instrument for the payment of money "otherwise charged for," and consequently not a bond or other obligation within clause 8 of the same schedule. We are of opinion that although not a hundi, it is in the nature of a promissory note, and comes within the description in clause 4: "other orders and obligations for the payment of money not being bonds or instruments or writings bearing the attestation of one or more witnesses."

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APPELLATE JURISDICTION (*a*)

Regular Appeal No. 20 *of* 1862.

PITCHAKUTTI CHETTI.....*Appellant.*

KAMALA NÁYAKKAN.....*Respondent.*

An instrument which is in terms a temporary lease is as binding on the lessor *qua* lease, where the tenancy is to commence at a future day, or on the determination of existing lease under which another lessee is in possession, as where it commences immediately.

The law of England as to the offences of maintenance and champerty does not apply to natives of India. In dealing with objections to their contracts, on the ground of maintenance or champerty, the Court must look to the general principles regarding public policy and the administration of justice upon which that law at present rests.

To constitute "maintenance" improper litigation must have been stirred up with a bad motive or purpose, contrary to public policy and justice.

"Champerty" is a species of "maintenance," and of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of the litigation.

4, 1793. fol-

Specific performance decreed of a lease, though the lease form of an arrangement whereby, as a consideration for the lease, t was to lend the defendant money to enable him (*inter*, the mence legal proceedings against the then tenant of the of the intended lease.

Suit No. I is ge- ced by plaintiff.

THIS was a regular appeal from the pport of it, namely Cotton, the Civil Judge of Madu esses, and two others, No. 1 of 1858. was executed. It is de-

The defendant was propriet e house (that of one Chela- Ammayanáyakkanur, which ested by one of the *same* par- iyar was another party who clair. The defendant havi individual is deposed to have determined to institute le n the court calling for the records

(*a*) Present he was concerned, and comparing

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enable him to do this, and to meet the demands of one Rámakrishna Chetti, as also obviously with the view of making fresh provision for a lease of the zamindári, the defendant came to an arrangement with the plaintiff by which the plaintiff was to make an advance of money to the defendant by way of loan, and the defendant was to execute a lease of the zamindári to the plaintiff. Under this arrangement the defendant, on the 17th September 1851, executed to the plaintiff two bonds, one for 2,000 rupees and the other for 100 rupees, and also a lease of the zamindári (marked A) for the term of ten years, to take effect from fasli 1267 or the year 1857, or (if the defendant was successful in his said legal proceedings) from fasli 1266 or the year 1856. And on the same day, the defendant executed and delivered to the plaintiff a tákid or order addressed to the náttánmaikáran, karanams, and the other villagers, reciting that he had made the lease and requiring them to pay to the plaintiff during the term and to place themselves under his orders. The period for the plaintiff entering upon his lease of the zamindári having arrived, and the defendant having obstructed him when about to take possession, this suit was been brought to enforce specific performance of the lease.

The defendant met the suit by the defence that the lease had been obtained from him under improper influence and fraudulently, and that it had been made void by reason of the plaintiff's non-performance of the stipulations contained in an instrument executed by the plaintiff on the 25th November 1851, (marked No. I on the record), wherein the Sáhib acknowledged that of the sum of rupees 3,000 factory at Tuticorin, no more than rupees 1,052 had been advanced; that on failure to pay the residue by the 1851, he would have nothing to do with the deed of lease and sixty-six and arrive back from the defendant the loan with your firm and test. The third paragraph of the sum of rupees 3,000 which is the defendant by the plaintiff was not paid. The plaintiff in his plaint the stipulations thereof, in regard to

The point to be considered comes properly under the 4th clause of Act (Act XXXVI of 1860), for, respecting the same, and

(a) Present Scotland, C. J. and

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certain other transactions, as also the stipulations of these documents, by which the plaintiff is bound to do certain acts."

The case came on for trial before the Civil Judge of Madura, and was, in the first instance, dismissed by him, on the ground that the lease on which it was founded had not been completed: that it was without consideration; and that, in terms, it provided expressly, by way of penalty, that a breach of the engagement was to be remedied by compensation for loss incurred.

Upon appeal against this decision the late Sadr Court, on the 8th February 1862, overruled the objections taken by the Civil Judge and remanded the case to him to be disposed of upon its merits generally. The case was accordingly heard on the 16th April 1862, when the Civil Judge passed the judgment which was the subject of the present appeal.

He held that the instrument of lease was merely an incomplete promise or agreement (citing *Special Appeal* No. 42 of 1853), and that the plaintiff's only remedy was a suit for damages. He also held that the transaction was 'maintenance' and savoured likewise of 'champerty' and cited Russell on Crimes, chapter xx, *Special Appeal* No. 129 of 1866, the maxims 'quod ab initio non valet in tractu temporis non convalescit,' and 'ex nudo pacto non oritur actio,' Wilmot, C. J. in 1 Norton's *Topics of Jurisprudence* 264, 265, and Story's *Equity Jurisprudence* §§ 769, 787, 793. The 20th and 21st paragraphs of his judgment were as follows:

"XX. Setting aside then all objections to A, the [illegible] claim depends entirely on whether the exhibit No. I is genuine or not. It has of course been repudiated by plaintiff. Five witnesses have been examined in support of it, namely the writer of it, and two attesting witnesses, and two others, whoever they were, present when it was executed. It is deposed it was executed in the same house (that of one Chelamaiyar) that A was, and is attested by one of the *same* parties who attested A. Chelamaiyar was another party who signed it, as a witness; this individual is deposed to have died ten years ago; but on the court calling for the records in some suits, in which he was concerned, and comparing

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his signature in the deed No. I, with those affixed, and his hand in certain papers of record, *about the same time*, it finds them to correspond, as does also the signature of the plaintiff in the deed, with others affixed to papers in the records.

"XXI. It may appear suspicious that, with such a document, the defendant did not at once deny the validity of A; but there is no accounting for a native's acts, and he may have been afraid to produce it, at the onset, for fear that the witnesses to it should become known and be tampered with: *indirect* allusion however was made in the answer to plaintiff's having concealed certain facts regarding the engagement and himself broken the contract. The court sees no grounds for questioning the evidence of the witnesses, it was given straightforwardly, and is unshaken by plaintiff's cross-examination."

Branson for the appellant, the plaintiff.

Mayne for the respondent, the defendant.

SCOTLAND, C. J. [after stating the facts above set forth, referred to the Civil Judge's judgment, and proceeded thus:—]

In preparing that judgment both care and some research have evidently been exercised, and although we cannot follow throughout the reasoning of the Civil Judge, or concur in the appositeness of all the authorities to which he refers, the judgment, we think, very distinctly and clearly states the grounds of the decision come to. Of these grounds two involve objections raised, not by the defendant, but by the judge himself, and held to be valid; and with these we will first deal. One objection is that as the defendant was not in possession of the zamindári, and the term of the tenancy was to commence at a future time, the instrument of lease could not be considered as anything more than an incomplete promise or agreement for the breach of which the plaintiff's only remedy was a suit for damages. The other objection is that the transaction between the parties amounted to the offence of "maintenance" and savoured of the offence of "champerty," and that the lease therefore was void.

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Neither of these objections is, we think, tenable ; and indeed the learned advocate of the respondent, who made no attempt to support them by argument, appeared to us to concede this at the hearing. With reference to the first objection it is clear law that an instrument which is in terms a temporary lease is just as effectual and binding upon the lessor *as a lease*, where the term of the tenancy is expressed to commence at a future day, as where it commences immediately; and it can make no legal difference in this respect that the term is made to commence form or upon the determination of a prior lease for years under which, at the time, another lessee is in possession. To make the instrument a lease, it must, of course, contain words of actual demise and not merely be an agreement for a lease ; and in the present case, there can be no doubt that the instrument (A) was intended to be, and is, in terms, an actual lease of the zamindári. It is not necessary after the former judgment of the late Sadr Court to say more on this point; but we must not be understood as adopting the opinion of the Civil Judge, supposing him to have been right in treating the instrument as an agreement simply, that then the plaintiff's only remedy would have been a suit for damages.

Then, as regards the other objection :—" maintenance" and " champerty" are made offences by the common and statute law of England, which, in this respect, has no application to the natives of this country ; and in considering and deciding upon objections to the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice, upon which the law at present rests. To that extent we think the law can properly be adopted and applied in prefect consistency with the Hindu law relating to contracts. See 1 Strange's *Hindu Law* 275. In this case the " maintenance" is alleged to be the loan of money by the plaintiff to enable the defendant to sue and eject his tenant Fondeclair ; but that of itself is not sufficient. There should appear to be the instigation of improper litigation with a bad purpose or motive, contrary to public policy and justice. In *Findon* v. *Parker*(*a*), Lord Abinger says; " The law of maintenance, as I understand upon the modern con-

(*a*) 11 M. & W. 682.

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struction, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages other either to bring actions or to make defences which they have no right to make ;" and in the late appeal case of *Fischer* v. *Kamala Naiken* (*a*) relating to this very zamindári, Sir John Coleridge, in delivering the judgment of the Privy Council, observes, as to maintenance, that " it must be against good policy and justice, something tend- " ing to promote unnecessary litigation, something that is " immoral, and to the constitution of which a bad motive " in the same sense is necessary."—See also *Flight* v *Leman*(*b*). Here, all that appears in evidence upon this matter is what is stated in the case and in the two bonds executed by the defendant, and we think there is nothing in these documents which can be said to bring this case within the law of maintenance as just stated. On the point of champerty, which is a species of maintenance and of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of the suit, we may add, although not necessary, that, when the nature of the lease and the mutual stipulations and undertakings contained in it are considered, there is no ground, we think, for the opinion that a part of the lease savoured of champerty.

We next proceed to the consideration of the other questions affecting the real merits of the case. The Civil Judge has rightly disallowed the defendant's plea, that the lease in issue was obtained from him under improper influences and fraudulently, as being unsupported by the evidence, and having so decided, it would have been better, we think, if he had abstained from making the observation referring to the plaintiff, that accompanies his decision. Observations not called for nor warranted by the evidence should, as much as possible be avoided, and the more so where, as in the present instance, they tend to convey a stigma on the character of one of the litigants before the Court, and who, so far as the record discloses, may have been dealing fairly and openly with the defendant.

The remaining question in the genuineness and validity of the defendant's exhibit No. I, before described. If estab-

(*a*) 8 Moo. I. A. Ca. 187. (*b*) 4 Q. B. 883.

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lished, this instrument makes void the lease. If it fail of proof, the lease holds good and must be enforced. And we are of opinion that the evidence fails to establish that it is a genuine instrument.

There is certainly oral evidence to the execution of the instrument by the plaintiff, but the credibility of the witnesses, and the weight and effect to be given to evidence of this nature, must be tested by all the circumstances and probabilities of the case, and these, in our apprehension, are the reverse of favouring the truthfulness of the witnesses.

The lease in issue, A, is on a stamp and the document was publicly registered. The instrument to cancel it, No. I is an unstamped paper ; and it is highly improbable that the precautions taken in this respect to fortify the lease should not have been adopted to strengthen and place, as far as possible, beyond question, an instrument obtained to make void the lease, if such instrument were genuine.

The document (No. 1) purports to bear date in 1851, shortly after the lease, and stipulates for the return of the lease and the bonds, and yet the lease and the bonds have remained undistrubed in the plaintiff's hands for the six years and upwards that intervened to the institution of this suit. It is not probable that the plaintiff should thus have been left in quiet possession of a document of so much importance as the lease, had it been really cancelled. There is, no doubt, some evidence as to the defendant having applied to the plaintiff to get back the lease ; but it is given only by witnesses brought to speak also to the execution of the document No. I, and is not satisfactory, and considered with the other circumstances of the case, cannot, we think, be relied upon.

Then with reference to what is stated in No. I as to the sums paid by the plaintiff, it is hardly possible to believe that it was executed by the plaintiff when other undoubtedly genuine documents given to the plaintiff, and allowed for years to remain in his possession, are considered. The loan of rupees 3,000 by the plaintiff, besides being mentioned in the lease as having been actually made, is secured by the two bonds taken from the defendant on the same date that the lease was executed, and which are marked C and D. Now

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it is consistent and reasonable that they should remain with the plaintiff as a security for the loan in expectation of his enjoyment of the lease : but it is quite otherwise if the case as respects No. I were as represented by the defendant; and we can see from the evidence no satisfactory reason for the plaintiff not having, as alleged, advanced the full amount of the loan, or for believing, when the terms of the lease are considered, that he would have been otherwise than ready and probably anxious to do so.

There is the further strong observation to be made as regards the defence set up by the appellant in the first instance, that if really armed with a genuine instrument to defeat the suit, such as the exhibit No. I, the defendant would assuredly not have met the plaint in the manner he has done in his written answer. It is only natural and reasonable to expect that the appellant, though a native, would have boldly asserted the existence of the instrument, and relied upon its terms ; but instead of this we find no reference made to the document unless, as has been said, the vague general words in paragraph 3 of the answer were meant to apply to it. *If so*, the only rational conclusion that we can come to is, that this, probably, was done designedly in order to avoid the mention of the instrument (if it then existed), which it was known could not safely be at once put forward as genuine, and at the same time to admit covertly of its being afterwards relied upon as a defence. We cannot reasonably adopt the suggestions made by the Civil Judge, and get rid of the great improbability of this part of the case and suppose a perfect honesty of purpose, on the ground that " there is no accounting for a native's acts." There is a further suspicious circumstance to which we may here allude. The general words used are inconsistent with the defence subsequently and actually rested on. In the answer, documents, stipulations, other transactions, and acts to which the plaintiff had bound himself are adverted to. But the actual defence depends upon but one alleged document, namely, the exhibit No. I with the simple stipulation on the part of the plaintiff that unless the plaintiff made good the balance of the loan expected of him within five days, he was to forfeit the lease and return it and the bonds.

In addition to the several improbabilities that we have pointed out, there are other circumstances that materially

affect the credibility of the witnesses who speak directly to the execution of the instrument. They are, one and all, connected intimately with the defendant, as his dependants or otherwise ; and their statements are no more than might be made if the instrument were not genuine. In a real transaction of this kind, it is fair to presume that both parties would have been represented in their witnesses, or that some disinterested persons neutral to them both would have been witnesses. The evidence of one witness, namely the third, is specially shown to be untrustworthy. He professes to be the writer of the exhibit, and yet makes the strange statement that for the two years preceding his examination he was unable to write. What he meant by this does not appear to have been elicited, and he seems to have been able to put his signature in full to his deposition. Now, on comparing this signature with the hand-writing of the exhibit in question, they are found to be very dissimilar, and this may account for the strange statement made by the witness.

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We find, further, on examining the document (No. I) that the alleged writer's name has been tampered with, two letters having been written over and altered, very apparently, into two other letters. Thus the name Ammávaiyan(*a*) has been altered into Appávaiyan (*b*),the latter being the deponent's name ; and this, we are led to suspect was done for the purpose of meeting this witness's evidence.

Upon consideration, then, of all the circumstances affecting the credibility of the witnesses and the whole of the evidence together with the probabilities and improbabilities of the case, we are clearly of opinion that the document No. I, has not been proved to be a genuine and binding instrument.

Our judgment is that the Civil Judge's decree must be reversed, and that the plaintiff is entitled to specific performance of the lease and to the possession and enjoyment of the zamindári of Ammayanáyakkanur under the terms of such lease.

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The costs throughout are to be discharged by the defendant.

Decree reversed.

NOTE.—Recent English cases as to maintenance and champerty are *Anderson* v. *Ratcliffe*, E. B. & E. 806 ; 28 L. J. Q. B. 32 S. C. : *Sprye* v. *Porter* 7 E. & B. 58 : 28 L. J. Q. B. 64 S. C. : *Simpson* v. *Lamb* 7 E. & B. 84 : *Knight* v. *Bowyer* 27 L. J. Ch. 521 : *Bainbridge* v. *Moss*, 3 Jur. N. S. 58 : *Earle* v. *Hopwood* 9 C. B. N. S. 566 : 7 Jur. N. S. 775 S. C.: *Hare* v. *London and N. W. Ry. Co.* Johns. 722: *Tyson* v. *Jackson*, 30 Beav. 384, 387.

ORIGINAL JURISDICTION (*a*)

Original Suit No. 1 *of* 1862.

MANSUK DÁS *against* RANGÁYYA CHETTI.

In an action by a vendor against a vendee for non-performance of a contract to deliver goods, which specifies no time for delivery, the measure of damages is the difference between the contract-price and that which goods of a like description bore on the lapse of a reasonable time for delivery.

Where a vendor contracts to deliver goods within a reasonable time, and payment is to be made on delivery, if before the lapse of that time he merely expresses an intention not to perform the contract, the purchaser cannot at once bring his action, unless he exercise his option to treat the contract as rescinded.

1863. *January* 23. *O. S. No.* 1 *of* 1862.

THIS was an action by a vendee against a vendor for not delivering cotton pursuant to a contract entered into on the 16th of July 1862. The contract was oral and payment was to be made on delivery, for which, however, no time was specified.

Norton and *Mayne* for the plaintiff.

Branson and *Arthur Branson* for the defendant.

The plaintiff having proved his right to recover, the question was what was the rule for measuring the damages?

SCOTLAND, C. J. :—In cases like the present the measure of damages is the difference between the contract-price and that for which goods of the same description and quality as the goods contracted for could have been obtained in the market; and here, I think, we must look at the market-price on the lapse of a reasonable time for delivery. The question then is, when did such reasonable time expire? Looking to

(*a*) Present Scotland C. J. and Bittleston, J