1862. *November* 20. *S. A. No* 336 *of* 1862.

sum of 18 pagodas. We consider that by accepting the sum of one pagoda, at the time in question, the second defendant abandoned his right to purchase the property, and that all he could and did transfer to the third defendant was his other rights under the instrument of mortgage.

Under these circumstances we set aside the decree of the Principal Sadr Amin and affirm that of the District Munsif.

The costs in appeal and special appeal are to be paid to the third defendant.

Appeal allowed.

NOTE.—See *Price* v. *Perrie*, 2 Freem. 258 ; *Willett* v. *Winnell*, 1 Vern 488 : Coote, Mortg. 14.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 803 *of* 1861.

LAKSHMI NÁRAYANA.....*Appellant.*

RÁMAPPA CHAKKIRA.....*Respondent.*

An usufructuary mortgage of lands was executed in 1846, but the mortgagee did not enter into possession. In 1852 his representative, the plaintiff, commenced a suit to obtain possession, but allowed it to drop. In 1854 he commenced the present suit for the same object :—*Held* that laches could not be imputed to the plaintiff from the date of presenting the plaint in 1852, and that the produce from that date should be accordingly awarded him.

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THIS was a special appeal from the decree of Lakshumáya, the temporary Principal Sadr Amin of Mangalur, in Appeal Suit No. 242 of 1860, by which he refused to allow the plaintiff the profits which the latter claimed under a deed of *bhogyadhi*(*b*), or usufructuary mortgage, dated the 29th March 1846.

Srinivasachariyar for the appellant, the plaintiff.

The defendant did not appear.

The facts sufficiently appear from the following.

(*a*) Present Strange and Frere, J J.

(*b*) *Bhogyadhi* is properly an usufructuary *pledge*, from Sanskr. *bhogya*, 'enjoyment' 'possession' and *adhi* 'pledge.'

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JUDGMENT :— The plaintiff brought this suit to obtain possession of property mortgaged to his nephew in the year 1846, together with arrears of produce.

The District Munsif of Kárkál decreed in his favour, and the Principal Sadr Amin affirmed the District Munsif's decree save as to the arrears of produce. These he has disallowed on the ground that the plaintiff's nephew, and after him the plaintiff, should have entered into possession of the land mortgaged, whereby they would have had the usufruct in consideration of their mortgage, and that their not having obtained their usufruct arises from their own laches, for which the plaintiff is not entitled to a remedy.

We think that such laches cannot be imputed to the plaintiff from the date that he took steps to obtain his rights and was wrongfully kept out of them by the defendant. He would thus clearly be entitled to the produce of the land from the year 1854 when he instituted the present suit. But beyond this it is to be observed that he brought a previous suit for the same purpose, namely No. 127 of 1862, which was allowed to drop on the institution of the present suit.

We amend the Principal Sadr Amin's decree by awarding to the plaintiff the produce, according to the rate allowed to him by the District Munsif, from the date on which the plaint in the aforesaid suit No. 127 of 1852 was presented, together with costs in proportion.

Appeal allowed.

NOTE.—See *Clarke* v. *Hart*, 6 H. L. Ca. 633; 5 Jur. N. S. 447 S. C.