SUBBA CHUKLI, *In re.*

acquittal being partial or complete. We think that the correct view has been enunciated in *Emperor* v. *Sheodarshan Singh*(1). We must, therefore, decline to alter the finding or enhance the sentence. We desire to say as little as possible about the merits of the case, in view of the action we propose to take. There has, we consider, been a miscarriage of justice. We set aside the conviction and order a retrial on the charge of murder by the present Sessions Judge of Coimbatore.

B.C.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Curgenven.

1926, September 1.

R. E. MAHOMED KASSIM & Co. (PLAINTIFF), APPELLANT,

v.

SEENI PAKIR BIN AHMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 13 (b)—Foreign judgment—Judgment passed on default of appearance of defendant—Defendant duly served with summons—Judgment passed without trial on evidence—Suit on such judgment in a Court in British India, whether maintainable—Decision on the merits of the case, in sec. 13 (b), Civil Procedure Code, meaning of.

A foreign judgment, passed on default of appearance of the defendant duly served with summons, on the plaint allegations without any trial on evidence, is not one passed on the merits of the case within the meaning of section 13 (*b*) of the Civil Procedure Code; and a suit cannot be brought on such a judgment in any Court in British India. *Keymer* v. *Visvanatham*

(1) (1922) I.L.R., 44 All., 332.

* Appeal Suit No. 61 of 1924.

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Reddi, (1917) I.L.R., 40 Mad., 112 (P.C.), followed; *Janoo Hassan* v. *Mahamad Ohuthu*, (1924) I.L.R., 47 Mad., 877, overruled.

APPEAL against the decree of K. S. GOPALARATNAM AYYAR, the Additional Subordinate Judge of Rāmnād, in Original Suit No. 21 of 1923 (O.S. No. 20 of 1922 on the file of the Court of the Subordinate Judge of Rāmnād) :—

This appeal, coming on for hearing before KRISHNAN and VENKATASUBBA RAO, JJ., was referred to a Full Bench. The material facts appear from the following :—

ORDER OF REFERENCE TO A FULL BENCH.

KRISHNAN, J.—The suit from which this appeal has arisen was brought by the Plaintiff on a judgment of the Supreme Court of Penang obtained by him against first and second defendants and one Pichai Haji, deceased, whose legal representatives are defendants 3 to 6. That suit was on a deed of composition, Exhibit F, executed by the said three persons for money due on dealings in Penang. Though they were British Indian subjects, they were at the time of the suit in Penang, resident within the jurisdiction of the Penang Court. At the hearing of that suit they did not appear in Court to contest it. They were declared to have been properly served, the present first defendant having been served personally and the two others by substituted service. In accordance with a rule of procedure of that Court by which, in suits in which defendants, being properly served, do not appear and contest, judgment is given for the plaint-claim without any trial, judgment was entered up in favour of the plaintiff as a matter of course. It is on that judgment the present suit is brought.

The Subordinate Judge dismissed the suit holding that judgment was obtained against the defendant in Penang Court "by procuring a false and fraudulent return of service of the writs of summonses obtained against them" and that in fact the defendants had not been served at all and that it was against natural justice to recognize such a judgment in our Courts. I am unable to agree that there was any real defect in the service of summons. The issue raised in the present suit, Issue I, has reference only to service on the first defendant. That issue is "Has the decree in O.S. No. 714 of 1921 on the file of the

Supreme Court of Penang been obtained against the first defendant by procuring a false and fraudulent return of service of the writ of summons on him?" The verified report of the process-server to the Penang Court was that he was personally served, Exhibit D. The only evidence we have now, viz., that of P.W. 1 is that he was personally served. The first defendant did not go into the box and deny it. I think that on this evidence it must be held that the first defendant was personally served. As regards the other two defendants who were served by substituted service, no issue was raised, but the Subordinate Judge has held that substituted service was bad . . . [The learned Judge dealt with the evidence and proceeded as follows:—]

There is no justification in my opinion for the Subordinate Judge's finding that the defendants had not been served at all.

It has, however, been broadly argued by the learned vakil for the respondents that the judgment of the Penang Court being a judgment by default cannot form the basis of a suit in this country. He relies upon section 13 of the Civil Procedure Code, clause (*b*), and contends that the judgment, not having been given on the merits of the case, is not binding on the defendants. He concedes that an *ex parte* decree given by a Court after taking evidence and finding that the Plaintiff's claim is proved on such evidence, may be a decree on the merits, but he urges, that, as in the present case, no such evidence was taken, but the Penang Court under its rules of procedure entered up judgment for Plaintiff on the defendants' default of appearance, such a judgment could not be treated as one on the merits of the case. He has relied on *Keymer* v. *Visvanatham Reddi*(1), in support of his contention. In that case the Privy Council in agreement with this Court's judgment in *Viswanadha Reddi* v. *Keymer*(2) held that a judgment in England obtained after the defence was struck off for default in not answering interrogatories and after the suit had thus become an undefended one, was not a judgment on the merits and a suit founded on it in this country must fail. There was also another case reported in *Oppenheim & Co.* v. *Mahomed Haneef*(3), where a suit had been brought in Madras on an *ex parte* judgment in England, given on an award passed there; the suit was

(1) (1917) I.L.R., 40 Mad., 112 (P.C.). (2) (1916) I.L.R., 39 Mad., 95.
(3) (1922) I.L.R., 45 Mad., 496 (P.C.).

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also based on the award itself as well as on the original cause of action. The main point decided in that case was that the English award could not be impugned here on the ground of irregularity, but it was taken for granted in it that the suit so far as it was based on the English judgment that followed on the award could not be maintained as it was a judgment by default.

On the other hand there is a recent decision of a Bench of this Court in *Janoo Hassan* v. *Mahamad Ohuthu*(1), which held that a judgment though passed in an *ex parte* proceeding was one on the merits and formed a proper basis for a suit here. That was a Ceylon case where also a similar rule prevails as in Penang, entitling the Court to give a decree without any trial when the defendants being served do not appear; though the Ceylon rule gives power to the Judge to take evidence if he thinks fit, there is nothing to show that in the particular case any evidence was taken. It is difficult to reconcile this view with the view expressed in the cases in *Keymer* v. *Visvanatham Reddi*(2) and *Oppenheim & Co.* v. *Mahomed Haneef*(3). The 40 Madras case has been sought to be distinguished in *Janoo Hassan* v. *Muhamad Ohuthu*(1), on the ground that in the former case, defendant had filed a defence which was subsequently struck off, whereas, in a case where defendant does not appear, there is no defence raised, and it is suggested that in such cases there is a presumption that the defendant admits the claim. I am not satisfied that this is a proper distinction. Their Lordships do not put the case on any such narrow basis in *Keymer* v. *Visvanatham Reddi*(2). It is difficult to say that there is any decision on the merits when a decree is given mechanically in accordance with a prescribed rule.

A number of English decisions were cited to us wherefrom it would appear that suits on foreign judgments are allowed in England though they are judgments by default. My learned brother has referred to them and I need not do so again. It does not seem, however, to be necessary to refer to them in detail as we are governed by the language of section 13 of the Civil Procedure Code in dealing with the binding character of foreign judgments in this country. Whatever the English view might be, the question what the Indian Law is, though not of frequent

(1) (1924) I.L.R., 47 Mad., 877. (2) (1917) I.L.R., 40 Mad., 112 (P.C.).
(3) (1922) I.L.R., 45 Mad., 496 (P.C.).

occurrence, is of much importance, and in view of the decision in *Janoo Hassan* v. *Mahamad Ohuthu*(1), I think it is desirable that it should be settled by a Full Bench. I would therefore refer to the Full Bench the following question :—

"Does a suit lie in this country on a foreign judgment given on default of appearance of the defendant on the plaint allegations without any trial on evidence ?"

The other points in the case are reserved for further disposal after the Full Bench have given their opinion.

VENKATASUBBA RAO, J.—I agree that the judgment cannot be supported on the ground on which it is based. As my learned brother has fully dealt with that point, I do not propose to cover the same ground. If the ground on which the judgment is founded, is the only ground available to the defendant, I should, without hesitation, reverse the decision and allow the appeal; but the defendant's learned vakil seeks to support the judgment on another ground, namely, that a foreign judgment by default of appearance cannot be the foundation of an action in an Indian Court. The question is—does a foreign judgment given in default of appearance, operate as *res judicata* under section 13 of the Civil Procedure Code? The answer to this question depends, in my opinion, upon the view to be taken as to whether the law as contained in this section is or is not identical with the English Law on the point.

I cannot accede to the argument that under the English Law a foreign judgment obtained by default of appearance cannot be pleaded in bar. In *Douglas* v. *Forrest*(2), an action was brought in the English Courts upon a Scotch judgment obtained in default of appearance. The defendant was a native of Scotland and the debt was contracted in that country. The debtor was out of Scotland at the time, had not been personally served and had no notice of the proceedings. By the Scotch Law a person against whom such a decree was pronounced might at any time within forty years dispute the merits of such decree. BEST, C.J., held that the decree was consistent with principles of justice and would therefore support an action in an English Court.

To the same effect is the decision in *Vanquelin* v. *Bouard*(3). The French Court of the Tribunal de Commerce pronounced

(1) (1924) I.L.R., 47 Mad., 877. (2) (1828) 4 Bing., 686; 130 E.R., 933.
(3) (1863) 15 C.B. (N.S.), 341; 143 E.R., 817.

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judgment against defendant for default of appearance and it was contended that this foreign judgment was not binding upon an English Court, as under the law of France it would become void and of no effect as a matter of course, upon the defendant merely entering an opposition to it. ERLE, C.J., overruled this contention observing that the mere fact that a judgment is in a certain event liable to be set aside, does not prevent its being the foundation of an action in the English Courts. A further plea was taken in that case (the 13th plea) that the French Court had no jurisdiction. KEATING, J., while disallowing the plea, observed that the defendant ought not to be allowed to deny facts which it was competent to the foreign Court to try and must be assumed to have been tried.

In *Pemberton* v. *Hughes*(1), the *Vanquelin case*(2) was referred to with approval by the Court of Appeal. This was not a suit on a foreign judgment but its validity was put in issue. The plaintiff claimed to be the widow of Pemberton alleging that a decree for divorce from her former husband Erwin had been pronounced by the proper Court in Florida in an undefended action by the husband against the wife. The defendant in the English Court pleaded that at the time when the plaintiff went through the form of marriage with Pemberton, she was still the wife of Erwin and that consequently she was not the widow of Pemberton and was not entitled to the relief claimed. LINDLEY, M.R., after referring to the fact that in *Vanquelin* v. *Bouard*(2), *the defendant allowed judgment to go by default*, observed, that the Court of Common Pleas rightly overruled the plea of want of jurisdiction based on the ground that the French action had been brought in a wrong Court in France. In regard to foreign judgments, it was held that the only jurisdiction which matters, is the competence of the Court from an international as distinguished from a purely municipal point of view. RIGBY, L.J., and VAUGHAN WILLIAMS, L.J., also approved of the decision in the *Vanquelin case*(2).

That a suit lies in an English Court upon a foreign judgment obtained by default, is assumed in *Nouvion* v. *Freeman*(3). The point there decided was, that a judgment known as "Remate Judgment" in a Spanish Court cannot be the foundation of an action. The proceedings in the foreign Court are

(1) [1899] 1 Ch., 781. (2) (1863) 15 C.B. (N.S.), 341; 143 E.R., 817.
(3) (1890) 15 App. Cas., 1.

merely in the nature of "Executive" proceedings in which the defendant can plead only certain limited defences and under the Spanish Law, in respect of the same subject-matter, either party can take ordinary proceedings in which the whole merits may be gone into and the "Remate Judgment" may be superseded by the final "Plenary Judgment." It is on account of the nature of the "Remate Judgment" that the House of Lords held that the foreign judgment there in question could not be the basis of an action in an English Court. There are observations in the judgments of Lord HERSCHELL and Lord WATSON, which clearly imply, that the mere fact that a foreign judgment was given in default of appearance does not render it any the less binding upon the parties to that judgment. Stating the principle on which the enforcement of foreign judgments proceeds, Lord HERSCHELL declares that the foundation of the rule is that a final adjudication has been given where "*the whole merits of the case are open, at all events to the parties however much they may have failed to take advantage of them.*" Lord WATSON observes to the same effect that the reason for making a foreign judgment conclusive, is either because there had already been an investigation by the foreign Tribunal "*or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence.*" If the defendant, therefore, had the opportunity of defending the action, the fact that he did not actually defend it, is immaterial.

I have not the slightest doubt that under the English Law a suit lies upon a foreign judgment given on default. On behalf of the defendant two cases have been strongly relied on: *The Delta*(1) and *The Challenge*(2). These cases are distinguishable and at any rate I am satisfied that on the point in question they cannot, at the present day, be regarded as authoritative. In the first of the two cases, *The Delta*(1), the judgment was based upon the ground that "the suit in the Court of Commerce had not passed into a *res judicata* but was only a *lis alibi pendens.*" The learned Judge says expressly that it is upon this ground that his judgment is principally founded, although, he adds that there is a second reason, namely, that the foreign judgment was not given *on the merits of the case but on matters of form only.* In regard to *The Challenge*(2), the basis of the judgment was, that the defendants

(1) (1876) 1 P.D., 393. (2) [1904] Prob., 41.

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were not bound to submit to the jurisdiction of the Court in France and that they did not in fact submit to that jurisdiction. The plea of *res judicata* based on such a judgment by default was disallowed. *The Challenge*(1) therefore only applies to a case where the defendant was not a subject of, or resident of the country in which the foreign judgment was obtained. As I have said, the weight of authority in England is clearly in favour of holding that a foreign judgment by default operates as *res judicata*.

The question then arises, is the law in India different? Under section 13 of the Civil Procedure Code, a foreign judgment is declared to be conclusive except in certain cases specified in six clauses. For the present purpose the relevant clauses are clauses (*b*) and (*d*). Clause (*b*) says that a foreign judgment shall not be conclusive where it has not been given *on the merits of the case*. Clause (*d*) says that it shall not be conclusive where the proceedings in which the judgment was obtained are *opposed to natural justice*. There can be no doubt that the exception relating to natural justice is recognized in the English cases. The decisions to which I have referred fully bear this out; but it seems to me, however, that the further limitation in section 13 that the foreign judgment should have been given on the merits of the case, is a departure from the English rule. The only English cases where there was any reference to the merits of the case, are the *Delta* and the *Challenge* and it was assumed in these two cases that if the validity of the foreign judgment is to be judged by its being on the merits, a judgment by default does not satisfy that test and cannot therefore be the foundation of an action in an English Court.

In *Keymer* v. *Visvanatham Reddi*(2), the Defendant was originally sued in an English Court. His defence was struck out as he refused to answer interrogatories and judgment was given against him. Their Lordships of the Judicial Committee held that a suit did not lie in an Indian Court upon the English judgment so given. Their Lordships say:—

"He (the defendant) was *treated as though he had not defended* and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of section 13, sub-section (*b*)."

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(1) [1904] Prob., 41. (2) (1917) I.L.R., 40 Mad., 112 (P.C.).

The implication in this passage that the foreign judgment would be inconclusive had the suit been never defended at all is, as I have pointed out, not in consonance with the English Law on the point and I must therefore take it that in their Lordships' opinion the reference to merits in section 13 (*b*) makes the Indian Law more stringent in this respect. When the same case was before the Madras High Court Sir JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J., expressed also the opinion that under the Code an *ex parte* judgment is not conclusive for the reason that there has been no trial on the merits. They indicate that this view may not be in accordance with the more recent English cases but as they are construing a section of the Code they are bound to give full effect to it.

In *Oppenheim & Co.* v. *Mahomed Haneef*(1), the point came up for decision but was not decided. The plaintiff based his suit upon a foreign judgment as well as on the antecedent cause of action. COUTTS TROTTER, J., as he then was, sitting on the Original Side, assumed on the authority of the Keymer case, that a suit did not lie in an Indian Court on a foreign judgment by default, but held that on the alternative cause of action the plaintiff was entitled to a decree. Before the Judicial Committee the view of COUTTS TROTTER, J., on the first point was not challenged and their Lordships were invited to deal only with the second point.

Thus we have that in the first of the Privy Council cases the observation is in the nature of an *obiter dictum* and in the second Privy Council case the point was assumed and not challenged.

Notwithstanding this, I should be prepared to hold (agreeing with my learned brother) that section 13, clause (*b*), enacts a rule different from that which obtains in England and that an *ex parte* foreign judgment does not operate as *res judicata*; but I find that a different view has been taken by PHILLIPS, J., in a considered judgment (MADHAVAN NAYAR, J., concurring) in *Janoo Hassan* v. *Mahamad Ohuthu*(2), and that another Bench consisting of PHILLIPS and RAMESAM, JJ., have, without discussion, followed this case (see Appeals 144 and 145 of 1922, unreported). In view of what I have said, I think that the question as framed by my learned brother should be referred to a Full Bench for its opinion.

(1) (1922) I.L.R., 45 Mad., 496 (P.C.). (2) (1924) I.L.R., 47 Mad., 877.

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In making this reference I must advert to an argument advanced by the defendants' learned vakil. He sought to make a distinction between two classes of *ex parte* decrees, (1) Where by the procedure of the Court the plaintiff must adduce some evidence, generally oral, although there is default of appearance by the defendant; (2) Where upon a special form of writ, formal proof is dispensed with and judgment is given as a matter of course. It is contended that in the first case the judgment can be said to be on the merits whereas it is different in the second case. I must say that I cannot follow this distinction. In the one case the plaintiff proves his claim by adducing formal evidence; in the other case there is the implied admission of the claim by the defendant who, while it is open to him to contest it, allows judgment to go by default. I cannot accept this intermediate position; it may be that either of the two views is correct, but I find nothing in principle to justify the distinction sought to be made."

ON THIS REFERENCE—

A. Krishnaswami Ayyar (with *E. Vinayaka Rao*) for appellant.—The defendants were properly served with summons. They did not appear. They had full opportunity to appear but did not avail themselves of the same. Under the Law of Penang, the Court was competent to pass judgment for the plaintiff without trial on evidence. No evidence need be taken in such a case under the Penang Law, if the defendant is *ex parte*, after being legally served with summons. Where opportunity was given to the defendant to appear and he did not appear, the decision cannot be said to be not on the merits. Where no opportunity was given to defendant, a judgment in his absence is of course not on the merits. In *Keymer* v. *Visvanatham Reddi*(1), the defence was struck off as a penalty for his not answering interrogatories: hence this opportunity to appear was denied. It is not so here; the defendant, who was duly served, did not appear. It means he practically admitted the claim. The decision in *Janoo Hassan* v. *Mahamad Ohuthu*(2) supports this view. The English decisions in a series of cases show that a suit lies on a judgment given in default of appearance of defendant, if the defendant was duly served with summons or

(1) (1917) I.L.R., 40 Mad., 112 (P.C.). (2) (1924) I.L.R., 47 Mad., 877.

writ. See *Douglas* v. *Forrest*(1), *Nouvion* v. *Freeman*(2). Section 13 (*b*), Civil Procedure Code, should be construed in the light of the English decisions.

K. V. Krishnaswami Ayyar and *N. Kunjithapatham Ayyar* for respondents.—The decision in *Keymer* v. *Visvanatham Reddi*(3) governs this case. There is no decision on the merits within section 13 (*b*), Civil Procedure Code. By the Law of Penang, the judgment is given on default of appearance even without formal proof or evidence on plaintiff's side, on the allegations in the plaint. It is not a decision on the merits but on default. The English cases are not applicable. Reliance was placed on the decisions of the Privy Council in *Keymer* v. *Visvanatham Reddi*(3); *Oppenheim & Co.* v. *Mahomed Haneef*(4). The decision in *Janoo Hassan* v. *Mahamad Ohuthu*(5) is not correct in the face of the decision in *Keymer* v. *Visvanatham Reddi*(3).

OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This case has been dealt with so fully by the referring Judges that I propose to say very little. The suit was brought on a foreign judgment, namely, a judgment of the Supreme Court of Penang. At the hearing of that suit the defendants did not appear in Court to contest it but it has been held that the summonses have been properly served in accordance with the views obtaining in that Court. In that Court where the defendant does not appear after proper service of summons judgment is given without trial and without taking any evidence. It seems to me impossible to argue that that is not clearly within the decision and even the wording of the Privy Council in *Keymer* v. *Visvanatham Reddi*(3). It was argued—and very likely correctly argued—that the English Law was different. The answer to that is we are bound by the statute on which the decision in Keymer's case was based. That statutory provision is section 13 (*b*) of the

(1) (1828) 4 Bing., 686; 130 E.R., 933. (2) (1890) 15 App. Cas., 1.
(3) (1917) I.L.R., 40 Mad., 112 (P.C.). (4) (1922) I.L.R., 45 Mad., 496 (P.C.).
(5) (1924) I.L.R., 47 Mad., 877.

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COUTTS TROTTER, C.J.

Code of Civil Procedure under which an exception to the conclusiveness of a foreign judgment in a British Indian Court is where it has not been given on the merits of the case. As I understand Mr. Alladi Krishnaswami Ayyar's argument, he says that it is not like the case of the defendant's defence being struck out for not answering interrogatories or being out of time or anything of the kind; for that may be held not to be a defence on the merits because *ex hypothesi* the position is the defendant was precluded from going into the alleged merits which he had set up and he says it is quite different where the defendant does not appear at all because that is a clear intimation by him that he admits the validity of the plaintiff's claim and that is just as good as if the plaintiff has actually proved it by evidence. I think the decision of their Lordships of the Privy Council impliedly excludes any such distinction and I regret to say that I cannot agree with the attempt made by two learned Judges of this Court to draw this distinction in *Janoo Hassan* v. *Mahamad Ohuthu*(1), and I think that that case must be regarded as no longer law.

KRISHNAN, J.

KRISHNAN, J.—I agree with the learned CHIEF JUSTICE that our answer to the Full Bench reference must be that the foreign judgment is not conclusive as it has not been given on the merits of the case and that the suit therefore does not lie on it. I have dealt at length with this point in the referring order and I have nothing further to add except to give expression to my opinion which I withheld in that order as the matter was to be placed before the Full Bench. I have no doubt whatever that under section 13 (*b*) of the Code of Civil Procedure a decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been given on the merits of the case.

(1) (1924) I.L.R., 47 Mad., 877.

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KRISHNAN, J.

The matter, it seems to me, is concluded by the judgment of the Privy Council in Keymer's case. It was taken as settled in the subsequent case of *Oppenheim & Co.* v. *Mahomed Haneef*(1). After that, the attempt in *Janoo Hassan* v. *Mahamad Ohuthu*(2) to distinguish the Privy Council case on the ground that it was a special case where the defence had been put forward but struck out, interrogatories not having been answered by the defendant, is not tenable. I should like to add also that I would not entirely agree with my learned brother VENKATASUBBA RAO, J., regarding the concluding paragraph of his reference that there is no distinction between a case in which a decree is given without any trial whatever and a decree in a case in which even though defendant did not appear the matter was tried in full on evidence and the plaintiff proved his case. In the latter class of cases it may well be argued that they are cases which have been decided on the merits and do not fall within section 13 (*b*). However, that matter does not really arise here, for this case is clearly one where the decision was given without any evidence at all, but under the rules governing the Penang Court under which, where the defendant does not appear, a decree is given as a matter of course. I agree with the order proposed by the learned CHIEF JUSTICE.

CURGENVEN, J.

CURGENVEN, J.—I agree that the observations of the Privy Council in Keymer's case cover a case of this nature in which no evidence was given and therefore the decision was not upon the merits. The decision in *Janoo Hassan* v. *Mahamad Ohuthu*(2) appears to me to run counter to those observations and must be dissented from. I agree therefore that the question referred to us should be answered in the negative.

K.R.

(1) (1922) I.L.R., 45 Mad., 496 (P.C.). (2) (1924) I.L.R., 47 Mad., 877.