1868. *July* 29. *S. A. No.* 312 *of* 1868.

allowed is to be computed from the time the disability has ceased just as from the accruing of the cause of action in other cases and it is as long as the periods of limitation applicable to some suits and longer than those applicable to others. We think the effect of the Section must be construed to be to provide a distinct period of limitation applicable to every case in which but for legal disability the suit would be barred. In other words to add 3 years from the time the disability ceases to the period of limitation made applicable by the Act to the particular case. In this case, therefore, the Section does not operate to bar the plaintiff's right of action.

The decree must be reversed, and the suit remanded for hearing and determination on the merits. The costs in this and both the Lower Courts will abide the decree in the suit and must be borne by the party who fails on the merits.

Appeal allowed.

Appellate Jurisdiction (*a*)

Civil Petition No. 77 *of* 1868.

COMALAMMAL, guardian of SASHADRI IYENGAR, minor son of the late CODIALEM SASHADRI IYENGAR.

against

RUNGASAWMY IYENGAR.

The first hearing of a suit took place on 16th November, when issues were settled and the final hearing of the suit was fixed for the 22nd January following. On the 22nd January the plaintiff changed her Vakil and applied by the new Vakil for a summons to a witness, and on the 23rd the new Vakil stating that, owing to the absence of his witnesses, he was not prepared to go on with the case, the Judge dismissed the suit.

Held, that under Section 148 of the Civil Procedure Code the Judge was justified in dismissing the suit.

Section 119 of Act VIII of 1859 does not empower a Judge to set aside a decree passed under Section 148 of the same Act.

Semble—Section 114, as well as Sections 110 and 111 of the Code have reference only to the first hearing of the suit, which may be either on the day named in the summons or on a subsequent day to which such hearing may have been adjourned.

1868. *May* 22. *C. P. No.* 77 *of* 1868.

THIS was a petition against an order of R. Davidson, the Civil Judge of Trichoinpoly, on Miscellaneous Petition No. 160 of 1868.

(*a*) Present: Bittleston and Ellis, J. J.

1868.
May 22.
C. P. No. 77
of 1868.

O'Sullivan for the petitioner.

Miller for the counter petitioner.

This petition coming on for hearing, the Court delivered the following

JUDGMENT:—This is an appeal from an order of the Civil Judge of Trichinopoly, refusing the application of the plaintiff in a suit to set aside a decree dismissing the suit for default. The decree appeared to have been passed under Sections 114 and 148 of the Civil Procedure Code, and the application to set it aside was made under Section 119 of the Code.

As the decree could not be passed under both the Sections named, we must see under which of the two Sections, if either, it can be maintained.

Now Section 114 applies to the case of a plaintiff not appearing at the first hearing of the suit either in person or by a pleader; and there is no doubt that in this case the plaintiff did appear by a pleader. No judgment by default could therefore be passed against the plaintiff under that Section.

But though the plaintiff appeared by a vakil, the vakil stated that he was not prepared to go on with the case, the witnesses not being in attendance, and the question therefore is whether under Section 148 the Judge had the power to dismiss the suit.

The facts are that the first hearing of the suit took place on the 16th November 1867, when issues were settled and the case adjourned to the 22nd January which was the day fixed for the further hearing of the suit and for the production of evidence by the parties. On the 17th January the plaintiff by her vakil applied for 3 months' time, which was refused. On the 22nd January the plaintiff changed her vakil and applied by the new vakil for a summons to a witness and also for the examination of the former vakil, and on the 23rd the new vakil stating that by reason of the absence of witnesses he was not prepared to go on with the case, the Judge dismissed the suit.

1868: *May* 22. *C. P. No.* 77 *of* 1868.

Is then this a case to which Section 148 applies? Mr. O'Sullivan argued that it did not, because no time had been granted to the plaintiff: and unless the adjournment from the first hearing to the 22nd January was, within the meaning of Section 148, a granting of time to the plaintiff, the argument is well founded. But, upon a close examination of the various Sections of the Code bearing on the question, we think that the case did fall within Section 148.

Under Section 41 the summons to the defendant in a suit may be issued either for a final disposal or for a settlement of issues. If it be issued for final disposal, then the form of summons given in the schedule B requires the defendant to produce all his witnesses on the day named therein; and if either party fail without sufficient cause to produce the evidence on which he relies, then by Section 145 the Court is authorised at once to give judgment against the party so failing, and this judgment could not be set aside excepting upon appeal in the ordinary course.

If the summons be for settlement of issues and the parties are at issue upon some question of law or fact, the Court may, under Section 145, proceed at once to determine the issues, if satisfied that no further argument or evidence is required than can then be supplied by the parties; but otherwise the Court is bound to postpone the further hearing and fix a day for the production of such further evidence or for such further argument. Now when the latter course is taken the parties are then in the same position with reference to the day so fixed as they are upon a summons for final disposal with reference to the day named therein; that is to say they are bound to be ready with their witnesses on that day, unless prevented by some sufficient cause. It would then be very strange if the Legislature had provided that a failure to produce the evidence should in the one case subject the party to an adverse judgment, but not in the other case. Yet such is the result if Section 148 has not the effect of authorising the Court to pass an adverse judgment against a party failing to produce his proofs upon the day fixed for final disposal after a previous settlement of issues. In fact whenever a case is ad-

1868.
May 22.
C. P. No. 77
of 1868.

journed to a further day for the purpose of enabling parties on that day to produce evidence, time is granted to both parties whether the adjournment takes place upon the special application of either of them, or by reason of a provision of the Code requiring such adjournment; and in our opinion Section 148 must have been intended to apply to all cases of adjournments to a future day for the purpose of enabling parties to produce evidence on that day. In all such cases, if the parties or either of them shall not appear in person or by a pleader, Section 147 authorizes the Court to proceed in the manner pointed out in Sections 110, 111 or 114 as the case may be; but the language of Section 147 does not raise any question about the meaning of the words "a party to whom time may have been granted;" for it speaks only of adjournment generally; and Section 146, though it clearly authorises the Court to grant time and adjourn the hearing of a suit upon application by the parties or either of them, is not limited to such applications, but gives to the Court independently of any application a general power to adjourn the hearing of a suit from time to time.

It might appear at first sight that Section 147 is unnecessary, because Section 110 itself provides for the case of non-appearance of the parties on the day fixed for defendant to appear and answer, or on any other day subsequent thereto to which the hearing of the suit may be adjourned; but it appears to us that this Section and Sections 111 and 114 have reference only to the first hearing of the suit which may be either on the day named in the summons or a subsequent day to which the first hearing may have been adjourned.

Having then come to the conclusion that the Judge was authorised under Section 148 to pass judgment against the plaintiff, who failed to produce her witnesses on the day fixed for that purpose, and that he did dismiss the suit under that Section, it follows that the application to set aside the decree under Section 119 of the Code was properly refused; though it was refused by the Judge upon the merits of the case and not on the ground that Section 119 gave him no power to set it aside.

1868. *May* 22. *C. P. No.* 77 *of* 1868.

We were asked to give leave now to file a regular appeal against the decree, the time for appealing having expired. But we think that that must be the subject of a distinct application in the usual course, as to which we can say no more than that the Judges before whom it may be brought will of course take into their consideration all the circumstances connected with this present application, and will have the same means of judging whether they afford a sufficient cause for not having presented the regular appeal in proper time which we have.

Appellate Jurisdiction (*a*)

Special Appeal No. 50 *of* 1868.

J. RAYACHARLU.....*Special Appellant* (*Defendant.*)

J. V. VENKATARAMANIAH.*Special Respondent* (*Plaintiff.*)

A son during the life of his father has, as coparcener, a present proprietary interest in the ancestral property to the extent of his proper share; but beyond that he has vested in him no legal interest whatever whilst his father is alive.

Except in respect of his coparcenery rights a son is not in a different position as to the corpus of the ancestral property from that of any other relation who is an heir apparent of the owner of property.

Though the Limitation Act may have been decided to be a bar to a suit by the son for partition, his right as coparcener has not thereby been destroyed, and it may be that he is entitled to relief against the improper disposal by the defendant of more than his proper share of the property.

1868. *May* 27. *S. A. No.* 50 *of* 1868.

THIS was a special appeal from the decision of E. B. Foord, the Civil Judge of Berhampore, in Regular Appeal No. 16 of 1867, confirming the decree of the Court of the District Munsif of Chicacole, in Original Suit No. 237 of 1864.

Sanjiva Ráo for the special appellant, the defendant.

Snell for the special respondent, the plaintiff.

The facts sufficiently appear in the following

JUDGMENT:—The plaintiff in this case is the only son of the defendant, and the relief sought by the suit is a declaration of the plaintiff's right, on the death of his father, to the whole of the ancestral property movable and

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