1869. *June* 18. *S. A. No.* 113 *of* 1869.

The only question which remains is whether the Principal Sadr Amin was justified in passing a decree for the plaintiff in accordance with the terms of the mortgage (2) produced by the defendants, and we think that he was. The documents produced and relied upon by the defendants as genuine may be made the ground of a decree in the plaintiff's favor, if the relief granted be substantially such as was claimed in the plaint; and it is so in this case. The plaint was for restoration of the land on payment of 1,000 fanams, and the decree is for restoration of the lands on payment of 1,300 fanams, the plaintiff consenting thereto. We think therefore that the decree of the Civil Judge in this case must be reversed and the decree of the Principal Sadr Amin affirmed, and that the special respondents who appeared must pay costs of special appellant in this and Lower Appellate Court.

Original Jurisdiction (a)

Original Suit No. 221 *of* 1869.

KYLASANADA MOODELLY..... ....*Plaintiff.*

ARMUGUM MOODELLY.....*Defendant.*

The defendant, the payee of a promissory note, endorsed it to the plaintiff. The endorsment was "Pay to K. M. (plaintiff) or his order." The promissory note had been registered previous to the endorsment to plaintiff. A suit was brought by the plaintiff three years after the date of the endorsment to recover the amount of the note from the defendant.

Held, that the suit was barred by the Law of Limitation.

O'Sullivan, for the plaintiff.

Mayne and *Miller*, for the defendant.

The facts are stated in the following judgment of

1869. *June* 22. *O. S. No.* 221 *of* 1869.

BITTLESTON J:—This is a suit by endorsee against endorser of a promissory note dated 23rd September 1865 and payable one month after date.

It was presented for registration by the maker on the 25th September and was then registered by the District Registrar of Madras, who at the same time recorded thereon

(a) Present: Bittleston, J.

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the agreement of the maker and the payee that it might be enforced without suit under Sections 51 and 52 of Act XVI of 1864.

On the 12th March 1866, the payee, the defendant in this suit, endorsed the note in the usual form "pay to P. N. Kailasanada Moodelly or his order." This suit was commenced on the 24th April 1869, and the question is whether it is barred by the Law of Limitation. Now Act XIV of 1859, Sections 9 and 10, provides that three years shall be the period of limitation applicable to suits for breach of contract, when there is no written engagement or contract in writing, or when, there being such written engagement or contract capable of registration, it is not registered within six months from the date.

If therefore this were a suit by the payee against the maker of this promissory note, it is clear that neither of those clauses would apply, for the written engagement of the maker has been duly registered; and the period of limitation applicable to the case would be six years under Clause 16 of Section 1.

But this being a suit by the endorsee against the payee, who has endorsed to him, the questions arise whether this is a suit upon a new and different contract, whether if so the new contract is in writing and capable of registration, and whether it has been registered.

There cannot, I think, be any doubt that the contract of the endorser of a Bill of Exchange or Promissory Note is a perfectly distinct contract from that of the maker or acceptor, as was said by Montague Smith J. in the recent case of *Bradlaugh* v. *Derim* 37 L. J. C. P. 320 "The contract of the acceptor is made with the drawer to pay the bill at maturity to him or his payee or endorsee (as the case may be) or to the ultimate endorsee or holder. The original contract to pay no doubt passes by the law merchant by assignment. Superadded contracts may and do arise between the endorsers and those taking from them *inter se*; but the original contract remains against the acceptor." Now these superadded contracts are either written or unwritten; if unwritten, the limitation of three years must be held applicable; if written, can they be registered?

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The liability of an endorser is in fact never expressed in words on the bill or note, and arises when he has merely signed his name on the instrument with the intention of transfering it and has delivered it to the transferee. The rights and liabilities of the respective parties consequent upon this act are settled by the law merchant, and even if, as in this case, the endorsement be special it cannot be said that the terms of such endorsement of themselves express the liability of the endorser to the endorsee.

In a recent case in this Court (Referred Case 39 of 1868 4 *Madras High Court Reports* 216), it was held that when the Limitation Act (XIV of 1859) refers to an engagement or contract in writing, it means a writing in which the undertaking of the party sought to be charged is expressed; —and it seems to me difficult to distinguish that case from the present on this point.

So under the English Stamp Acts it is held that the agreement or memorandum of agreement which is subject to Stamp duty must be a writing in which the parties have put down the terms by which they intend to be mutually bound; and on that ground an I. O. U. does not require an agreement stamp.

I am inclined to think therefore that the mere endorsement of a Promissory Note or Bill of Exchange is not such a written engagement by the endorser as falls within Clauses 9 and 10 of Section 1 of the Limitation Act.

The case of the maker of a promissory note or acceptor of a bill of exchange is essentially different, for in both cases the promise to pay is expressed, though the words used are different, the word "accepted" having a legal meaning precisely equivalent to a promise to pay.

If, however, the contrary view should be taken, and it should be considered that the endorsement of a bill of exchange or promissory note being construed according to merchantile law does contain an engagement in writing by the endorser to pay the endorsee in the event of a failure to pay by the acceptor or maker, then there seems no reason to doubt that that engagement may be registered. It may be suggested as a difficulty that there would be

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nothing to register except a signature, and that Section 138 which requires a copy of the instrument to be made in a book could not be carried out, but if the signature at the back of the bill or note sufficiently expresses the legal engagement of the endorser, then the endorsement would be effectually registered by copying into the book the bill or note together with the endorsement.

In the present case it is certain that no registration of the endoresement has taken place, and I do not see how the registration of the instrument prior to endorsement can affect the case.

I must conclude therefore that the period of limitatation is three years and the suit barred. The suit must be dismissed but I think without costs.

Appellate Jurisdiction (a)

Special Appeal No. 52 *of* 1869.

SOMASUNDARA TAMBIRAN.....*Special Appellant (Plaintiff.)*

SAKKARAI PATTAN....*Special Respondent (2nd Defendant.)*

The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect.

1869. *June* 25. *S. A. No.* 52 *of* 1869.

THIS was a Special Appeal against the decision of V. Sundra Naidu, the Principal Sadr Amin of Tranquebar, in Regular Appeal No. 215 of 1867, modifying the decree of the Court of the District Munsif of Sheally in Original Suit No. 98 of 1867.

The plaintiff, trustee of the Velur Covil, brought this suit to recover rupees 326, being the balance of principal and interest due on a mortgage bond executed to Arumuga Pandaram, the late trustee of the Covil, by the 1st defendant, on the 2nd December 1858.

(a) Present: Bittleston and Carmichael, J. J.