1867. *April* 1. *R. C. No.* 5 *of* 1867.

JUDGMENT:—We are of opinion that the suit is not maintainable. The consideration of the plaintiff's right to the costs of the proceeding under Section 246, Act VIII of 1859, was an incident to the determination of the principal question and within the discretion of the Judge by whom the claim to the property in dispute was heard and determined. It is only when the costs are made a part of the order (which is not subject to appeal) and then by execution under it, that a party can in such cases enforce the payment of costs. The Judge might, on review, have extended the order to the granting of the plaintiff's costs; but, unless included in the order, the plaintiff can have no right to them. The plaintiff therefore cannot recover in the present suit.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 94 *of* 1866.

CHEDAMBARAM CHETTY, and another.....*Appellants.*

(*Plaintiffs.*)

KARUNALYAVALANGAPULY TAVER.....*Respondent*

(*Defendant.*)

In a suit upon a razinama, the execution of which was admitted by the defendants, which purported to create an interest in immoveable property, the Civil Judge dismissed the suit because the document had not been registered in accordance with Act XVI of 1864, Section 13.

Held (reversing the decree of the Civil Judge) that, the existence of the agreement not having been disputed, its production was not necessary, and that the plaintiff was entitled to whatever relief the effect of the plaint and answer taken together would entitle him on the admission of the defendant.

1867. *June* 3. *R. A. No.* 94 *of* 1866.

THIS was a regular appeal from the decree of F. S. Child, the Civil Judge of Tinnevelly, in Original Suit No. 11 of 1866.

The original suit was brought to recover Rupees 4,13,470-8-4, due on a razinama filed on the 9th of January 1865 in the Civil Court of Tinnevelly, in Original Suit No. 5 of 1864, wherein Ponnuswami Taver was plaintiff

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

1867. *June* 3. *R. A. No* 94 *of* 1866.

and the present defendant was defendant, and made over to the present plaintiff. The plaint alleged that the defendant had not paid Rupees 74,376-12-0 for principal and interest on the 1st instalment on the 8th January, 1866, as, by the terms of the razinama, he was bound to do, and the plaintiff sued for the whole debt.

The defendant, in his written statement, admitted the execution of the razinama, but stated that he had not received from the plaintiff's assignor the amount expressed to be paid to defendant. Paragraph 10 of the written statement was as follows :—

The defendant is ready to pay the residue due for the 1st instalment of the said razinama, after deducting from the amount thereof, Rupees 57,222-12-7 the amount of principal and interest due to the defendant as aforesaid ; and he is further ready to pay the amounts of the other instalments at the time when they should become severally due.

The Civil Judge dismissed the suit for the reasons stated in his Judgment which, after stating the nature of the pleadings, was as follows :—

The suit was posted for final settlement, and at the hearing plaintiff's vakil raised the question that, seeing that the document was a razinama filed in Court, such a defence was, by the ruling of the late Sadr, dated 10th April 1854, inadmissible.

Before, however, deciding how far this ruling of the late Sadr is or is not affected by the order passed on Civil Petition 136 of 1864 and by Regular Appeal 19 of 1862 (High Court Reports, Vol. II. 174 and 305) for no decree was passed on this razinama, and therefore the razinama is a mere contract, there is the following difficulty to be got over.

The razinama, on which the suit is brought, contains a mortgage of the whole zemindary for the loan and was executed on the 9th of January 1865, just 9 days after the Registration Act of 1864 came into force, and Section XIII of that Act declares that no instrument affecting an interest

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in land shall be received in Court or acted upon unless registered as required by the Act. This razinama has not been registered, and therefore I do not see how I can entertain a suit founded on such an instrument.

There can be no doubt that in the present case it comes hard on the plaintiff, for the Court appears to have been as much as or more in ault than the plaintiff. It had been the practice in this Court at that time to treat such razinama as decrees, and there can be no doubt that the parties looked upon this as such, and therefore naturally supposed they had no more to do, and that it was for the Court to register its own decrees, and even if the Court neglected to register a decree the parties to the decree are not affected by that neglect.

Unfortunately, as stated above, there is no decree, and the razinama is therefore but a mere contract between the parties, and being an instrument such as described in Section XIII of Act 16 of 1864, the Court must dismiss the plaint ; of course there will be no costs.

The plaintiff appealed.

The *Acting Advocate General*, for the appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—This is a suit brought to enforce the provisions of a razinama filed in Original Suit No. 5 of 1864 which the parties prayed might be made a decree of Court, but which was not made a decree of Court.

The Civil Judge dismissed the suit because the document, purporting to create an interest in immoveable property, had not been registered in accordance with Section XIII of the Registration Act of 1864.

The razinama unquestionably purports to create an interest in immoveable property, and the decision of the Civil Judge is unquestionably right if, for the decision of this suit, it is necessary to receive the document in evidence, or if, in giving a decree at all, he would be doing the act which is expressed by the words " shall be acted upon by any public officer." These two questions are different but so closely connected that they can scarcely be separated.

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On the first of them cases under the Stamp Act have a direct bearing, and the words of Lord Eldon in Huddleston v. Briscoe (11 Ves. 583-596) are "wherever an action has been brought on an agreement that ought to be on a stamp and the form of pleading has been such that at the trial it was not necessary to produce the instrument, as if it was admitted on the record and the trial was upon issues collateral to the existence of the agreement, it has never been considered as open to the Court to examine the question whether the instrument was legally available with reference to the stamp law." That doctrine has been repeatedly followed and once in a case decided by Scotland, C. J. and Holloway, J. of which we are unable to find a report. The decision is exactly in point, because the writing would, if the matter were in dispute, be the only evidence, but that evidence becomes unnecessary where the agreement is not in dispute. The present Act merely forbids the offering of the document in evidence. It may, however, be argued with some plausibility that, by making a decree without the production of the document according to its terms, the Court would, in fact, be a public officer acting upon the unregistered document. Setting aside the question whether "shall be acted upon by any public officer" does not apply to the acts of executive officials, such as the registering transfers of land, entering the names of transferees in the revenue accounts, &c., if a Court in making such a decree made it on the basis of the document it would be acting upon it. In truth, however, whether the document is produced or not, the basis of the decree would be the jural relation created by the concordance of wills between the parties and of that jural relation the document is merely evidence, but, if its production is essential, on the principles of the law of evidence, the only evidence. Where, however, that jural relation is admitted upon the record, the production of the document becomes unnecessary and there is no violation of the Act in decreeing in accordance with the admission. We do not at present think it advisable to dissect the admission and determine its exact effect. It is sufficient at present to express our opinion that the state of the allegations is such as not to render the production of the document essential to the plaintiff obtaining any relief: but that he is

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entitled to whatever relief the effect of the plaint and answer taken together will entitle him on the admission of defendant, subject of course to the decision upon the questions, which the defendant has raised, as to whether he has in fact, and the extent to which he has, failed in the performance of the admitted agreement. The decision of the Civil Judge upon this preliminary point will be reversed and the suit remitted for decision according to the principles here pointed out. The costs will be dealt with in the revised decree.

Suit remitted.

ORIGINAL APPELLATE JURISDICTION. (*a*)

Regular Appeal No. 5 *of* 1867.

K. KISSEN LALA.....*Appellant.*

JAVALLAH PRASAD LALA.....*Respondent.*

According to the law which prevails in Madras the sons of a grand daughter are excluded from the inheritance.

The plaintiff brought a suit for a moiety of the estate of his deceased second cousin who left no issue or nearer kindred, claiming through his maternal great-grand father.—*Held* : that the plaintiff was not entitled to inherit the estate of the deceased.

1867. *August* 14. *R. A. No.* 5 *of* 1867.

THIS was a regular appeal from the decree of Mr. Justice Innes, in Original Suit No. 256 of 1867 dismissing the plaintiff's suit.

The *Acting Advocate General* and *Miller*, for the appellant.

Branson and *O'Sullivan*, for the respondents, the 2nd and 3rd defendants.

The facts sufficiently appear from the following judgment which was delivered by

SCOTLAND, C. J. :—The plaintiff in this suit, claiming as joint heir with his brother, the 4th defendant, of one Taik Chand deceased, prays for an account of the estate which has come to the hands of the 1st and 2nd defendants, that a sufficient sum out of the estate may be set apart for the maintenance of the 3rd defendant, and that the plaintiff may be declared

(*a*) Present : Scotland, C. J. and Holloway, J.