

1869.  
November 10.  
*B. A. Nos. 98*  
*& 100 of 1868.*

The plaintiff has certainly been placed in a position of some hardship, but the hardship lies in his being prejudiced by a recent decision taking away the remedy by process of execution after the raziuamah had been given effect to as a decree of the Court under an acknowledged but improper rule of procedure. The bar under the Act of Limitations would equally apply to the suit if it could be viewed as brought upon a decree. But it cannot, for Section 11 of Act XXIII of 1861 prohibits such a suit. If the plaintiff can now have relief at all, it must be through a renewed application for execution, but we do not intend by this observation to intimate any opinion as to the success of such an application. For these reasons the decree of the Civil Court must be affirmed, but we think that it should be affirmed without costs.

*In R. A. No. 100 of 1868.*

This case is entirely governed by our judgment in Regular Appeal No. 98 of 1868 and in accordance therewith the order of the Lower Court must be affirmed and this appeal dismissed.

*Appeal dismissed.*

### Appellate Jurisdiction. (a)

*Civil Miscellaneous Regular Appeal No. 108 of 1869.*

MUTTEALAUMMAL and another.....*Petitioners.*

CHELLAYAMMAL.....*Counter-Petitioner.*

A Civil Court has no power to stay execution in cases where an appeal has been made to the Privy Council against a decree of the High Court.

1869.  
November 11.  
*C.M.R.A.No.*  
*108 of 1869.*

THIS was an appeal against the order of C. F. Chamier, the Civil Judge of Salem, dated the 22nd February 1869, passed on Civil Petition No. 95 of 1869.

The facts sufficiently appear from the following

JUDGMENT :—The appellants in this case seek to rescind the order of the Civil Court staying the execution of the decrees obtained by them in the Civil Court and in this Court, during the pendency of the appeal which has been preferred from the decree of this Court to Her Majesty in

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

Council; and the question to be determined is whether the Civil Court was empowered to make the order.

1869.  
November 11.  
C.M.R.A. No.  
108 of 1869.

It appears that the liability sought to be enforced by execution was in respect of the amount of the costs decreed to be paid to the appellants, and the Civil Judge, finding that an appeal to Her Majesty in Council was pending, thought it unfair to enforce the payment of the costs before the determination of the appeal, and on that ground made the order.

We are of opinion that the order is invalid. The power of the Civil Court to stay execution is given by Section 338 of the Code of the Civil Procedure, and that section has clearly no application to decrees of this Court which are appealable to Her Majesty in Council. It applies only to decrees from which appeals lie to appellate tribunals in this country. But if even it had been applicable to such decrees, we think the order would not have been sustainable. The section makes the power of the Lower Court conditional upon the application for execution being within the time allowed for an appeal, and the Court not having at the time received intimation of an appeal having been preferred. If either of those requirements be wanting, the power to stay rests with the Appellate Court alone, and in the present case it appears that both were wanting.

A stay of execution pending an appeal to Her Majesty in Council might be granted by this Court in a proper case. See *Regulation VIII of 1818, Section 4.*

The order of the Civil Court must be set aside, but we think without costs.

*Appeal allowed.*