1869. *February* 22. *R. C. No.* 4 *of* 1869.

reference under Section, 22, Act XI of 1865, and which of the two words "may" and "shall" mentioned in that Section is applicable to District Munsifs.

The Court delivered the following

JUDGMENT:—In this case we understand the fact to be that the moochilka sued on was given in exchange for a puttah as required by Sections 3 and 4 of Madras Act VIII of 1865. If that be so, we are of opinion that the suit is maintainable under Section 7 of the Act. We think that Section 6 was intended to impose upon kurnums the duty of signing and registering, but no more. Had it been intended to be a condition of the right to sue, it would have been expressly so provided in Section 7, and a provision made for compelling registration. It is not necessary to answer question 2, and question 3 is not a question which arose in the trial of the suit, and therefore ought not to have been referred.

Appellate Jurisdiction. *(a)*

Referred Case No. 31 *of* 1868.

KRISTNA ROW *alias* MUTTUKISTNA ROW *against* H. F. MUTTUKISTNA, ESQUIRE.

Taking it that the rule of English Law, that the relation of Counsel or Advocate and Client creates the mutual incapacity to make a binding contract of hiring and service either express or implied, governs the relation of Advocate and Client generally in this country, there must be the relation of Advocate and Client to give rise to the incapacity, and the incapacity is strictly confined to contracts relating to service as an Advocate in litigation and matters ancillary to such service.

The degree of Barrister is but one of the qualifications for admission and enrolment as an Advocate of the High Court.

Where the defendant, a Barrister who was not admitted an Advocate of the High Court, or specially authorised to plead in the Session Court, accepted a vakalutnamah from the plaintiff to defend him upon a charge pending in the Session Court, and the defendant failed to appear on the day to which the trial of the plaintiff was adjourned, and the plaintiff sued the defendant to recover the amount of the fee paid,

Held that the suit was maintainable.

1869. *March* 1. *R. C. No.* 31 *of* 1868.

THIS was a case referred for the opinion of the High Court by J. R. Daniel, Acting Judge of the Court of Small Causes of Madura, in Suit No. 1161 of 1868.

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

1869.
March 1.
R. C. No. 31
of 1868.

The following was the case stated :—

The plaintiff sues to recover Rupees 500, being fees paid by him to the defendant to conduct his defence in a Criminal case before the Court of Session, whereas the defendant did not conduct his defence.

The defendant pleads first his privilege as a Barrister that he cannot be sued at all, and, secondly, that he appeared and was ready to conduct the defence at the Sessions to which the case was committed, but that the case was adjourned by the Court to the next Sessions, and he had therefore done all that he was bound to do.

The case was heard before me on the 10th September 1868, and a decision was given in favor of plaintiff subject to the opinion of the High Court upon the following case :

On the first point raised, I am of opinion that Mr. Mutukistna is liable to be sued. It is true that in England the employment of a Barrister is held to be honorary, and he cannot maintain an action for his fees, nor can he be sued for recovery of fees once paid to him. In all the English cases, however, the Barrister practises as a Barrister only, and I know of no case where it has been ruled that a Barrister practising also as Attorney is not liable to be sued. It is presumed from the relations of a Barrister and a Client that no contract can possibly be made between them, whereas in this case an express contract has been made, and its terms must be enforced.

The second point must be decided according to the terms of the contract between the parties. The plaintiff was committed for trial on a charge of forgery to the Session Court for the July Sessions 1867. At the end of June Mr. Mutukistna undertook to defend the case for Rupees 500 which he received.

On the first day of the Sessions Mr. Mutukistna appeared and applied to the Court to advance the case as he was going to Ceylon and the case was posted at the end of the Sessions. The Court granted the application ; but on the next day the Government Prosecutor applied for a postponement of the case for the next Sessions, and the

1869. *March* 1. *R. C. No.* 31 *of* 1868.

case was accordingly adjourned and intimation given by the Judge to Mr. Mutukistna by letter that the case would not be tried that Sessions.

Before the August Sessions following Mr. Mutukistna had gone to Ceylon, but he wrote a letter to Dr. Joseph who appeared, and not only applied for, but obtained, a further postponement of the case for the September Sessions.

The case was finally decided at the September Sessions. Mr. Mutukistna returned about the 11th of the month, but the case had already been disposed of, and the plaintiff had engaged another advocate to defend him.

The following are the terms of the document appointing Mr. Mutukistna :—

" I, Kistna Row *alias* Mutukistna Row, 1st accused " in Calendar No. — of 1867 on the file of the Deputy " Magistrate of Madura and Tirumunglum taluq, do hereby " nominate and appoint you H. F. Mutukistna, Esquire " Barrister-at-law, and you Mr. Thos. Morton Scott as " Counsels for my defence in said case committed for trial " to the Session Court of Madura at the next Sessions ; " and I agree to bind myself by all your acts as if they " were done by myself.".

This agreement was not produced by either of the parties, but was sent for by the Court from the records of the Criminal Case ; the only evidence produced by the parties was oral—Rupees 500 was paid by plaintiff in consideration that Mr. Mutukistna should defend him in the case then committed to the Sessions, but no express stipulation was made that he should defend him at the July Sessions only. When the agreement was made, the case was fixed for that Sessions, and doubtless Mr. Mutukistna expected it would be heard then. The plaintiff says that at the time a postponement was contemplated ; he may have been aware of the intention of the Government Prosecutor to apply, but I cannot suppose that Mr. Mutukistna wished for a postponement, as he applied for the case to be advanced, and no doubt at the time it was expected that the case would be disposed of at the Sessions to

1869. *March* 1. *R. C. No.* 31 *of* 1868.

which it stood committed. Still as there was no stipulation with a view to a possible adjournment, Mr. Mutukistna was unconditionally bound to defend.

According to the terms of the written agreement, too, Mr. Mutukistna was unconditionally bound,—the words committed for trial to the next Sessions are a mere description of the case.

The adjournment was the act of the Court, but it was no more occasioned by the acts of the plaintiff than by those of Mr. Mutukistna. If Mr. Mutukistna considered himself engaged to the one Sessions only, it was clearly his duty to do all in his power to prevent a postponement. He was not present when the application was made by the Government Prosecutor. Had he been present, it would have been his duty to oppose it. He received a notice after the postponement had been made. He might have made another attempt to have the case heard that Sessions. The order of postponement might have been re-considered as it had been made on an *ex-parte* application. Mr. Mutukistna, however, acquiesced in the postponement, and did not withdraw as if he had fulfilled his engagement. The plaintiff then went to ask what was to be done about the fees if Mr. Mutukistna were not present at the next Sessions. On this occasion the plaintiff states that Mr. Mutukistna assured him that he should return in time for the case, and that if he did not he would return the fees. Mr. Mutukistna distinctly denies that he promised to return the fees, but he certainly gave the plaintiff to understand that he should return to defend his case ;—that he did intend to do so is, I think, clear from the fact of his writing to Dr. Joseph, in consequence of which a further postponement was effected. He allows that he was willing to defend the case if it had been postponed for his arrival, but this only as a matter of favor and beside the contract.

I am therefore of opinion that Mr. Mutukistna did not fulfil the terms of his contract by merely appearing at the Sessions for which the case was committed and applying for the case to be advanced. He was bound unconditionally, and the fact that the adjournment was the act of the Court does not affect the case,—it was not the

1869. *March* 1. *R. C. No.* 31 *of* 1868.

act of the plaintiff, and did not prevent Mr. Mutukistna from fulfilling his contract by appearing at the subsequent trial. By his absence in Ceylon he rendered himself incapable of performing his duty; and therefore the plaintiff is entitled to recover the fees for which he has received no consideration.

At the request of the defendant, Mr. Mutukistna, this decision was made subject to the opinion of the High Court. The following are the questions put by Mr. Mutukistna himself:

(1.) Can an action be maintained against a Barrister to recover a fee given to him to conduct a trial which he did not attend?

(2.) Having regard to the terms of the vakalat, and to the fact that Mr. Mutukistna had received his brief, attended Court and urged that the case may be heard,—was he, the case being postponed on the motion of the Government prosecutor, bound to attend again at the trial? If so was he bound to do so without a refresher? If he was and did not, could an action be maintained to recover back the whole of the fees paid him or any portion and what portion?

Mr. Mutukistna had not been enrolled as an Advocate of the High Court, and had not received a sunnud from the Civil Court.

Miller, for the defendant.

The Court delivered the following

JUDGMENT:—Confining the first question submitted strictly to the facts of this particular case, we are of opinion that the defendant was not privileged from liability to be sued for a breach of the contract evidenced by his acceptance of the vakalutnamah given by the plaintiff. The rule of the English Law in regard to the incapacity of Counsel and Client to contract as now settled by the well-considered and exhaustive judgment of the Court of Common Pleas in the case of *Kennedy* v. *Brown and wife*, 32 *Law Journal Common Plea.* 137, is that the relation of Counsel or Advocate and Client creates the mutual incapacity to make a binding contract of hiring and service either express or

1869. *March* 1. *R. C. No.* 31 *of* 1868.

implied concerning advocacy in litigation, and neither therefore incurs a legal obligation to the other in respect of such advocacy.

Now taking it that the same rule governs the relation of Advocate and Client generally in this country, we think it inapplicable to the parties in this case, the defendant not being as the case states an Advocate of this Court or specially authorized to plead in the Session Court at the time that he accepted the vakalutnamah or that the trial took place. The Roll of the Court shews that he was admitted an Advocate on the 20th of April 1868. The incapacity to incur any legal obligation is attached not simply to the degree of Barrister, but to the Barrister, who in the character and capacity of Advocate, is entitled to appear and plead on behalf of clients. There must be the relation of Advocate or Counsel and Client to give rise to the incapacity. Not only is that plainly laid down in *Kennedy* v. *Brown*, but the incapacity is strictly confined to contracts relating to service as an Advocate in litigation and matters ancillary to such service, and on that ground the Court distinguish the cases in which it had been decided that a Barrister has the capacity *quâ* Barrister to make binding contracts for his services. Referring to these cases, the Court observe:—the proposition is confined "to incapacity for contracts concerning advocacy in litiga-"tion. This class of contracts is distinguished from other "classes on account of the privileges and responsibilities "attached to such advocacy, and on this ground we con-"sider the cases unconnected with such advocacy to be "irrelevant," and lay down as their conclusion that "on "principle as well as on authority there is good reason for "holding that the relation of Advocate and Client in litiga-"tion creates the incapacity to make a contract of *hiring* "as an Advocate." It follows that to be within the rule the Barrister must be entitled to appear and plead as an Advocate.

In England the degree of Barrister gives the right of advocacy, except when specially and conditionally conferred, as it has been frequently of late, for the purpose of admission to the Bar of the High Courts in India or the

1869. *March* 1. *R. C. No.* 31 *of* 1868.

Courts in the Colonies, in which cases it does not give the right of advocacy anywhere that we know of. Whether the defendant so obtained his degree, we are not sure, nor is it material to ascertain, for here certainly the degree though conferred unconditionally, is simply one of the qualifications for admission and enrolment as an Advocate of this Court. Before such admission and enrolment has been granted, a Barrister's position is not different from that of a member of the Faculty of Advocates in Scotland or a person possessing either of the other qualifications for admission as an Advocate, and it is as an Advocate of this Court that the right to practise throughout the Presidency under the Acts I of 1846 and XX of 1853 and the rules of Court can be claimed.

The defendant then not being an Advocate of this Court, nor specially authorized to plead in the Session Court at the time that he accepted the vakalutnamah or that the trial took place, it is obvious that the legal relation of Advocate and Client to which the incapacity is attached by the rule never existed. If, as was contended, the right to practise as an Advocate was an immaterial consideration, a Barrister who had been refused admission or suspended from practice or struck off the roll would be entitled to claim immunity from a suit under any contract which he chose to make concerning advocacy in litigation. For these reasons we are of opinion that the defendant was not exempt from liability to be sued.

With respect to the second question, as the defendant must, if present, have been allowed in the capacity of authorized agent to defend the plaintiff on the criminal charge under Section 432 of the Criminal Procedure Code, the matter to be considered is the effect of the adjournments. On the facts stated, we think the reasonable construction of the vakalutnamah is that the defendant undertook to appear for the plaintiff in the case, subject to the ordinary incidents of procedure, and that the adjournments appear to have been such incidents. The defendant's own conduct before he left for Ceylon shows that he so understood the undertaking. As to there having been no additional fee paid by way of refresher, we can only say that

the right to such a fee would require some distinct agreement, or at least settled practice to support it, and nothing of the kind is stated. Our answer, therefore, to the second question is that the suit is maintainable for the sum given for those services which the defendant failed to render in breach of the contract.

1869. *March* 1. *R. C. No.* 31 *of* 1868.

Appellate Jurisdiction (*a*)

Civil Miscellaneous Special Appeal No. 182 *of* 1868.

SUBBRAMANIYA PILLAY ... .*Petitioner.*

M. PERUMAL CHETTY and 69 others...*Counter Petitioners.*

A Civil Court in hearing an appeal from the decision of a Collector under Madras Act VIII of 1865 must be guided by the Civil Procedure Code, and the judgment of the Civil Court may be reviewed under Section 376 of the Code. The order granting a review is final.

Semble.—The terms of Section 57 of Act VIII of 1865 are wide enough to justify a Collector in treating as *ex-parte* a defendant not appearing on the day to which the hearing of the suit may have been adjourned under Section 66 of the Act.

1869. *March* 3. *C. M. S. A. No.* 182 *of* 1868.

THIS was a petition against an order of F. S. Child, the Civil Judge of Tinnevelly, dated the 22nd May 1868.

The plaintiff (petitioner) brought a suit under Madras Act VIII of 1865 against the counter-petitioner and eighty-two other persons to enforce the acceptance by the defendants of the puttahs tendered by the plaintiff or to eject the defendants from their holdings. The Collector decided that the defendants were bound to accept the puttahs within ten days. The Collector passed judgment *ex-parte* against the defendants under Section 57 of the Act upon the ground that they failed to file a written statement as they were required to do.

The defendants appealed to the Acting Civil Judge, who by an order dated the 31st March 1868 dismissed the appeal upon the ground that by Section 58 of (Madras) Act VIII of 1865 there could be no appeal from an *ex-parte* judgment. The Acting Civil Judge thought it was doubtful whether a Collector by terming his decision *ex-parte* could

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