the records of the Court from which an Appeal lies to it. This power has been recognized in England and in America, which follows the English Common Law, and also in this country. The English case that is quoted on the subject is *Douglass* v. *Yellop* (1). The matter was more fully discussed in an American case, *McLendon* v. *Jones* (2), a judgment of the Court of Alabama which quoted and followed *Douglass* v. *Yellop* (1) and a case which had been decided by the Supreme Court of New York; and that case *McLendon* v. *Jones*(2) points out :

> "Cases must frequently have occurred in which, by accident, the records of Courts of Justice have been destroyed or lost, and it would seem strange if the Common Law had provided no adequate means by which the injuries growing out of such accident could be averted or remedied,"

and then goes on to discuss the methods by which the remedy should be provided. I call attention to it because it states the matter more fully than the other

(1) (1759) 2 Bur., 722 (97 E.R., 532) (2) (1845) 42 Am. Dec., 640.

MARAKARUTTI v. VEERAN KUTTI. — SCHWABE, C.J.

reported cases. In this country the matter came before the Calcutta court in 1867 in *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree* (1), a judgement of Sir BARNES PEACOCK, C.J., and JACKSON, J. In that case records had been lost in transit from the first Court to the second; the second Court acted on some documents purporting to be office copies which the High Court held were not regularly proved or admitted. The Court held that there were two alternative courses open, to direct the lower Appellate Court to receive such secondary evidence of the contents of original records as may be forthcoming or to order an entirely new trial. It decided against the second alternative for very cogent reasons with which we agree. It directed the lower Appellate Court to recieve secondary evidence of the contents of the whole record, but, if not able thus to replace the record, that the parties should be at liberty to adduce further evidence and on the record so reconstructed and supplemented, give judgment. While agreeing in the main with this, we think it desirable to state our own view of the matter.

The first thing to observe is that the appellant has, in order to get his Appeal heard at all, to satisfy the Court what the record is of the case in which he has failed. He can come to the Court and say that he has tried to get the record which has been destroyed. He can then ask the Court to be allowed to reconstruct that record. It is then for the Court, if so minded (I say that, because it is conceivable that the Court may say, on the material at hand before it or on the appellant's application, that no amount of reconstructing of the record would assist the appellant in his Appeal) to permit the appellant to get the record reconstructed.

(1) (1867) 7 W. R., 18.

The Court has not got to have the case re-heard. The respondent is entitled to the benefit of having the judgment which he has got in his favour on the original hearing. It may be that in reconstructing the record, the Court will have to go very near to re-hearing, but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. It will be for the Judge to whom the application is made to decide how the reconstruction of the record is to be attempted; affidavits, counter-affidavits, the hearing of witnesses and the admission of copies are all methods which he can in a proper case allow. He will, of course, get the best evidence available. It will be open to him in a proper case to call for a finding of the District Munsif on what the record was. It may well be in some cases that it would be more convenient that the Court that heard the matter and made the record should do the reconstructing rather than the Appellate court and, with that in view, the Appellate Court may well in a proper case send the case to the District Munsif for the recording of evidence and a finding as to what the record consisted of, which finding, when given it will be open to the Appellate Court to accept or reject in the ordinary way. It is worth observing that in the Appellate Court, probably the best evidence of what took place in the Court below will be found in the judgment, if that has been preserved, of the District Munsif, or of the Subordinate Judge, as the case may be, who heard the case and recorded findings.

In the case at present before us, we have the District Munsif's judgment still existing, and he states on several matters the facts that were proved before him and it is

MARAKABUTTI v. VEERAN KUTTI.

SCHWABE, C.J.

very clear that his statement as a contemporaneous statement of what took place before him or statement made at any rate a short time after it had taken place will be as good evidence as can be obtained and in all probability better than any other. In the event of the Appellate Judge being unable to reconstruct the record to his satisfaction, it must be borne in mind that the onus is on the appellant to establish his grounds of Appeal and on the respondent his cross-objections, if any.

Therefore in this case we direct the District Judge of South Malabar to hear the Appeal and if he thinks it necessary, to reconstruct the record for the purposes of the Appeal in the manner suggested above. I do not think we can in anticipation usefully give any further instructions as to what should be done in these matters.

Costs of this reference will be costs in the Appeal.

OLDFIELD, J. OLDFIELD, J.—I agree and have nothing to add.

RAMESAM, J. RAMESAM, J.—I agree.

N.R.