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of 1868. I do not, after hearing the argument, feel sufficient confidence in my opinion to dissent from the view taken by the Courts below and by my colleagues in full bench.

Appellate Jurisdiction (a.)

Special Appeal No. 61 of 1869.

ACHUMANDE AGATH KUNHI } *Special Appellants*
 PATHUMAH and another. } *(1st and 2nd Defendants.*

MAKACHINDE AGATH MAKACHI } *Special Respondents*
 and another..... } *(Plaintiffs.)*

The plaintiffs were in possession of certain immoveable property, when the Joint Magistrate, under Section 319 of the Criminal Procedure Code, placed the 1st defendant in possession until the rights of the parties should be determined by a competent Civil Court.

Held, in a suit to recover possession of the property instituted more than six months after the plaintiffs were dispossessed, that the plaintiffs could not recover without showing title.

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of 1869 THIS was a Special Appeal against the decision of K. R. Krishna Menon, the Principal Sadr Amin of Tellicherry, in Regular Appeal No. 230 of 1868, reversing the decree of the Court of the District Munsif of Kaway in Original Suit No. 85 of 1866.

The plaint stated that the property sought to be recovered was the ancient jenmon of the 1st plaintiff, and that upon a Police complaint the 2nd defendant having raised a jenmcm dispute, the property was deposited with the 1st defendant. The 1st and 2nd defendants had no claim whatever to this land,—therefore it was prayed that the property be recovered to the plaintiff with rupees 320-15-10, the value of produce.

The issue was whether or not the disputed land was in the possession of the plaintiff and the 1st and 2nd defendants until ousted by the Magisterial decision.

The Munsif found that the title set up by the plaintiffs had not been established and dismissed the suit upon that ground.

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

Upon appeal, the Principal Sadr Amin reversed the decree of the District Munsif. The Judgment of the Principal Sadr Amin was as follows :—

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It appears to me that the Munsif has misapprehended the nature of this suit. He has apparently regarded it as a suit brought for the determination of the jerm title to the lands, but in reality it did not pray for anything of the kind. The only relief plaintiff sought was the restoration to him of the possession of certain lands which while in his actual possession the Joint Magistrate of Malabar attached and made over to the charge of 1st defendant. His right to be restored to possession was alleged to rest not upon his jerm title but upon the fact of his karnavan and after him himself having been in possession up to the date of the above decision. His right to the jerm of the lands was mentioned only in the way of explanation as to how his family came to possess the lands, but the action was founded solely upon his right of possession. Was the plaintiff in possession and turned out of it or was Kalandan (his elder brother) in possession until his death, and was his lawful successor (plaintiff) prevented from succeeding to that possession by the above decision, was therefore the sole question in this case. If either of those propositions be proved, plaintiff is entitled to have his possession restored. If he held manual possession his ejectment was a mere trespass, the Magistrate having no authority to do so. In the other case also the possession of the deceased Kalandan must be held to have passed to his lawful successor and to have been resident in him at the arising of the complaint before the Sub-Magistrate of Cherikul. As far as the Joint Magistrate's decision goes to show, there was nothing from which a breach of the peace could be apprehended. Further the short interval between Kalandan's death and the lodging of the above complaint did not amount to that reasonable period, which, according to the nature of the property, would be deemed sufficient to rebut the natural presumption that property found in one's possession at his death is in the possession of his lawful successor. Proof of Kalandan's possession at his death will therefore equally entitle plaintiff

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to recover in this case, and the evidence satisfies me that the land and paramba were in Kalandan's actual possession at his death in Minóm 1040 (March, April 1864.) The witnesses speaking to this point are supported by the fact of the assessment standing in his name, and the decision of the Joint Magistrate (exhibit F) which vested the 1st defendant with possession itself almost admits the fact. The 1st and 2nd defendants, the widow and son of the deceased Kalandan, assert that his father-in-law purchased the property from his (Kalandan's) family in 1014 (1838-9) and re-sold it to his purchaser's daughter (1st defendant) in 1029 (1853-4) and while the plaintiffs contend that the alienation of 1014 (1838-9) was a fictitious transaction to defraud Kalandan's creditors and that the property never passed under it to the so-called purchaser. This question may at the proper time and place be a very fit question for the Court to try. *Prima facie*, however, the possession of Kalandan was legal, and the defendants were only entitled to dispute it in the position of plaintiffs in a competent Court. Instead of that they by an unauthorized proceeding succeeded in divesting this possession *prima facie* legal and thereby obtained the great advantage of appearing as defendants. It is unfair to plaintiffs to be compelled to meet their opponents in a disadvantageous ground while they are entitled to retain an advantageous position especially when as in this case, the evidence upon the question of jenm title is conflicting and is weighing almost equally. Without prejudice therefore to any right which the defendants may possess to the jenm of the property sued for, I reverse the Munsif's decree and order the restoration of the land and paramba to 2nd plaintiff with rent at the plaint rate payable by 1st defendant and saddle the 1st and 2nd defendants with plaintiff's costs original and appeal.

The defendants presented a special appeal against the decree of the Principal Sadr Amin.

Miller, for the special appellants, (the 1st and 2nd defendants.)

Mayne, for the special respondents, (the plaintiffs.)

The Court delivered the following

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JUDGMENT :—Assuming the facts to be as found by the Lower Appellate Court, viz, that the plaintiffs were in possession of the immoveable property when the Joint Magistrate by an order, under Section 319, Criminal Procedure Code, attached the property and placed it in possession of 1st defendant as receiver or custodian of the property until the rights of the parties should be determined by a competent Civil Court, the question is whether the plaintiffs can now recover possession without showing title. It is admitted that more than six months had elapsed since the plaintiffs were turned out of possession before the suit was brought, and consequently, if the Magistrate acted without jurisdiction, and the plaintiffs were turned out of possession “otherwise than in due course of law,” then Section 15 of the Limitation Act is a bar to the present suit. The Principal Sadr Amin seems to consider that if plaintiffs had actual possession at the time their ejection by the Magistrate was a mere trespass. But if the Magistrate had jurisdiction to enquire into the matter and to make an order under Chapter 22 of the Criminal Procedure Code, it was not a trespass, for the mere fact that the Magistrate took a wrong view of the evidence, upon which he was bound to decide, cannot render his order one made without jurisdiction any more than the judgment of an otherwise competent Court can be said, because founded upon a misappreciation of the evidence in the case, to be made without jurisdiction. Then if the Magistrate had jurisdiction in the case, and his order remained, as it did, in force at the institution of the suit, can the plaintiffs be entitled to treat as a mere wrong-doer and trespasser the person placed in possession under the order of the Magistrate? It seems to us impossible to suggest any ground for such a view. The order was one made in due course of law and not reversible in the suit, and the possession acquired under it was a lawful one, though it is of course liable to be determined by the decision of a competent Civil Court in accordance with

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the civil rights of the parties which it was not within the competency of the Magistrate to consider, and which he did not pretend to consider or decide. In this view the plaintiffs in the present suit cannot succeed without proving title in themselves. The Principal Sadr Amin disposed of the case on the ground that the present suit is not founded upon title but is brought to enforce a bare right to immediate possession as against the 1st defendant whom the plaintiffs claim to treat as a mere wrong-doer and trespasser. We agree that strictly construed this was the object of the suit, but the plaintiff fairly admits of the question of title being tried in the suit, and the Court of First Instance decided the suit upon this question. For these reasons the decree of the Lower Appellate Court must be reversed, and we think that the plaintiffs are entitled to have the case remanded in order that the Lower Appellate Court may consider and decide the question of title in the appeal. The plaintiffs must pay the defendant's costs of the special appeal, and the costs hitherto in both the Lower Courts will abide the final decree in the appeal.
