1869. September 6. S. A. No. 565 of 1868.

Then, being purely gratuitous, that promise is not a binding obligation by contract which the law will enforce, any more than if it had been merely a verbal promise. Consequently the plaintiff's claim is not sustainable even on the ground of a contract by the defendant to transfer the property. The decrees of the Lower Court must be reversed and the suit dismissed; but considering the relationship of the parties, we think no costs should be allowed.

Appellate Jurisdiction (a.)

Special Appeal No. 75 of 1869.

MUTTU VIRAN CHETTY and another.......... } *Special Appellants (4th and 12th Defendants.)*

RANI KATTAMA NATCHIYAR and another......... ...... } *Special Respondents (1st and 3rd Plaintiffs.)*

A perpetual or permanent lease at a low fixed rent made by a Zemindar who obtained the zemindary by self-acquisition is binding upon the Zemindar's successors, although the instrument was not registered under Regulation XXV of 1802, Section 8.

1869. September 7. S. A. No. 75 of 1869.

THIS was a Special Appeal against the decision of J. D. Goldingham, the Acting Civil Judge of Madura, in Regular Appeal No. 228 of 1868, reversing the decree of the Court of the Principal Sadr Amin of Madura in Original Suit No. 118 of 1866.

This suit was brought by the plaintiffs, of whom the 1st is the zemindarni, and the 2nd the lessee of the Shevagunga estate, to recover the melvarum right of the village of Kuttagudy situated in the said zemindari valued at rupees 3,330, as also rupees 6,098, being the value of the melvarum or Zemindar's share of the produce, &c., derived from the village in Fuslies 1273 and 1274. The plaintiffs represented that the village in question is a part of the zemindary, having been included in it at the period of the permanent settlement; that the melvarum right thereof was enjoyed by the Istimrar Zemindar till his death in 1829 when the estate having passed into the hands

(a) Present: Innes, and Collett, J. J.

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of the usurpers, the 1st defendant obtained a grant of the melvarum right of the said village subject to the payment of a light or favorable quit-rent; that this alienation of a portion of the zemindari being illegal, the plaintiffs attempted to resume the grant immediately after the right of the 1st plaintiff to succeed to the zemindari was recognized by the decree of the Privy Council, and instituted suits before the Collector of the district for compelling the tenants of the said village to exchange puttahs and muchilkas; that as these suits were finally rejected by the High Court on the ground of the grant in question having been made by the Istimrar Zemindar, the present action has been filed to set it aside.

No written statement was filed by any of the defendants, but counsel appeared on behalf of the 4th and 12th defendants, and pleaded that the suit was barred by the Statute of Limitation, inasmuch as the village in dispute was granted to the defendants in 1828 by the Istimrar Zemindar and had remained in their uninterrupted possession for upwards of 36 years. He admitted that the village was an Ain one at the date of the grant.

This objection was overruled at the first hearing of the case, as in the first place, it was denied by the plaintiffs that the grant was made by the Istimrar Zemindar, and in the second, she and her mother were engaged in a protracted litigation regarding the said zemindari from 1833, which terminated only in 1863, and therefore not in a position to sue earlier for the cancelment of the grant in question.

The following issues were settled :—

I. Whether or not the grant relied on by the defendants 4 and 12 was issued by the Istimrar Zemindar.

II. Whether or not the grant is legal and valid, and binding on the 1st and 2nd plaintiffs, and

III. Whether or not the plaintiffs are entitled to the damages sought for.

The Principal Sadr Amin found the first issue in favor of the defendants.

His judgment upon the second issue was as follows :—

The act of the Istimrar Zemindar in alienating melvarum right of Kuttagudy which was included in the assets of the zemindari when the permanent settlement was made is neither legal nor valid. The grant was not made in conformity with the requirements of Regulation XXV of 1802. It was not registered in the Collector's Office as required by Regulation XXV of 1802, nor was the village sub-assessed and a proportionate reduction made in the peishcush of the zemindari. As ruled by the High Court in Regular Appeal No. 38 of 1865, *page* 68, *Vol.* 3, *High Court Reports,* "the grantee might have been ejected the next morning after the grant was made." But the defendants contend that the title to resume the grant having accrued to the Istimrar Zemindar, the 1st plaintiff's father, the plaintiffs ought to have called in question the validity of the grant within twelve years after the title to resume accrued, and that they are not now competent to dispute the defendant's right to enjoy the melvarum of the said village. In reply, the plaintiffs represent that the 1st plaintiff and her mother were engaged in establishing their right of succession to the whole estate of Shevagunga from the date of the Istimrar Zemindar's death till 1863, and that the time during which they were so engaged should be excluded in computing the period of limitation. I was at first disposed to recognize their right to make the deduction, since neither the 1st plaintiff nor her mother was in a position to sue for portions of the zemindari when her right to the whole estate was under litigation, but the counsel for the defendants objects to any deduction being made on the said account since the present defendants were not parties to the former suit, and the circumstance of the 1st plaintiff's and her mother's right of succession being under litigation did not hinder them from suing to set aside improper alienations made by the Istimrar Zemindar.

A case analogous to the present one was disposed of by the High Court of Calcutta, and is quoted at page 190 of "Act XIV of 1859" by Mr. N. H. Thomson. It is that of *Mudden Mohan Tavari* v. *Kishen Mohan Koondoo*, in

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which the plaintiff, an adopted son, sued to set aside certain acts of his adopting mother in alienation of the estate of his adopting father. The defendants in possession of the estate pleaded limitation by reason that the plaintiff's suit was not brought within twelve years from the date of the acts which he sought to set aside. In reply, the plaintiff contended that, in computing the period of limitation, a deduction should be made of the time during which he was engaged in prosecuting, as against those who, on failure of his right, would have been heirs of his adopting father, successive suits to establish the legality of his adoption. The Lower Court decided that, as the plaintiff was in no position to sue until his right to the succession had been determined, the time during which the former litigation had been pending should be deducted. But this decision was reversed on appeal by the High Court, who observed that the deduction contemplated in Section 14, Act XIV of 1859, is of the pendency of suits of an entirely different character as therein specified, and that the circumstance of the plaintiff's right of succession being under litigation in no way interfered with his right of suit to set aside alienations, since, when he sued his mother to establish the legality of his adoption, he might at the same time have sued to have her acts set aside. The omission of the 1st plaintiff to sue within twelve years from the date of the grant to have it set aside is therefore fatal to her present claim, and her right to resume the grant in question is barred by lapse of time. She is consequently bound to continue it.

For these reasons I reject the plaintiff's claim and charge each party with their own costs.

The plaintiffs appealed, and the Civil Judge, holding that the suit was not barred, reversed the decree of the Principal Sadr Amin. The following is taken from the judgment:—

From the numerous cases that have been referred to and consulted upon the operation of the Law of Limitation, I gather that if the 1st plaintiff had inherited through the immediate successors of the Istimrar Zemindar, she

would have been bound by their laches, but that as the title to the zemindary was involved in litigation during nearly this whole period which intervened, and as the property was never finally adjudged to her till 1863, nor possession made over till 1864, the cause of action as between the present parties did not arise till that latter period.

The case which bears the closest resemblance to the present is to be found in the judgment of the High Court in Regular Appeals Nos. 21 and 30 of 1866, but there is this difference that there the lands in contention though granted by the Istimrar Zemindar were resumed by him at the death of the grantee and subsequent possession was obtained by his widows by an act of the usurping Zemindar. The Principal Sadr Amin in throwing out this case has relied solely upon a judgment of the High Court of Calcutta quoted at page 190 of *Thomson's Commentary on the Limitation Act*. How far this case is analogous to the present one is difficult on the mere report to say, but it does not seem to me to be strictly parallel. In the Bengal case the adoptive mother of the plaintiff had alienated a portion of her husband's estate, and plaintiff had sued to have the legality of his adoption established. The defence was that plaintiff's suit to set aside the alienation was neither brought within twelve years from the date of the acts complained of nor within three years of attaining his majority, and the Court held that the circumstance of plaintiff's right of succession being under litigation in no way interfered with his right of suit to set aside the alienations. There appears therefore this difference between the two cases, that in Bengal plaintiff was suing for succession to property a portion of which had been alienated, a circumstance which is presumed he was acquainted with. Here 1st plaintiff was suing for recovery of a large landed estate in possession of an usurping branch of the family, there had been no real alienation of landed property, but the melvarum of a village had been given away upon such favorable terms as almost to constitute it a present, and clearly 1st plaintiff could have had no knowledge of the circumstance till she had actually taken possession

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of the zemindary. The reasoning adopted by the Bengal High Court if applicable here would appear to me to be equally applicable to the case decided by the Madras High Court, but the judgment of that Court is concluded with the following observation.—" It must be considered that the defendants have always held their lands subject to the final determination of the pending litigation, and that no separate and independent cause of action for possession had risen as against them before 1863."

In this case it is difficult to say how 1st plaintiff could have sued for the full melvarum of this village while her title to the zemindary was in dispute, and while the management of it was in other's hands. It appears to me she would have been met at the outset with this objection—" You have no right to the revenue of the estate at all—what have you to do with the details of the collections—first make out your title to the whole and then come in for the less." Besides this it appears the rightful owners of the zemindary were kept out during this long period not from neglect on their part to put forward their claims but from what their Lordships in the Privy Council call a signal failure in the Courts below to do justice between the parties. Then again had the zemindary escheated to Government, would they have been bound by this alienation when the regulation forbidding such alienations was passed for the express protection of the public revenues ? Taking this view of the case, I differ from the Principal Sadr Amin in holding that the suit is barred, and for the reasons stated reverse the decree of the Lower Court, judgment being for plaintiffs for the melvarum of the village and the loss of produce claimed together with costs of suit throughout and interest thereon at six per cent. per annum till date of collection.

The 4th and 12th defendants presented a special appeal to the High Court against the decree of the Civil Court for the following reasons, namely.

Error in law in that,—

The plaintiff's suit is barred by the Act of Limitation.

The deed of grant, defendant's exhibit I, is valid and effectual in law and binding on the plaintiffs.

Under any circumstances the plaintiffs have no right to the melvarum for two years claimed by the plaint.

Handley and *Scharlieb,* for the special appellant, (the 4th and 12th defendants.)

Advocate General, for the 1st special respondent, (the 1st plaintiff.)

The Court delivered the following

JUDGMENT:—In this special appeal we must take the facts to be as found by the Lower Courts that the village in question, or speaking accurately the melvarum right over it, was granted in 1828 by the rightful Istimrar Zemindar to the special appellants, and that the deed of grant was not registered in accordance with Section 8, Regulation XXV of 1802. It was conceded bythe counsel for the special appellants that if no right of action to set aside such grant arose till after the death in 1829 of the Istimrar Zemindar, then the decision of the Lower Appellate Court, that the present suit by the 1st plaintiff who recovered possession of the zemindary only in 1863, is not barred by the Law of Limitations, must be sustained. But the main contention for the special appellants was that the grant of 1828 was a grant of a permanent lease, and the recent decision of this Court in Special Appeal No. 129 of 1869 (*a*) (not yet reported) which followed the decision of the Privy Council reported in 8 *Moore's Indian Appeal Cases* 327 and overruled the previous decision of this Court reported in 1 *Madras High Court Reports,* 143, was relied upon as fatal to the plaintiff's case. We have first therefore to consider what was the nature of the grant made by the instrument of 1828, and we are of opinion that it ought to be regarded as a permanent or perpetual lease at a low fixed rent. It is true that the instrument is entitled " a deed of gift of land, " and it begins with the words " I have given you in gift the village of Kuttagudy, &c.," but it then proceeds to set

(*a*) Ante Page.

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out the quantity of land conveyed, and states that after deducting the land set apart for a temple, there are 171 kallams and two merkals of nunjah land and 25 kurukkams of punjah land ; and concludes with these words " you will have to pay a rent at seven fanams for each kallam of nunjah land and one fanam for each kurukam of punjah land." Now it is quite clear that in this country little or no stress can be laid on whether the word used in such an instrument as this is " given" " granted" or " demised"—the whole document must be looked at, and the real nature of the interest created by it must thus be ascertained. Here the substance of the document is that there is a conveyance in perpetuity of a certain quantity of land with the reservation of a rent fixed at so much for each measure of land. This is really a fixed rent, though no doubt at a favorable rate and is not a mere pepper-corn rent, if that would make any difference, though we are not at present prepared to say that it would. We therefore are decidedly of opinion that the interest created by this instrument was a perpetual lease at a low fixed rent. If so that brings the case within the rule laid down by the Privy Council in 8 *Moore's Indian Appeal Cases* 327, in deference to which a recent decision of this Court overruled the previous decision of this Court reported in *Mad. H. C.* 143. For the plaintiffs we were referred to an unreported decision of this Court in Regular Appeal No. 30 of 1864 where the case in 8 *Moore* was cited but distinguished. Besides that we are bound to follow the decision in the Privy Council in preference to any decision by this Court, we are of opinion that on examination of the facts of the case in 8 *Moore* the grounds relied on in Regular Appeal No. 30 of 1864 for distinguishing the case are not sustainable, and it is essential for us to consider them, for if sound they would render this case also distinguishable. It was said by this Court in Regular Appeal No. 30 of 1864 that in the case in 8 *Moore* the original grant was of a date long anterior to the permanent settlement and that the Zemindar therefore took his estate then subject to that deduction from his revenues, and that consequently there was nothing

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in the Judgment of the Privy Council at variance with the old decisions of the late Sadr Court which were accordingly followed. It is clear from the Judgment in 8 *Moore* that the facts of that case were quite mistaken by this Court. There had indeed been grants by the ancestors of the Zemindar to the ancestors of the plaintiff in that case anterior to the permanent settlement, but the sole foundation of the plaintiff's title was a deed of 1805 subsequent to the settlement, and so far from any deduction or allowance having been made to the Zemindar at the time of the settlement for the villages held by the plaintiff's family, the grant of the whole zemindary including the villages was made without noticing the rights of the plaintiff's family, and the sole object of the deed of 1805 was to secure such rights without disturbing the grant of the zemindary, and this was done by fixing in the form of a rent upon the villages held by the plaintiff's family a sum of money which was in fact the proportion of the *jumma* which was assessed upon them by the Government at the permanent settlement, the deed of 1805 being in form a demise in perpetuity of the villages with this sum reserved as annual rent. Indeed the Lower Courts thought so little of the grants anterior to the permanent settlement, that they did not consider the question of their genuineness, but the Privy Council regarded the grants as of some value as a matter of inducement showing the probabilities of the case. The case was, therefore, the case of the creation of a perpetual lease at a low fixed rent subsequently to the permanent settlement, though the inducement thereto was the existence of a rent-free estate anterior to it.

It was further contended for the plaintiffs in the present case that even if the deed of 1828 is to be regarded as creating a perpetual lease, yet that the rule of the general Hindu Law against alienation of family property applied, and that it mattered not that the form of the thing was a perpetual lease at a low fixed rent if the substance of it was permanently to diminish and alienate the interest of the heirs in the property. Had this been the case of a descended zemindary, and therefore to be regarded as ancestral property, we should probably have thought the

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argument a very sound one ; but it is an undisputed fact, and indeed was the ground of title on which the 1st plaintiff ultimately succeeded in 1863 in ejecting the usurpers who had been in possession since 1829, that this zemindary was the self-acquired property of the Istimrar Zemindar who executed the deed of 1828, and there can therefore be no question as to his right, according to the general Hindu Law, to make the alienation, at least in the absence of any male issue. Upon the whole we are of opinion that the contention for the special appellants is well founded, and that we are bound to hold in accordance with the Judgment of the Privy Council in 8 *Moore* that the deed of 1828 is not invalid for want of registration and is binding upon the plaintiffs. The result is that we shall reverse the decree of the Lower Appellate Court and dismiss the plaintiff's suit, and we think that no sufficient reason appears why the 4th and 12th defendants, the special appellants, should not have their costs as well in both the Lower Courts as also of this special appeal, and it will be decreed accordingly.

Appellate Jurisdiction (a.)

Special Appeal No. 541 *of* 1868.

NETIETOM PERENGARYPROM *alias* PANISHERRY DAMODREN NAMBUDRY. } *Special Appellant (Plaintiff.)*

TAVANBARRY PARAMESHWAREN NAMBUDRY. } *Special Respondent (Defendant's heir.)*

The plaintiff brought a suit to establish his right to certain property as against the claim which the defendant had successfully made under Section 246 of the Civil Procedure Code in execution of a decree obtained against the plaintiff. The order of the Court directed the release of the property from attachment. The present suit was brought more than one year from the date of the order.

Held, per Scotland, C. J, Bittleston, and Collett J, (Innes J. doubting) that the plaintiff was a party against whom the order was "given," within the meaning of the Section, and that the suit was barred by the Section.

1869. *October* 12. *S. A. No.* 541 *of* 1868.

THIS was a Special Appeal against the decision of I. K. Ramen Nair, the Principal Sadr Amin of Calicut, in

(*a*) Present : Bittleston, Innes, and Collett, J. J.