

provision in the bond, allowing of the defendant placing the plaintiff in temporary possession of the land, is not a condition of a compulsory nature, binding the plaintiff to accept the land and forego his right to sue for the money or failure of payment within the stipulated time. The latter right remains absolutely in the plaintiff, notwithstanding the said provision ; and the Judge of the Court of Small Causes has properly determined that the defendant shall pay the money due by him to the plaintiff.

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R. C. No. 1  
of 1862.

## APPELLATE JURISDICTION (a)

SABÁPATI MUDALIYÁR *against* NÁRÁVANSYÁMI  
MUDALIYÁR.

Where an action on a contract was brought in the High Court and judgment was given to the plaintiff for rupees 454-13-4 :—*Held* that as the amount so found due was less than rupees 500 the plaintiff could not have his costs, unless the Judge who tried the cause certified that the action was fit to be brought in the High Court.

The 37th clause of the Letters Patent constituting the High Court does not give the Court an uncontrolled discretion as to costs in civil suits.

Act IX of 1850(b) sec. 101 is not repealed.

A special enactment is not impliedly repealed by a subsequent affirmative general enactment if the two enactments are not so repugnant as to be incapable of standing together.

HIS was an appeal by the plaintiff against the decree of Mr. Justice Bittleston in the suit of P. Sabápati Mudaliyár against R. Náráyansvámi Mudaliyár. The plaintiff claimed payment of rupees 601-5-4 for principal and interest secured by an instrument of mortgage in Tamil, dated the 10th of July 1854. The case came on before Mr. Justice Bittleston for settlement of issues. The defendant admitted the borrowing of the principal, the execution of the mortgage and the correctness of the particulars of the plaintiff's claim ; but, although no part of the principal had been repaid, the defendant contended that he was entitled to counter-interest on his payments of interest, under a clause in the mortgage-instrument, of which the following is a translation : " When the rupees I pay in small instalments amount to one hundred, then [at the rate of] one on every

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

(b) An Act for the more easy recovery of small debts and demands in Calcutta, Madras and Bombay.

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one hundred you are to allow counter-interest." The payments of interest amounting to more than rupees 100, Mr. Justice Bittleston allowed the claim for counter-interest, and consequently found the amount due to the plaintiff to be only rupees 454-13-4. For this sum judgment was given. The plaintiff thereupon applied for costs, but his lordship doubted whether, as the amount found due was less than 500 rupees, he had any power to grant costs, unless he could certify in the terms required by Act IX of 1850 sec. 1850, which in this case he considered he could not do. "The question," said his lordship, "turns upon the effect of section 11 of 24 & 25 Vict. c. 109, taken together with sections 12 and 37 of the Letters Patent constituting the High Court. It was not fully argued before me, and is one which I should have referred for decision to two Judges, but that I understood that the plaintiff was prepared to appeal from my decision if I should refuse to grant the costs. On the 15th of November therefore I gave judgment in accordance with the view which I at first took of the question, refusing the costs, so that on appeal the matter may be fully argued."

The sections and clauses referred to in the argument and judgment are as follows :

Act VIII of 1859 sec. 187 :—"The judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether any whole or in what part or what proportion ; and the Court shall have full power to award and apportion costs in any manner it may deem proper."

Act IX of 1850 sec. 101 :—"If any action shall be commenced after the passing of this Act in the Supreme Court, for any cause other than those lastly hereinbefore specified, for which a summons might have been taken out from a Court holden under this Act, and a verdict shall be found for the plaintiff for a sum less than 500 rupees, if the said action is founded on contract, or less than 100 rupees, if it is founded on wrong, the plaintiff shall have judgment to recover such sum only, and no costs ; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney any client, unless in either

case the Judge, who shall try the cause, certify on the back of the record that, by reason of the difficulty, novelty <sup>1862.</sup> Dec. 16, 17 or general importance of the case, or of some erroneous course of decision on like cases in the Court of Small Causes the action was fit to be brought in the Supreme Court."

Stat. 24 & 25 Vict. c. 104 sec. 11 ('An Act for establishing High Courts of Judicature in India') :—" Upon the establishment of the said High Courts in the said Presidencies respectively all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council, or charters, or of any Acts of the legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the judges of those Courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council."

Letters Patent constituting the High Court, clause 12:—" And We do further ordain that the said High Court of Judicature at Madras, in the exercise of its ordinary original Civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immoveable property, such land, or property shall be situated, or in all other cases, if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within the local limits of the ordinary original jurisdiction of the said High Court, except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Madras in which the debt or damage, or value of the property sued for does not exceed one hundred rupees."

Ibid., clause 37. "And We do further ordain that the proceedings in all matters coming before the said High Court of Judicature at Madras, in the exercise of its testamentary and intestate jurisdiction, shall be regulated by the rules relating

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to the granting of probates and letters of administration contained in the aforesaid Letters Patent of His Majesty King George the Third and by such further or other rules in respect thereof as are now in force ; and that the proceedings in all matters coming before the said High Court, in the exercise of its matrimonial jurisdiction, shall be regulated as nearly as may be, by the rules and proceedings of Our Court for Divorce and Matrimonial Causes in England : and that save as hereinbefore in this clause otherwise provided, the proceedings in Civil suits of every description between party and party brought in the said High Court shall be regulated by the Code of Civil Procedure prescribed by an Act passed by the Governor General in Council, and being Act No. VIII of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as are now in force ; Provided always, that the regulation of such proceedings respectively shall be subject to such laws and regulations as shall be hereafter made by the Governor in Council in relation to such proceedings respectively."

*Stokes*, for the plaintiff, in support of the appeal.

First, the instalments mentioned in the clause in the mortgage-instruments providing for counter-interest can only be taken to mean instalments of principal. Otherwise they must, as the defendant contends they do, mean instalments of interest and principal or of interest alone. But it can hardly be supposed that the parties intended the mortgagee to pay interest on his own interest, especially as then, if the mortgage-security lasted long enough, the counter-interest would necessarily amount to more than the interest paid him. The Court is not asked to insert words which are not in the instrument, but only to construe the words of the instrument in a manner most agreeable to the meaning of the parties, *Smith v. Packhurst (a)*. If, then, the counter-interest was only payable on instalments of principal it never became due at all : Mr. Justice Bittleston should not have allowed the claim in respect of it ; the plaintiff would have been entitled to judgment for more than 500 rupees ; and the power to grant costs was not restricted by the provision in Act IX. of 1850 requiring the judge to certify.

(a) 3 Atk. 136 per Willes C. J. See *Wight v. Dickon* 1 Dow 147 and the cases cited in the note to *Roe v. Tradmarr* 2 Smith L. C. 5th ed. 453.

Secondly Even though the plaintiff we only entitled to judgment for less than 500 rupees, the Court has now an uncontrolled discretion as to costs. Section 101 of Act IX of 1850 does not apply, for it is inconsistent with the 37th clause of the Letters Patent establishing the Madras High Court (or rather with sec. 187 of Act VIII of 1859 which is incorporated by that clause with our charter), and is therefore, under 24 and 25 Vict. c. 104 s. 11, inapplicable to cases like the present.

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*Cur. adv. vult.*

SCOTLAND C. J.:—[After expressing his dissent from *Stokes'* argument against the allowance of counter-interest, and observing that the Court had no authority to insert the words "of principal" in the mortgage-instrument, proceeded as follows:] The question we are called on to decide in this case turns upon the construction to be put on the 37th clause of the Letters Patent establishing the High Court of this presidency. The case is not simply that of a subsequent Statute or Act of the Legislative Council providing in general terms in respect of a matter as to which there was in force at the time a previous special legislative enactment. Both Acts, Act VIII of 1859 and Act IX of 1850, were independently in full force as respects all their provisions, before the Letters Patent came into operation, and the question is whether the latter part of clause 37 of the Letters Patent, providing for the regulation of the procedure in civil suits, has the effect or giving an uncontrolled discretion as to costs in such suits, and of thus indirectly repealing the provision contained in section 101 of Act IX of 1850? The clause in question does not provide that the Code of Civil Procedure shall alone regulate the proceedings in civil suits. They are to be regulated also by 'such further or other enactments of the Governor General in Council in relation to Civil procedure as are now in force.' And if it had been the intention of the framers of the Letters Patent that the provision as regards costs in the Small Cause Court Act (which was clearly an enactment then in force relating to civil procedure) should no longer be acted upon, it is reasonable to suppose that there would have been some express provision

1862. to that effect, and that they would not have left their inten-  
 December 17. tion to be carried into effect in the indirect way now sug-  
 gested.

This observation derives additional weight from a consideration of clause 12 of the Letters Patent, which contains an express provision doing away with the concurrent jurisdiction that before existed and all discretion as regards costs, in suits for sums under one hundred rupees.

But though such may not have been the intention of the framers of the Letters Patent, still, if giving to the language of the 37th clause its ordinary meaning, it necessarily has the effect of rendering sec. 187 of Act VIII of 1859 a repeal of sec. 101 of Act IX of 1850, we must so construe it. But we think this is not the necessary effect of the clause, and that the 101st section of the latter Act remains in operation, notwithstanding the affirmative general words of the 187th section of the former Act, in accordance with what must have been, we think, the real intention of the framers of the Letters Patent. The Code of Civil Procedure is, no doubt, to be taken as the governing law, and if the two sections in question could not reasonably have concurrent operation, the 187th section of the Code would alone regulate the question of costs. But upon every principle of construction, and according to the authority of decided cases, we ought not, in considering the language of the 37th clause of the Letters Patent, to construe the affirmative general enactment in the Code as impliedly a repeal of the special enactment in the Small Cause Court Act, if the latter is not so contrary to and inconsistent with the former that the two may not stand together, there being nothing otherwise to shew that such was the intention of the framers of the Letters Patent. Section 187 of Act of 1859 is one amongst others providing for the mode in which a judgment and decree in a suit are to be given, and in general terms confers upon the Court power to award and apportion costs in its discretion. No doubt the words are large enough to include the costs in every suit, whatever the amount. But that does not necessarily make it so contrary to, or inconsistent with, the provisions in the Small Cause Court Act as that the two cannot stand together. The former jurisdiction

of the Small Cause Court under this Act is left just as before, except that as regards suit in which the debt or damage or value of the property does not exceed 100 rupees the concurrent jurisdiction of this Court is taken away ; and the reasons for the provision as regards costs in cases, still within the concurrent jurisdiction of the Court remain the same. We think, then, that effect may reasonably be given to both sections consistently with each other, and that the general discretionary power conferred by section 187 of the Code of Civil Procedure should be considered as subject to and regulated by the special provision of the Small Cause Court Act, in suits with respect to which there is a concurrent jurisdiction. In this way both sections have a reasonable operation given to them without any contrariety or repugnancy.

BITTLESTON, J. concurred.

*Appeal dismissed.*

NOTE.—See *Gregory's Case*, 6 Rep. 19 b : *Lyn v. Wym* Bridg. 122 : *Darcy's Case*, Cro. Eliz. 512 : *Foster's Case*, 11 Rep. 63 : 15 East. 377. *Pajet v. Foley*, 2 Bing. N. C. 679 : *Rex v. Middlesex Justices* 2 B. and Ad. 818 : *Reg. v. Inhabitants of St. Edmunds* 2 Q. B. 84 : *The Dean of Ely v. Bliss* 5 B. & V. 574, 582 per Lord Langdale M. R. : S. C. on appeal 2 D. M. & G. 459 ; see p. 470 : *Brown v. Mac Mullin* 7 M. & W. 196 : *Crip. v. Burnby*, 8 Bing. 394, and the late case of *Green v. Jenkins* 1 DeG. F. & J. 454, 469, where Lord Campbell C. said " There may certainly be an implied as well as an express, repeal of existing laws by new laws—but that is where the new and the old laws are conflicting and cannot stand together." *Leges posteriores leges priores contrarias abrogant.*" But if there is no express repeal and the old and the new laws may both be operative, the old remain in force."