"possession or management of such property or estate on "account of such alleged share." Reading the word "payment" in the sense which we consider the reasonable construction of the clause shews that it was intended to have, namely, as importing anything given or allowed to be enjoyed on account of the share sued for, the second part of the provision is, we think, applicable to this suit and to every case in which such a benefit can be shewn to have been received by the claimant or the co-parcener through whom he claims however long the property may have been ancestral. From the date of the last benefit received, the period of twelve years is computable; but to establish the bar there must be proof of absolutely exclusive enjoyment for that period. In the present case, the receipt by the plaintiff of a portion of the produce of the property on account of his share ceased a short time after his father's death in 1839, and the Civil Court has found that from that time the property has been enjoyed adversely to the plaintiff. For these reasons the decree appealed from will be affirmed with costs.

1869. *June* 15. *S. A No.* 633 *of* 1868.

Appellate Jurisdiction *(a)*

Special Appeal No. 113 *of* 1869.

UNICHA KANDYIB KUNHI KUTTI NAIR..... } *Special Appellant (Plaintiff.)*

VALIA PIDIGAIL KUNHAMED KUTTY MARACCAR and 5 others..... } *Special Respondents (1st to 4th and 9th and 10th Defendants.)*

The 15th clause of Section 1 of Act XIV of 1859 does not require that the acknowledgment should be given to the mortgagor.

In a suit to redeem, the plaintiffs produced a mortgage, the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sadr Amin made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. The Civil Judge reversed the decision.

Held, in special appeal, that the Principal Sadr Amin was justified in making the decree which he gave.

THIS was, a Special Appeal against the decision of G. D Leman, the Acting Civil Judge of Tellicherry, in Regular Appeal No. 262 of 1867, reversing the decree of the Court

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

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

1869. *June* 18.

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

of the Principal Sadr Amin of Tellicherry in Original Suit No. 5 of 1867.

The suit was brought to recover three parcels of land alleged to have been demised on an otti of 1,000 fanams in 991 (1816) by plaintiff's late karnavan Ookan Nair to Kotekul Kuttiassan, the deceased karnavan of 1st and 2nd defendants, who transferred their right to the family of 3rd and 4th defendants.

Third defendant stated that his karnavan purchased the jenm of the plaint lands at some period which he is unable to state, as the jenm deed was carried off by junior members of his tarwad, one of whom (9th defendant) now pretends that she procured an assignment of the right which the tarwad possessed in the lands from a deceased karnavan, and that he (3rd defendant) has filed a suit (15 of 1865) to recover possession of these and other tarwad lands.

Fifth defendant asserted a simple lease over the western half of the land II derived from 10th defendant.

Sixth defendant asserted a simple lease over the remaining half of the land II derived from 10th defendant and claimed improvements.

Seventh defendant stated that he held a simple lease over the land I of the 9th and 10th defendants and had built a shop which was undervalued in the plaint.

Ninth and 10th defendants, members of 3rd defendant's tarwad, stated that the otti demise sued upon was untrue, that the land I was originally hypothecated to one Ali in 958 (1782-3) for 500 fanams whose heir Kunhi Moidin sold it in 999 (1823-4) to their karnavan; that in 971 (1796-7) plaintiff's karnavan granted a kanom of 1,300 fanams over all the three lands to the karnavan of 1st defendant which the family of these defendants (9th and 10th,) purchased in 998 (1822-3); that ultimately in 1005 (1829-30) their karnavan Komappa Nair purchased the jenm right also from plaintiff's karnavan Komappa Nair and Rama Nair, and these lands with other property were assigned to 9th and 10th defendants by their then karna-

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vans in 1026 (1850-51,) and that neither plaintiff nor the 3rd defendant had therefore any right to the lands at present.

Eleventh defendant stated that the land III was his jenm property, and that the plaintiff's family held only an otti over it derived from his family by plaintiff's karnavan in 981 (1806-7).

1st, 2nd, 4th, and 8th defendants were *ex-parte*.

The issue was whether plaintiff's karnavan Komappan Nair sold the jenm of the plaint lands to defendant's karnavan in 1005 (1829-30.)

The following is taken from the Judgment of the Principal Sadr Amin :—

Upon whom does the burden of proof lie in this case is the first question to be determined. Is it for plaintiff to show that the karnavan of 1st and 2nd defendants originally obtained the lands on otti, and that the present possession of 9th and 10th defendants commenced under that otti demise, or is it for defendants to prove that lands amitted to have been once the jenm property of plaintiff's tarwad were in fact sold by them to the family of those defendants at a period subsequent to the date of the alleged otti mortgage ? There are two conflicting presumptions here, one in favor of the right of a man to a thing found in his actual possession, and the other in favor of the continuance of a thing once admitted to exist. The defendants admitted that they originally derived possession from plaintiff's tarwad, and if nothing more happened afterwards to alter the nature of this possession it must be held to be still subordinate to that tarwad, and it was therefore for those who contended that this subordinate possession was at a later period matured into an independent one to establish it. The possession of a tenant in the eye of law being the possession of his landlord, a mere manual possession by one who acknowledges himself to be a tenant of another is wholly insufficient to throw the burden upon that other of establishing his title to recover.

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The question has been moreover settled by former decisions. [The decrees of the late Sadr Court in Suit 142 of 1858 at page 22 of the Decree Book of 1859 and in Suit 84 of 1859 at page 99 of the same Book.] The first decision is a distinct authority upon this case. There the declaration sought to redeem a mortgage and the defence was "land not mortgaged but sold," and the Court held that the *onus* was on defendant, and on his failing to prove his purchase decree was given for plaintiff without requiring proof of the mortgage. The second decision also upheld the same principle. It being thus established by precedents that the *onus probandi* in a case of this kind rests with the alleged purchaser, I amended the original issue to allow the defendants an opportunity of establishing their purchase.

[He found that the deed of sale had not been established by the evidence.]

Plaintiff has consented to pay the amount entered in exhibit II, namely, 1,300 silver fanams.

For the above reasons I decree the return of the lands to plaintiff on his depositing in Court the otti amount of 1300 fanams and paying the value of improvements to 6th, 7th, and 8th defendants at the rate shown in the Amin's accounts, and order the 3rd, 9th, and 10th defendants to pay plaintiff's costs and saddle the defendants with their own costs.

The 9th and 10th defendants appealed to the Civil Court.

The Civil Judge dismissed the suit, stating his reasons as follows:—

The Principal Sadr Amin has in this case, I am of opinion, erred in throwing the *onus probandi* on the defendants. It is not as if they had fully admitted the plaint and had contented themselves with pleading the defence that their karnavan was the purchaser, but they have alleged in addition that the kanom on which the plaintiff has sued is not a correct one, but that he parted with his property in 971 (1785), and that therefore by Section 1, Clause

15 of Act XIV of 1859, he cannot bring the suit, the deceased karnavan having mortgaged it more than sixty years ago.

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The Principal Sadr Amin has found that the alleged deed of sale is a forgery, and that being so, the defendants have the other ground, viz., that the suit is barred.

Now it seems to me that the plaintiff must first prove his case as alleged in the plaint, for the defendant is not bound to show anything till his title is disproved, he being the man in possession for a long series of years.

By none of his witnesses does he succeed in doing so—his own evidence that he has taken the jenmom share of the crop is very vague, and a mere assertion of the fact unsupported in any way.

I shall therefore reverse the decree of the Principal Sadr Amin, and direct that this suit be dismissed and that plaintiff pay all costs original and appeal.

The plaintiff appealed specially to the High Court.

Sloan, for the Special Appellant, plaintiff.

Mayne, for the Special Respondents, the 5th and 6th defendants.

The Court delivered the following

JUDGMENT:—This was a suit to redeem a mortgage alleged in the plaint to have been executed in 1816 and to be for 1,000 fanams.

The defendants 3, 9, and 10, members of the same tarwad, allege a sale of the jenm to their karnavan, but the 9th and 10th defendants in their statement admit a mortgage in 1796-7 for 1300 fanams by plaintiff's karnavan to the karnavan of 1st defendant, which mortgage was purchased by the family of the 3rd, 9th, and 10th defendants in 1822; and they produced amongst other documents the mortgage deed of 1796 for 1300 fanams. (No. 2,) and also a receipt (3) for the kanom amount of 1300 fanams in December 1822, and a Teer deed (4) given by 1st defendant's karnavan to the karnavan of defendants 3, 9, and 10, in 1814.

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The 5th, 6th, and 7th defendants claimed under the 9th and 10th defendants, the 11th defendant stated that part of the property was his own jenm, and the other defendants did not appear.

The Principal Sadr Amin called upon the 3rd, 9th, and 10th defendants to establish the alleged sale of the jenm to their family, and disbelieved the evidence adduced by them on that point. Thereupon with the consent of the plaintiff he passed a decree for restoration of the lands in accordance with the terms of the mortgage of 1796, which the defendants had set up, but requiring the plaintiff to make compensation for improvements to 6th, 7th, and 8th defendants.

Against this decree only the 9th and 10th defendants appealed, and the Civil Judge thereupon dismissed the suit with costs. We understand the grounds of his decision to be that the plaintiff had not proved the mortgage alleged by him in his plaint, and that as to the mortgage admitted by the defendants 9 and 10, the plaintiff's suit was barred by the Law of Limitation.

On the hearing of the special appeal before us, it was argued by Mr. Sloan on behalf of the appellant that the case was taken out of the Law of Limitation by the written acknowledgment contained in the document No. 4. Now this document certainly does contain a distinct acknowledgment of the mortgage in 1796; and it is signed by the karnavan of the 1st defendant, who by this instrument transfers the said mortgage to the karnavan of 3rd, 9th, and 10th defendants. It was argued by Mr. Mayne on behalf of the defendants for whom he appeared that this was not a sufficient acknowledgment to take the case out of the law of limitation because it was given by the mortgagee to a third person, and not to the mortgagor or to any person claiming under the mortgagor. But the 15th clause of Section 1 of Act XIV of 1859 does not, in our opinion, require that the acknowledgment should be given to the mortgagor. The language of the Section is that "If in the meantime" (that is during the period of 60 years from the time of the mortgage) an acknowledgment of the "title of the mortgagor or of his right of redemption shall

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"have been given in writing signed by the mortgagee or "some person claiming under him,"—the statutory period is to run "from the date of such acknowledgment in writing," and when this languge is compared with that of the English Statute on the same subject, *i. e.*, with Section 28 of 3 and 4 Will IV ch. 27, it is impossible to avoid the inference that the Indian Legislature intended that an acknowledgment of the title of the mortgagor should be sufficient whether made to the mortgagor or to a third person; for the above Section in the English Act contains the express provision that the acknowledgment must be given "to the mortgagor or to some person claiming his estate or to the agent of such mortgagor or person."

This inference is strengthened by the circumstance that prior to the enactment of 3 and 4 Will IV C. 27, the rule acted upon in the Court of Chancery regarding suits to redeem was the other way. This rule is stated by the Master of the Rolls in *Hansard* v. *Hardy*, 18 *Ves.* 459 in these words :—"It is however, said for the defendants "that these acknowledgments made in dealings with third "parties are totally foreign to the mortgagor; and that the "acknowledgment which is to operate so as to bar the "objection from length of time should be an acknowledg-"ment arising out of some transaction directly between "mortgagor and mortgagee. How far that would be the "more reasonable rule I shall not now examine, but "certainly it is not the established one. In the case of *Swart* "v. *Hunt* (4 *Ves* 478) it was in an assignment to a third "person that the mortgagor found the evidence of acknow-"ledgment upon which he was relieved." Other cases to the same effect are also cited by the Master of the Rolls; and having reference to this history of the decisions and legislation on the question we must assume that the Indian Legislature considered the old rule of the English Court of Chancery preferable to the statutory rule laid down in the 3rd and 4th W. IV. C. 27.

It is satisfactory to us to know that this conclusion is in accordance with a decision in the High Court of Calcutta quoted by Mr. Sloan from 3 *Weekly Reporter*, p. 3.

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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.