No Counsel were instructed.

1869. *November* 17. *R. C. No.* 33 *of* 1869.

The Court delivered the following

JUDGMENT :—Section 168 of the Code of Civil Procedure requires that there should appear to the Court to be satisfactory ground for believing that the default on the part of the witness is without lawful excuse. But we are of opinion that it is not necessary for this purpose to institute a formal investigation and come to a determination on the evidence adduced.

The proper service of the summons must be proved, and if the proof in the present case led the judge to believe that the summons had come to the knowledge of the witness, and he saw no reason to doubt that the witness could give material evidence in the suit, and there was no one in attendance in the Court who could account for the absence of the witness, the discretionary power to issue a warrant given by the Section might, we think, be exercised.

Appellate Jurisdiction. (*a*)

Civil Miscellaneous Special Appeal No. 52 *of* 1869.

KARUPPANAN.....*Petitioner.*

MUTHANNAN SERVEY.....*Counter-Petitioner.*

A decree was passed in June 1851. Application was made for execution on the 21st July 1861, and from that date at various intervals, each less than three years, up to 1868. Upon different grounds all the applications were rejected, but the last order was reversed in appeal by the Civil Judge.

Held, that the last application was not barred by the Limitation Act.

1869. *November* 18. *C.M.S.A.No.* 52 *of* 1869.

THIS was an appeal against the order of J. D. Goldingham, the Acting Civil Judge of Madura, dated the 20th November 1868, reversing the order of the Court of the District Munsif of Madura, dated the 22nd September 1868.

Handley for *Gover*, counsel for the petitioner.

The Judges delivered the following judgments :—

Mr. JUSTICE INNES.—The decree in this case was passed on the 30th June 1851. Application for execution was made on 21st July 1861 and from this date at various intervals each less than three years up to 1868.

(*a*) Present : Innes and Collett, J.J.

1869. *November* 18. *C.M.S.A. No.* 52 *of* 1869.

Upon different grounds all the applications were rejected. Upon one indeed an order was passed allowing the applicant to take possession of such lands as the defendants might be inclined to give him, but this of course was not an order upon which process of execution could issue. The last order made in the District Munsif's Court in 1868 dismissed the application on the ground that there had been no appeal from the order in 1864. The Civil Judge in appeal has reversed the order of the Munsif, being of opinion that the decree-holder might long ago have obtained execution, but for the unwarranted obstruction placed by the Court itself in the way of his obtaining it. The appeal now made to us on the part of the defendants does not call in question this view of the Civil Judge as to the character of the intermediate proceedings. The only point taken in arguing the case was that the provisions of Section 21 of Act XIV of 1859 preclude the decree-holder from now proceeding to execution, because no such process of execution as is required by Section 21 of Act XIV of 1859 has issued within the time contemplated by that Section. And it is upon this point alone therefore that our decision must depend. The argument is that to entitle a decree-holder to enforce a decree there must have been within three years preceding the application for enforcement not merely a proceeding to keep the decree alive but an actual process of execution. By the words "Process of execution may issue" seems, however, to be meant the Court may grant execution. These words refer not to the intermediate proceedings required by Section 20 to be taken by the party to keep the decree alive, but to a final or what is at the time contemplated as the final process of execution to be issued by the Court, and to understand Section 21, it should be read with Section 20 as was pointed out by a full bench of the Calcutta High Court, reported in VII, W. R., p. 515. Before the passing of Act XIV of 1859 a decree might be enforced within 12 years from its date or from the date of some proceeding taken to keep it alive. One of the objects of Act XIV of 1859 was to reduce the period of 12 to 3 years, but at the same time it is not to be supposed that in doing this it was intended to place holders of decrees passed prior to the Act at a disadvantage as compared with subsequent decree-holders. Sec-

1869. November 18. C.M.S.A.No. 52 of 1869.

tion 20 would give to holders of decrees subsequent to the Act a fresh time of three years from any step taken *bonâ fide* to keep the decree alive. But Section 21 read literally would limit absolutely the time of possible enforcement to 12 years in the case of decrees passed prior to the Act. So that as the Act was passed on the 5th May 1859 a decree passed on the 4th May 1847 would be absolutely unenforceable after the passing of the Act, notwithstanding intermediate proceedings. Read, however, as one Section with Section 20 it is possible to give to the provisions of Section 21 a meaning which will put prior decrees on the same footing in this respect with decrees passed since the Act. The meaning of the Sections read together, is I think, well given in page 518 of the 7th Volume, W. R. That no process of execution shall issue upon any judgment more than 3 years old, unless some proceeding shall have been taken to enforce or keep it in force within 3 years next proceeding the application for execution, provided that process of execution, in respect of a decree obtained before the passing of Act XIV of 1859 may be issued either within the time limited by law or within three years next after the passing of the Act whichever shall first expire, even though no proceeding shall have been taken to enforce it or to keep it in force within three years next preceding the application for execution. Viewed in this light, it is clear that the application for execution in 1861 was an application which was within time. That Act was passed on 5th May 1859, and the applicant had up to 5th May 1862 for enforcement of his decree and has an undoubted right to have it enforced.

The order of the Civil Judge should therefore be, I think, affirmed, and the special appeal dismissed.

MR. JUSTICE COLLETT.—I concur in affirming the order of the Civil Court, but in so doing I wish to limit myself to the ground stated in the Full Bench Judgment of the Calcutta High Court referred to, namely, that the words coming after the "but" in Section 21 were intended as a proviso to Section 20, and that the position of a decree holder coming under Section 21 is the same as that of one under Section 20, and it is enough to keep the decree in either case alive that a *bonâ fide* proceeding to enforce it has been taken within

1869. *November* 18. *O.M.S.A. No.* 52 *of* 1869.

the proper period, and the decree holder whose case is within Section 21, will therefore not suffer, if, notwithstanding his diligence, no actual process of execution has been issued upon his application for execution. It is not necessary in this case to decide, and I should at present have great difficulty in deciding that, notwithstanding Act XI of 1861, which was passed to delay the operation of Act XIV of 1859, the period of three years mentioned in Section 21 must be taken to have expired on the 5th May 1862, Act XIV of 1859 having been passed on the 5th May 1859.

Appellate Jurisdiction. (a)

Referred Case No. 36 *of* 1869.

J. C. SHAW, AGENT TO MESSRS. PARRY & CO., MADRAS.

against

SUBRAMIER.

A defendant arrested in execution of a decree of a Small Cause Court applied to that Court under Section 273 of the Civil Procedure Code, averring that the only property which he had was immoveable property, and he was willing to place it at the disposal of the Court.

Held, that the judgment creditor is liable to be called upon to show cause for not proceeding against the property described in the application in execution of his decree.

1869. *November* 24. *R. C. No.* 36 *of* 1869.

THIS was a case referred for the opinion of the High Court, by F.H. Woodroffe, the Acting Judge of the Court of Small Causes at Cuddalore, in Suit No. 343 of 1869.

The following was the case stated :—

In this suit plaintiff got a decree for Rupees 88-7-4 with subsequent costs and interest.

On defendant being subsequently brought before the Court under warrant in execution of the decree he presented an application under Section 273 of the Civil Procedure Code to the effect that he had only landed property worth Rupees 100-0-0 and that he was willing to place it at the Court's disposal.

Plaintiff's pleader thereupon contended that he ought not to be called upon to show cause for not proceeding against defendant's immoveable property because :—

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