1870. *November 7.* *R. A. No.* 37 *of* 1869.

ciation, and my opinion is not arrived at upon any consideration of the matter of the supposed compromise but upon the absence of evidence to its existence. In the present case I am unable to find upon the evidence any proof that the parties considered that there was any matter in doubt, and without the consciousness of a doubt, there could be no agreement to solve it, because there could be no intention of setting at rest the non-existent. I carefully avoid saying that there must be a matter of fact or law really doubtful to render such a compromise valid. (Williams *v.* Williams, 2, *L. R.* 294.) It will, I believe, be found that this depends upon a dictum of Leach, V. C. not necessary to the case before him and at variance with many much higher authorities. I think that the decree of the Civil Judge must be reversed and the case remitted for the ascertainment and delivery to plaintiff of the share to which, on the ordinary rules of Hindu Law, he may be found entitled. If it were a proper element in the determination, it would not, I think, be difficult to give economical reasons in favor of partition far outweighing those in favor of the maintenance of family dignity.

Appeal allowed.

Note by Mr. Justice Holloway.

I leave the above observations with one omission as I made them at the close of the argument. Their form might be improved, but they dealt with the arguments used in the appeal and I adhere to their substance.

Appellate Jurisdiction (*a*)

Referred Case No. 41 *of* 1870.

A. SASHACHELLUM CHETTY *against* T. GOVINDAPPA.

A stipulation in a document that no other payments except payments endorsed on the document itself shall be admitted does not exclude proof of payment by other evidence.

1870. *November* 10. *R. C. No.* 41 *of* 1870.

THE following was a case referred for the opinion of the High Court by A. R. Veerasamy Iyer, the District Munsif of Tirupatty in Suit No. 153 of 1870.

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

1870. November 10. R. C. No. 41 of 1870.

The defendant in this case pleaded, in answer to plaintiff's demand for payment of money due on a bond, accord and satisfaction alleging that he paid sums on four different occasions.

The plaintiff in reply relied on the stipulation contained in the bond to the effect that all payments on account of the bond should be endorsed on the bond itself, and no other evidence of payments should be accepted; and pleaded that the defendant was bound by that condition.

The following is the translation of the bond:—

The 14th Vyasee Prabhava. Kararnama given by Theevity Govinthappa, a resident of Tirnputty, to Anuntha Sasha Chalam Chetty of the same place.

If you ask what, I, Senghery Ramaswamy, Somi Chetty, Vencatarayadoo, and his brother Ramaswamy have settled our accounts with you in respect of goods taken by us for sale in the west, and it is found that I owe you twenty-one Rupees after giving credit for what I have paid in respect of the said transaction. I shall pay the said sum of Rupees twenty-one with interest at one per cent. per mensem when demanded, and cause the payment endorsed below this bond. You need not admit if I say any other mode of payment [than that agreed]. I thus execute the bond of my own consent. There is another bond with you which I will take back after my satisfying the same.

(Here follow the signature and attestations.)

The High Court have held that under the Hindu Law a contract need not necessarily be in writing, and therefore even on the supposition that the stipulation in question is reasonable and binding, there is nothing that prevents the parties from coming together, and, by an oral agreement, setting aside the original written contract. It is, I think, a settled law that in the Common Law Courts accord and satisfaction can be pleaded in answer to an action on a specialty, provided such accord and satisfaction occurred after breach of the contract. Apart from this, the defendant has a right to put in issue the fact of the several payments alleged by him, independently of any written evidence that may exist thereof. It is clear law that a receipt even when endorsed on the bond itself is not binding conclusively on the plaintiff, and therefore the want of such receipt should not prejudice the defendant.

1870. *November* 10. *R. C. No.* 41 *of* 1870.

However strong these reasons may appear to me, I must bow to the express decision to the contrary by the late Court of Sudder Adalut, reported at page 47, M. D. dated 7th March 1855, S. A. No. 2 of 1855, which does not seem to have been overruled by any subsequent ruling.

I decide the question raised between the parties in favor of plaintiff subject to the opinion of the High Court that I am right in so deciding.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the stipulation relied upon by the plaintiff does not exclude proof of the alleged payments by other satisfactory evidence.

We think if such payments were made, the plaintiff himself ought, according to the fair construction of the stipulation, to have endorsed them on the bond, and therefore that he cannot make the absence of endorsements an objection to legitimate proof of the payments.

But a further ground of our opinion is that the language of the bond as translated in the case does not import more than that the plaintiff should not be bound to *acknowledge* payments made in any other mode.

In deciding whether the alleged payments were made, of course the omission of endorsements is a most important circumstance to be considered.

Appellate Jurisdiction. (*a*)

Civil Miscellaneous Special Appeal No. 116 *of* 1870.

KENDIGA MADI CHETTI.....*Petitioner.*

SOOBBAMMA.....*Counter-Petitioner.*

The Civil Judge rejected an application for execution of a Decree on the ground that it was barred by the Law of Limitation (Section 20, Act XIV of 1859). A prior application was made in 1864, and less than three years before the present application, but the Civil Judge treated the former application as nugatory, because it was not accompanied by a certificate which the applicant had been directed to produce by an order of Court made upon the Petitioner's application for execution in 1862.

Held, by the High Court that the applicant's right to have process of execution issued was not barred.

1870. *November* 11. *C. M. S. A. No.* 116 *of* 1870.

THIS was an appeal against the order of F. M. Kindersley, the Acting Civil Judge of Coimbatore, dated the 18th

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