probably will be much easier to establish the validity of his adoption, if he was in truth duly adopted, by a suit at once than by one many years hence at the end of his minority. 1866. *May* 12. *R. A. No.* 17 *of* 1866.

The decree below must be reversed under Section 351, and the suit remanded in order that it may be restored to the file and investigated upon the merits. The first defendant must also pay the plaintiff's costs of the appeal.

*Appeal allowed.*

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APPELLATE JURISDICTION (*a*)

*Regular Appeal No.* 11 *of* 1866.

GOVINDAN PILLAI .....*Appellant.*

CHIDAMBARA PILLAI and others.....*Respondents.*

In a suit to enforce the right to share in property on the ground that it was joint family property :—*Held*, that upon the construction of Clause 13, Section I of Act XIV of 1859, the claimant, in order that the statute shall be a bar, must have been entirely out of possession and excluded from possession by those against whom he claims.

Clauses 12 and 13, Section I of the Limitation Act considered.

THIS was a regular appeal from the decree of T. I. P. Harris, the Civil Judge of Trichinopoly, in Original Suit No. 1 of 1864. 1866. *May* 21. *R. A. No.* 11 *of* 1866.

The suit was for the recovery of one-third share of the family property. The plaint stated that one Anna Pillai had four sons, viz., Veláyudhan Pillai plaintiff's father, the 1st defendant, Muttusámi Pillai the adoptive grand-father of the 2nd defendant, and Nágalingam Pillai. That all the brothers lived undivided. That Muttusámi Pillai the adoptive grand-father of the 2nd defendant, and plaintiff's father about 45 years ago left for Nagpore. That subsequently plaintiff's father returned and lived jointly with the defendants at their house until his death, which took place in the year 1861. That the plaintiff and the 1st and 2nd defendants not agreeing, the plaintiff asked for a division. That thereupon disputes arose, and in consequence mediators were nominated and a deed of agreement drawn up, but 1st and 2nd defendants held back in the matter —Hence this suit.

(*a*) Present Holloway and Collett, J.J.

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The 1st defendant denied the execution of the agreement above alluded to ; asserted that he had lived separately for more than 30 years, and that the plaintiff's claim was barred by the law of limitation. The 2nd defendant supported the plaintiff's claim. Of the other defendants, some claimed as their own portion of the property specified in the plaint, and others did not appear at the hearing. The Civil Judge decided that the plaintiff was barred by the statute of limitations.

The plaintiff appealed.

*Miller and Srinivasa Chariyar*, for the appellant, the plaintiff.

*Advocate General*, for the first, fourth, seven, eighth and fifteenth, and *Venkatapathy Rao*, for the second, respondents, the defendants.

The Judgment of the Court was delivered by

HOLLOWAY, J.—In this case no issues whatever have been framed, although both parties have adduced evidence. The only point decided by the Lower Court is that the suit is barred by Clause 13 of the Limitation Act. The Judge apparently disbelieves the residence of plaintiff's father with the defendants on his return from foreign parts, but has not said what effect he considered that such evidence would have produced if it had been true.

I have before (*a*) had occasion to remark upon the extreme difficulty of this clause. The first period of limitation prescribed is 12 years from the death of the person, from whom the property alleged to be joint is said to have descended. In Bengal, where the theory is that the property descends from the father to the sons and where the right to enforce partition only arises at the death of the father, these words are applicable to all family property which has descended from the father to the sons, and equally applicable, whether the property is ancestral or self-acquired. Supposing, however, that the family elects to remain in union and all the members are supported in the family house under the presidency of the elder brother, as the theory of that law permits, it surely cannot be intended that the right to

(*a*) See M. H. C. Reps., Vol. II, p. 347.

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enforce partition must be exercised within 12 years of the death of the father or not at all. Is it possible that a man's right can be barred, while he is actually in possession of the property? Or is the still more curious consequence to result, that perpetual union after 12 years is to be the state of the family, unless the right of the claimant is barred by the latter part of this Clause? It seems to me that to make any sense of the first part of this provision, it must be assumed that the claimant has been entirely out of possession and excluded from possession by those against whom he claims, and making this assumption, it is reasonable enough that he should be put to his action within 12 years of the period from which his right accrued. He would not be barred if out for any number of years during the father's life, but he would be barred if he allowed the exclusive possession of another for 12 years after that period.

The latter part of the clause seems to me to apply to the case, under the Bengal law, of division not being sought at the father's death and the family remaining united under the elder brother or other person in the possession or management of such property. It seems here again, however, that by dating the cause of action for the last payment on account of the share claimed, the claimant must to be barred have been out of possession for the statutory period. It can scarcely with any reason be contended that a brother, living in the family house will be barred, unless something is actually paid to him by the person in possession. If he is absolutely out of possession and the exclusive possession is held by another, he will be barred after a period of 12 years. This is only consistent with the construction of all statutes of limitation. The absence of possession in one person and the exclusive possession of another must unite for the period required by the statute.

In its application to Madras the first branch of the clause presents great difficulty. Nothing except self-acquired property can in any sense be said to descend. At the moment of birth the son is a co-parcener and can enforce partition against his father, and a grandson, his father being dead, against a grandfather (1, M. H. C. Reps. 77).

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Where the property is ancestral, the only person from whom it can be said to have descended, is the original acquirer, and it certainly seems clear, that, except in a very limited class of cases, the first branch of the section can have no bearing.

As to the second proviso, the application is not impossible, but it seems clear to me that there must be exclusive possession for the statute to operate upon. The effect of the clause may perhaps be to make possession for the statutory period without a payment a bar to the person out of possession, and I am inclined, although not without considerable doubt, to put this construction upon the clause. Whether however, there has been such exclusive possession is altogether a question of fact.

If the excluded person again got into possession, I see no reason to doubt that the operation of the statute would be interrupted. This is peculiarly applicable to the present case, for it is alleged, and does not seem to be denied, that the father of plaintiff returned to the family house. It may be of course that he was a mere guest, but it may as well be that he resumed, on his return to his own country, the exercise of rights which he had never abandoned.

It may be, on the other hand, that there has been no exclusive possession. If the father, as alleged, was in the habit, though at a distance upon service, of sending funds for the support of the family, and if these funds were expended partly upon either conserving, improving, or increasing the family property, it would, I think, be very difficult to contend that there ever was an exclusive possession in the member who remained. Long absence is doubtless an evidentiary fact of great importance to the determination whether the absent member is still one of the family or not, but mere absence is not incompatible with the continuance of union.

No issues were framed in this case, and the mode in which the decision upon the statute, which does not seem to have been distinctly pleaded, was arrived at without dealing clearly with a single disputed point, is unsatisfactory. The defence of the substantial defendant was division, and, as showing the truth of that defence, he sets up the enjoy-

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ment. The Civil Judge has not disposed of this suit in a satisfactory manner and it must be remitted for the framing of issues and regular disposal. On the question of the statute, which has again been raised in appeal, the first question will be whether the first defendant has, for a period of 12 years before action brought, held exclusive possession of the property ? Then it is to be borne in mind that the present act bars the remedy only and any interruption of that exclusive possession, such as is alleged in this case, will interrupt the opearation of the statute.

I have put this construction upon the words, although I of course feel the difficulty, that there is no hint in this act of an intention to abolish the old doctrine that the possession of one joint tenant, co-parcener or tenant in common, was the possession of all. That doctrine was as well established in Madras as it was in England before the statute of the late King. In Section XIII of that statute the legislature expressly abolished the old doctrine. This act does not, in the sections relating to real property, abolish the old doctrine of hostile and friendly possession. Section XII, the general section relating to real property, shows this. It is clear also that it does not, as Section XXXIV of the English Act does, extinguish the right at the lapse of the statutory period.

The only effect which in my judgment can possibly be given to the act, is to make it a question upon the facts whether the possession is hostile, whereas before the act that the possession was friendly was an irrebuttable presumption of law. It may be, as was argued, that the legislature intended to make mere detention without payment hostile possession, but taking Clauses 12 and 13 together, I can only say that, if such was their intention, they have not expressed it. I have myself decided, on a finding of a Lower Court that there was a hostile possession for 12 years, that the latter part of this clause is a bar, but further than this I see no warrant for going, when I look at the law before the act and the language of the act itself.

COLLETT, J.—The Civil Judge has held that this suit is barred by the law of limitations under Clause 13 of

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Section 1 of Act XIV of 1859, on the ground, apparently, that the plaintiff has neither been in physical possession of the property or of any part of it within 12 years before the suit was brought, nor has proved any payment by the defendant to himself or his father within that period. The suit is one for partition, or in the words of the act, one "to enforce a right to share in property on the ground "that it is joint family property." The period of limitation for such a suit is 12 years, and the period may be reckoned from either of two dates, namely, either (1) "from "the death of the person from whom the property alleged to "be joint is said to have descended," or (2) "from the "date of the last payment to the plaintiff or any person "through whom he claims, by the person in the possession "or management of such property or estate, on account of "such alleged share."

As to the first mode of calculating the period, it is to be observed that, as between Hindus governed by the *Mitakshara* law as the parties to this suit are, it is difficult to see how it ever can be applied to ancestral property such as the subject-matter of this suit is alleged to be. According to this school of Hindu law a son on his birth acquires such a joint interest with his father in ancestral property, that he can enforce a partition during his father's lifetime, and he is, in the words of Sir Thomas Strange, in some sort a co-proprietor with his father. It is otherwise by the Bengal School of law, and in Bengal joint property may, with accuracy of language, be said to descend to the sons on the death of the father. I do not wish to be understood to mean that under *Mitakshara* law the joint interest of a son with his father in the family estate is co-extensive with that of an ordinary co-parcener, that is a difficult question; but looking to the interest which the son certainly has and especially his right to enforce a partition and the restraint upon alienation by the father, it is scarcely appropriate to say that joint property among Hindus in this presidency descends to the sons upon the death of the father. But I do not think it necessary to say more upon this portion of Clause 13, for the case for the defendants was, I think, rested upon the second mode of calculating the period

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of 12 years. I think that the possession or management, spoken of in this second portion of Clause 13, must be a possession or management exclusive of the plaintiff. Otherwise the contention must be carried (as in fact it was) to the extent of saying that, as either possession or management is sufficient, if one of several brother has the management and the rest are merely supported and receive no actual payment, then their right to partition as against the managing brother will be lost after the lapse of 12 years, since payment is expressly the only act that can interrupt the running of the statute. It must also be contended, as I think it was, that the object of the legislature was to do away with the doctrine of the possession of one joint tenant being under any circumstances the possession of all. But I think that we should have had a much clearer intimation of the intention of the legislature, if such results had been contemplated. If though by possession or management is meant an exclusive possession or management, that is to say one not in any way on behalf of the plaintiff, then naturally enough the only thing that would be stated as interrupting the bar would be a payment ; for there could not well be any other overt act that could evidence an acknowledgment of the plaintiff's claim. No doubt there is great force in the argument that the clause was intended to shut out suits, in which one branch of a family, after perhaps 50 years of practical separation, seeks to share in the fruits of the really independent industry of another branch of the family. I have but little doubt that this clause will exclude such suits. But if an absent member were shown to have been in the habit of contributing to the maintenance and improvement of the joint property, it would be rather starting to have to hold that his right to share in it had nevertheless been barred, because he had not within 12 years enforced some payment to himself in order to keep alive his remedy. I think that it must always be a question upon the evidence, whether the absent member had abandoned his interest in the family property, or whether otherwise the possession or management of those in possession or management, had ceased to be one on behalf of the absent member, and had become exclusive and hostile to him. Lengthened absence

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in a distant country may, in some cases, be cogent evidence against the plaintiff; while in others there may be other acts, besides payments by the defendant, which may be equally cogent evidence that the defendant's possession or management continued to be as much on plaintiff's behalf, as it would have been if he had been present on the spot and living in actual union with the other members of the family.

In the present case the evidence on both sides has not been fully gone into, and until it is, I think that it is impracticable to say whether the facts will show that the suit is now barred. I think that the suit should be remitted in order that the issues may be settled and the evidence fully barred; and that all other issues between the parties besides that as to the bar, should also be heard and decided, as we shall then, on the case coming back, be in a position to dispose of the suit, if we should think that it is not barred.

*Suit remanded.*

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APPELLATE JURISDICTION (*a*)

*Special Appeal No.* 70 *of* 1866.

SUBUPALAYI AMMÁL.....*Appellant.*

APPAKUTTI AIYANGÁR and others.....*Respondents.*

Where there was a written agreement between the 1st defendant's father and the Collector, in which the first defendant's father undertook to pay a certain rent "for ever," but these general words were qualified by the words that he is to pay the rent "as long as the village remains in his possession," and the document did not contain any express agreement or undertaking on the part of the Collector:—*Held*, that the enjoyment of the land by the 1st defendant's father at a certain rent for as long as he retained possession of it was ample consideration and motive for his agreement to pay the rent, and that it was not necessary, in order to prevent the consideration and motive for his agreement from being wholly defeated, to imply on the part of the Collector an agreement that he should hold the land for ever at that rent and no more.

1866. *May* 26. *S. A. No.* 70 *of* 1866.

THIS was a special appeal from the decision of E.H. Bird, the Civil Judge of Tanjore, in Regular Appeal No. 177 of 1865, confirming the decree of the Principal Sadr Amin of Combaconum in Original Suit No. 36 of 1864.

(*a*) Present Holloway and Collett, J. J.