1867. October 23. S. A. No. 209 of 1867.

therefore, does not, in our judgment, contain an agreement binding the plaintiff not to redeem the property within the mortgage term.

The result is that the decree of the Lower Appellate Court must be affirmed. As respects the costs, we think the 1st defendant must pay the plaintiff's costs of this appeal in addition to the plaintiff's costs in the Lower Appellate Court. The 2nd defendant will bear his own costs. But the defendant's costs in the Original Court should be added to the mortgage debt due, and be paid by the plaintiff, unless he insists on an issue to try whether he tendered the amount due for the principal and interest before suit, in which case the question as to the latter amount of costs shall abide the finding on such issue.

Special appeal dismissed.

ORIGINAL APPELLATE JURISDICTION. (a)

Regular Appeal No. 11 *of* 1867.

KAREEM BEE.....*Appellant.*

BEEGAM BEE and others.....*Respondents.*

An appellant has no right to withdraw an appeal which has been regularly registered without the permission of the Court.

Where the appellant had given notice of the withdrawal of the appeal before the day hearing and notice of withdrawal had been given to the respondent, but not until costs had been incurred ; *Held*, that the appellant was not at liberty to withdraw the appeal, and the Court ordered that the appeal be set down for hearing.

1867. October 24. R. A. No. 11 of 1867.

The *Acting Advocate General* appeared for the respondent.

The appellant did not appear by counsel.

The Court delivered the following

JUDGMENT :—Thit is an application on behalf of the respondent for an order to compel payment of his costs, the appeal having been withdrawn, or an order directing the appeal to be again set down for hearing.

The appeal is from the decree of a division Courtunder Clause 15 of the Letters Patent, and was, it appears, in due course set down for hearing on the 13th of August. But the appellant, on the 7th, delivered at the Registrar's Office a notice of the withdrawal of the appeal, which was

(a) Present : Scotland, C. J. and Collett, J.

1867. *October* 24. *R. A. No.* 11 *of* 1867.

accepted ; and thereupon the appeal was struck out of the paper of appeal suits for hearing. It appears also that notice of the withdrawal was given by the appellant to the respondents, but that he had previously incurred costs in the appeal.

We have clearly at present no jurisdiction to order the appellant to pay costs. The rules of the Court contain no express provision relating to the withdrawal of appeals, but by the operation of one of the sections which, under the rules, regulate appeal proceeding (Section 37, Act XXIII of 1861), the provision made in Section 97, Act VIII of 1859 for costs on the withdrawal of a suit in the Original Court is no doubt applicable to the withdrawal of an appeal. That provision, however, so far as it relates to costs, does not enable us to do more than our general power as a Court would warrant :—namely, impose costs as a condition of the granting of leave to withdraw an appeal, when such leave is necessary and is applied for.

Then as to the right to withdraw the appeal without the permission of the Court, we are of opinion that the appellant had not such right. It is clearly not given by the provisions of the Code of Civil Procedure made applicable to this appeal. They shew quite the contrary intention, and we have ascertained that, according to the established practice on the other side of the Court, no appeal can bee withdrawn without the leave of the Court. We may mention also the decision in Referred Case No. 11 of 1867 recently before us on the Appellate Side (*a*). There the appellant sought to withdraw the appeal in the course of the hearing in order to avoid a decision on a point raised by the respondent, and we held that he was not at liberty to withdraw the appeal. We have no doubt that the leave of the Court is in every case necessary after an appeal has been regularly registered : and as a general rule of practice, we think the respondent should be served with due notice of the application for leave when it is made after the notice of the day fixed for hearing has been issued. In every instance the appellant will be liable to pay to the respondent his costs occasioned by the appeal.

(*a*) 3 Mad. H. C. R. 302.

1867. *October* 24. *R. A. No.* 11 *of* 1867.

The withdrawal then being ineffectual, the order we make is, that the appeal be set down for hearing on a day to be hereafter fixed, and then disposed of, unless in the meantime the appellant shall obtain the leave of the Court to withdraw the same ; that the costs of this application be reserved for consideration on the application for leave to withdraw, and if no such application be made that they be costs in the appeal.

Further, that a copy of this order be forthwith served by the respondent on the appellant and an affidavit of such service filed in the Registrar's Office.

APPELLATE JURISDICTION (*a*)

Referred Case, No. 13 *of* 1867.

BHIMAVARAPU BÁLARAMÁYA.....*Plaintiff.*

G. R. HODSON.....*Defendant.*

A suit cannot be maintained to recover assessment unlawfully levied by Municipal Commissioners under (Madras) Act X of 1865.

1867. *Oct ober* 28. *R. C. No.* 13 *of* 1867.

THIS was a case referred for the opinion of the High Court by the District Munsiff of Vizagapatam in Small Cause Court Suit No. 143 of 1867.

The plaint set forth that the defendant gave notice to the plaintiff, that plaintiff was Agent at Vizagapatam of one Nagulakondo Royalu, and that he should pay a Municipal tax of Rupees 12-8-0. Plaintiff informed the defendant that no business was done at Vizagapatam for the said Nagulakonda Royalu, and that plaintiff was not his Agent, but defendant unlawfully levied from plaintiff the sum of Rupees 12-8-0 on the 7th January 1867. To recover this amount with interest, costs, and subsequent interest, the suit was instituted.

The defendant contended that the Court had no Jurisdiction to entertain the suit and relied on Section 69 of Madras Act X of 1865, which is in these terms :—" Appeals against any rate, tax, or fee assessed or levied under this

(*a*) Present : Holloway and Ellis, J. J.