APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Pakenham Walsh.

1928, November 8.

M. P. P. S. T. PALANIAPPA CHETTIAR AND THREE OTHERS (DEFENDANTS), APPELLANTS,

v.

VALLIAMMAI ACHI (APPLICANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), article 183—Transferee decree-holder—Application by, to have execution proceedings under decree transferred to another Court—Order passed recognizing him as transferee decree-holder and transmitting decree for execution to the other Court—If such order operates as revivor within the meaning of article 183—Order qua *order of transmission—If creates a new starting point of limitation.*

Where the transferee of a decree passed on the original side, applied to have the decree transferred to another Court, on the ground that the judgment debtors resided within the jurisdiction of that Court and had immovable properties situate there, and an order was made by the Deputy Registrar recognizing him as transferee decree-holder and transmitting the decree for execution to that Court, *held*, that such an order effected a revivor within the meaning of article 183 of the Indian Limitation Act, and therefore gave a new starting point of limitation; *held further*, that an order transferring the decree for execution to another Court, *qua* order of transmission, did not give a new starting point of limitation.

ON APPEAL against the order of the Hon'ble Mr. Justice WALLER, dated 2nd September 1927 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in E.P. No. 504 of 1926 in C.S. No. 98 of 1911.

The facts necessary for this report appear in the Judgment of COUTTS TROTTER, C.J.

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* Original Side Appeal No. 56 of 1927.

The order passed by the Deputy Registrar (In Chambers) on 8th March 1917 was as follows :—

"Upon the application of . . . for the applicant, and upon reading the execution application . . . the deed of transfer and the revival notices issued herein to the defendants, and the defendants herein not appearing in person or by pleader though served with the said revival notices . . . it is ordered as follows :—

1. That R. M. M. Subramanyam Chetty as the transferee of the said decree herein in favour of the plaintiff, dated the 17th January 1912, be at liberty to execute the decree against M. P. P. S. T. Palaniappa Chetti . . . the defendants herein.

2. That a copy of the said decree together with the usual certificates be transmitted to the District Court of Ramnad for execution against the said defendants."

Sir *C. P. Ramaswami Ayyar* (with him *V. Ramaswami Ayyar*) for appellants.—An application for transmission does not effect revivor within the meaning of article 183 of the Limitation Act, *Banku Behari Chatterji* v. *Narxindas Dutt*(1). An order of transmission is a ministerial and not a judicial act. The order was passed by the Deputy Registrar in Chambers. His sole duty on that occasion was merely to transmit. The expression "be at liberty to execute" in the order is unwarranted. The execution is done by the Court to which the decree is transmitted. Order XXI, rule 16, Civil Procedure Code, governs the case. The order for transmission upon an application for transmission, and not for execution, did not constitute revivor, *Khajch Salauddin* v. *Mt. Afzal Begum*(2). The prayer in application is that the decree may be transmitted to the Ramnad Court for execution.

[CHIEF JUSTICE :—By continual transfers a decree can be kept alive for all time.]

The transferee cannot have rights higher than the transferor. See also *Monohar Das* v. *Futteh Chand*(3) and *Chutterput Singh* v. *Sait Sumari Mull*(4).

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(1) (1927) I.L.R., 54 Calc., 500. (2) (1924) 28 C.W.N., 963 at 965 and 966.
(3) (1903) I.L.R., 30 Calc., 979 at 981. (4) (1916) I.L.R., 43 Calc., 903.

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A. Krishnaswami Ayyar (with him *E. Vinayaka Rao*) for respondent.—Whenever there is a change of parties either of judgment debtor or judgment creditor there is a "revivor" in law. "Revivor" in the Indian Limitation Act is taken from English Law, the Bill of Revivor in Chancery and the Writ of *Scire facias* in Common Law, the underlying theory being that it is only by revivor a suit can be kept alive. See Encyclopædia of the Laws of England, Vol. 13, p. 1; Wharton's Law Lexicon *Scire facias*, p. 786; Edwards on Execution, pp. 48 and 49; and Tidd's Practice (1821), p. 1148. The following decisions of the English and the Irish Courts have put the matter beyond all doubt. *Farrell* v. *Gleeson*(1), *Farran* v. *Beresford*(2), *Ottiwell* v. *Farran*(3) and *In re Walter Blake*(4). The principle of these decisions has been recognized and followed by the High Courts in India in a number of cases. The decision of the judicial committee in *Raja of Ramnad* v. *Velusami Tevar*(5) concludes the matter. The Deputy Registrar's order is a judgment entitling me to execute. The circumstance that it is opposed or defended does not make any difference. The Deputy Registrar acted under powers delegated to him and this order made by him was quite competent.

Sir *C. P. Ramaswami Ayyar* replied.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—Before dealing with the question of law raised in this appeal it is necessary to set out briefly the facts which raise them. They are all matters of record and are not disputed. One Jayanna Rao Daga brought a suit C.S. No. 98 of 1911, on the Original Side of this Court against a family of Nattukottai Chetties who may be described for the present purposes as M.P.P.S.T. which is their *vilasam*. On the 7th of January 1912 he obtained a decree for Rs. 8,957; he took no steps to execute it, but on the 8th of May 1913 he assigned his

(1) [1844] 11 Cl. and F., 702.
(2) [1843] 10 Cl. and F., 319.
(3) [1839] 2 Ir. Rep., 110 at 144 and 145.
(4) [1853] 2 Ir. Ch. Rep., 643.
(5) (1920) 48 I.A., 45.

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decree to one R.M.M. Subramanyam Chetti for a sum of Rs. 3,800. R.M.M. discovered that neither the judgment-debtors nor any of their property were to be found in Madras. So on the 17th of October 1916 he applied to have the execution proceedings under the decree transferred to the District Court of Ramnad, on the ground, that the judgment-debtors resided within the jurisdiction of that Court, and had immovable properties situate there, and on the 8th of March 1917 an order was made recognizing him as transferee decree-holder and transmitting the decree for execution to the Ramnad Court. No execution was effected in the Ramnad District and the papers were returned to the Original Side of the Madras High Court. Meanwhile a side-issue arose. One S. N. Subramanyam Chetti came forward and alleged that he was the principal behind R.M.M. Subramanyam Chetti, the decree-holder who was only his benamidar, and, he issued an execution petition which was filed on the 17th of January 1924, and on the very same day, R.M.M. himself filed an execution petition as decree-holder. KUMARASWAMI SASTRI, J. passed an order on the 2nd of April 1924 accepting S. N. Subramanyam Chetti as the true owner of the decree and allowed him to proceed in execution. That decision was brought up in appeal and was reversed by myself and SRINIVASA AYYANGAR, J., who held that where a transfer is evidenced by an instrument in writing in favour of a named person no one can come forward and allege that that person is a benamidar for himself, *Palaniappa Chettiar* v. *Subramania Chettiar*(1). There therefore remained pending the rival application of R.M.M. for execution; but before anything was done R.M.M. died and his widow Valliammal applied to be

(1) (1924) I.L.R., 48 Mad., 553.

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brought on the record as his legal representative and to be allowed to continue the execution. The Judge of first instance, SRINIVASA AYYANGAR, J., allowed that to be done, but on appeal that decision was reversed by myself and CURGENVEN, J., a decision reported in *Palaniappa Chettiar* v. *Valliammal Achi*(1). Shortly afterwards Valliammal on the 3rd of December 1926 made a fresh application for execution of the old decree in her own right. On the face of it, it was clearly barred by limitation, but WALLER, J. held that the order of the Deputy Registrar, dated 8th of March 1917, for transmission for execution of the decree to Madura operated as a revivor within the meaning of article 183 of the Limitation Act. It is from that order of WALLER, J. that this appeal is brought.

The elaborate and learned argument before us has really centred on two points. The first is that the order of the Deputy Registrar transferring the decree for execution to another Court in March 1917 gave a new starting point of limitation *qua* order of transmission. That contention is unsustainable after the decision of the Privy Council in *Banku Behari Chatterji* v. *Naraindas Dutt*(2). The second is that the order transmitting the decree for execution to Ramnad also substituted R.M.M. as the person entitled to execute the decree; that this was a judicial act and gave a new starting point for limitation.

I will deal first with certain rules of Order XXI, which deals with matters arising in execution. The governing rule is Order XXI, rule 16 in which the material words are as follows:—

"Where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution

(1) (1926) I.L.R., 50 Mad., 1. (2) (1927) I.L.R., 54 Calc., 500.

of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder." There is added the following proviso:—

"Provided that, where the decree. . . . has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution."

On the one hand it is contended that the order of the Deputy Registrar is a mere order of transmission, a ministerial act and involved no determination of a judicial character as to the validity of the alleged transferee to stand in the shoes of the original judgment-creditor, which is said to be a matter outside his jurisdiction, even if he had purported to exercise it in that direction. All he had to do, it was argued, was to satisfy himself that the person who represented himself to be a transferee was able to produce documents which purported to disclose that character, but that it was left at large in the transmitted execution proceedings for the judgment-debtors to contend that the alleged transferee in fact fulfilled no such character. In that view the order would be a ministerial and not a judicial act and would not give rise to a fresh period of limitation. It is certainly a startling result if a Deputy Registrar by this order can alter the whole law of limitation applicable to these matters. He was at liberty to refer the matter to a Judge, which he would doubtless have done, had he thought himself clothed with the power to pass a judicial, as distinct from a ministerial, order allowing the alleged transferee decree-holder to go on with the execution in the Ramnad Court. It is argued that his order amounts to no more than this:— "You allege yourself to be the transferee decree-holder and ask for an order of transmission to the

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Rāmnād Court. That I do as a ministerial act and that is the effect of my order. The question as to whether you are in truth and in fact the transferee of the decree is one which must be decided by the Court in which execution must be sought and to which I have transferred the decree. You take the order at your own risk, the risk, namely, of it being proved in the Rāmnād Court that you cannot establish your claim there to be considered the true transferee decree-holder."

Much wider ground has been covered in the argument, and the industry of counsel has put before us all the learning of the English reports as to bills of revivor and writs of *scire facias*. I enter on such an enquiry with reluctance, but I do not see how I can escape it. The respondent's case is put thus, that wherever there is a change of parties under an order of Court there is a revivor, and consequently a new starting point of limitation. That is said to be the necessary result of the use of the word "revived" in article 183 of the Limitation Act, because it throws us back on the English and Irish cases relating to bills of revivor and writs of *scire facias*. I have always regarded the Indian Limitation Act as the worst drafted piece of legislation which it has been from time to time my misfortune to be compelled to construe. But I think that the climax is reached in article 183 with its use of the word "revived", which could easily have been defined but was not. Of two things, one: either the draftsman had acquainted himself with the English case law on the subject or he had not. If he had not, he neglected a plain duty cast upon him by his own action in using a term of art like "revived" without attempting either to enquire into its history or to formulate his own definition of it; if he had, he must have known that the use of the term was a throwing of an apple of discord

into the arena, which would set Indian Counsel and Indian Judges to grope among the English authorities in the quest of a guiding principle. The pursuit has undoubted intellectual attractions akin to those which sustain a classical scholar in the task of collating manuscripts in the endeavour to produce an authoritative text of the ancient writer he has elected to edit. I see indications in the reported Indian cases that such an enquiry has presented those attractions to various Judges. For myself, I confess it has none. I have neither the knowledge nor the leisure in an already overworked Court to hope to master the subject sufficiently to throw any new light upon it. The bar has given us the greatest assistance, delved into the English cases with diligence and put them all before us. I therefore feel it incumbent upon me to follow the example of other Indian Courts and briefly review the English case law on the subject. I shall be brief for two reasons. If this case stops here—which I do not suppose it will—I do not wish to embarrass my successors by an extended discussion which would almost inevitably contain *obiter dicta* which it would probably be their duty in later cases to reject or explain away. If the case goes to the Privy Council, I am not foolish enough to suppose that an elaborate disquisition from me would give the Board any real assistance in a subject-matter which must be far more familiar to its members than to any Indian Court.

The first book cited to us was Tidd's Practice of which the 7th Edition is dated 1821, in which the following passage occurs :—

"The *scire facias* upon a change of parties is governed by the rule laid down in the case of *Penoyer* v. *Brace*(1), but where a new person is to be benefited or

(1) [1697] 1 Ld. Raym., 244.

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charged by the execution of the judgment, there ought to be a *scire facias* to make him a party to the judgment."

In Wharton's Law Lexicon, 12th Edition (1916) an elaborate account is given of the writ of *scire facias* with a significant note that "the writ though not abolished is now almost out of use." The equitable remedy of filing a bill of revivor is fully dealt with in Volume XIII of the Encyclopædia of the Laws of England, Second Edition, p. 1. There arose a series of cases in the Irish and English Courts which discussed the effect of the taking out of a writ of *scire facias* in which the point argued was, whether a writ of *scire facias* merely continued an old cause of action as it stood at the time of the writ, or whether it created a new right. The cases I refer to are *Farrell* v. *Gleeson*(1), *Farran* v. *Beresford*(2), *Ottiwell* v. *Farran*(3), and finally before an imposing bench of the Privy Council in 1853, *In re Walter Blake*(4).

I will take it that those decisions establish that a judicial determination following on the taking out of a writ of *scire facias* which gave the right to the new person on the record to continue execution under the old decree, gave a new starting point of limitation. I fail to see the justice of holding that a statute-barred decree can be given a new life by the operation of an antiquated writ; but it is not for me to question the decisions of the House of Lords and the Privy Council. No later English or Irish case has been referred to in the argument before us and the matter stood thus when article 183 of the Limitation Act compelled the Indian Courts to come to some conclusion on the matter. All these cases have been cited before us. There are three decisions of the Calcutta High Court

(1) [1844] 11 Cl. and F., 702.
(2) [1843] 10 Cl. and F., 319.
(3) [1839] 2 Ir. Rep., 110.
(4) [1853] 2 Ir. Ch. Rep., 643.

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and several of the Madras High Court with which I will deal shortly. The decision in *Ashootosh Dutt* v. *Doorgacharn Chatterjee*(1) expressly bases itself on the English Common Law rule relating to *scire facias*, namely, that a judgment on a writ of *scire facias* does not merely extend the original remedies but creates new ones; and that decision was followed in *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain*(2), and in effect in *Jagendra Chandra Roy* v. *Shyam Das*(3), a very learned judgment in which the English case law is exhaustively reviewed. The Madras Court proceeded on the same lines, *Ganapathi* v. *Balasundara*(4). The trend of the later Madras cases is in the same direction, viz., to hold that to bring a transferee decree-holder on to the record is not merely a recognition of his character as transferee decree-holder but is a step in execution which will save limitation. I will enumerate the cases without discussing them in detail. They are *Ramachendra Aiyar* v. *Subramania Chettiar*(5) and *Bolla Brahmadu* v. *Ruddaraju Venkataraju*(6). In *Chutterput Singh* v. *Sait Sumari Mull*(7) the decision was obviously adverse to the present respondent's first contention.

The point, therefore, seems to narrow itself to this. Was the order of the Deputy Registrar of the 8th of March 1917 a ministerial order or was it a judicial determination in so far as it not merely transmitted the case for execution to Ramnad but purported to recognize the position of the alleged transferee decree-holder? In the Code of Civil Procedure, by Order XXI, rule 16, proviso, it is enacted that notice of an application for execution by a transferee decree-holder shall be given to the transferor and the judgment-debtor and the

(1) (1880) I.L.R., 6 Calc., 504.
(2) (1892) I.L.R., 20 Calc., 551.
(3) (1909) I.L.R., 36 Calc., 543.
(4) (1884) I.L.R., 7 Mad., 540.
(5) (1903) 14 M.L.J., 393.
(6) (1916) 33 I.C., 71.
(7) (1916) I.L.R, 43 Calc., 903.

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decree shall not be executed until the Court has heard their objections, if any, to its execution. It appears on the face of the order of the Deputy Registrar that such notices had been given. The actual words are these:

"The defendants herein not appearing in person or by pleader though served with the said revival notices as appears by the affidavit of Doraikannu Mudaliyar" and the Deputy Registrar purported to affix to his order the statement that it was "by the Court" speaking through him. In view of that I should find it very difficult to hold, even if I had no further guidance on the matter that that was other than a judicial act. Those affected had the right and the opportunity to be heard and they did not choose to avail themselves of it. But I think that the matter is concluded for me not merely by the words of Order XXI, rule 16, but by the pronouncement of the Privy Council in *Raja of Ramnad* v. *Velusami Tevar*(1) which appears to me to be a direct authority for the proposition that when a Court has recognized the assignment of a decree and passed an order allowing the assignee to execute it, that gives a fresh starting point of limitation and that it is not open to the judgment-debtor to contend that it did not act as a revivor. The Allahabad Court had consistently taken the same view; see *Dwarka Das* v. *Muhammad Ashfaqullah*(2). I may point out that the decision of the Privy Council in *Banku Behari Chatterji* v. *Naraindas Dutt*(3), proceeded on the express ground that an order of transmission was not a judicial act, because it could be passed *ex parte*, and that the matter was not affected by the fact that actually notices to the parties concerned had been given, because their Lordships held

(1) (1920) 48 I.A., 45. (2) (1924) I.L.R., 47 All., 86.
(3) (1927) I.L.R., 54 Calc., 500.

that they need not have been given and should not have been given; and that therefore the order of transmission remained what it was always meant to be under the Code, a ministerial order. Under Order XXI, rule 16, notices not only may, but must, be given."

In the result, I feel myself compelled to hold that the Deputy Registrar's order of the 8th of March 1917 did give a fresh starting point of limitation. The result is one which I confess I greatly regret. These orders are passed without any realization of the far-reaching effects and implications they may have. In this case an original decree debt of Rs. 8,957 has been converted in the intervening years by accumulation of interest to a sum of Rs. 17,626 up to November 1926, and at this date is nearly Rs. 20,000 and those who are to be the recipients of this large sum of money have obviously slept on their remedies for many years. I feel myself unable to find a way out. If this case goes to a higher tribunal I trust it will be able to discover that which escaped me. The appeal is dismissed with costs.

PAKENHAM WALSH, J.—I concur with the conclusions of my Lord the Chief Justice with whom I have discussed the matter fully and have nothing to add.

B.C.S.