1871.
May 30
A. No. 195
of 1869.

fendant at any yearly term, with the almost total loss of the advantage to be derived from the money he has been induced under the agreement, to lay out. For, if this were so, all that defendant could do would be to pull his house to pieces and remove the materials, which would not, of course, realize anything like the value of the building.

I think, therefore, that the decision of the Principal Sadr Amin is in accordance with principle in decreeing that plaintiff, before ejecting defendant, must pay the value of the buildings.

I agree in dismissing this Special Appeal.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 27 *of* 1871.

KRISTNA MUDALI........................*Special Appellant.*

SHANMUGA MUDALIAR..................*Special Respondent.*

Plaintiff sued, as managing trustee of a choultry, to set aside certain mortgages of the lands with which it was endowed, made by the 2nd 3rd and 4th defendants to the 6th and 7th defendants, and for an injunction to compel payment of kist, which had been allowed to fall into arrears, contrary to the provisions of Exhibit A, the muchalka sued upon. The defendants pleaded that the mortgages made were not in violation of the provisions of Exhibit A. The Court of First Instance dismissed the suit. On appeal, the Civil Judge considered the provisions in Exhibit A—" Moreover, we are only entitled to cultivate the said four villages and to maintain the said choultry with the income therefrom as above stated ; and we have no right to alienate the said lands by sale, &c."—fatal to the right to mortgage advanced by defendants 1 to 6. Accordingly he reversed the decree appealed from.

Held, by SCOTLAND, C. J.—That the reasonable construction to be put upon that portion of the rázináma relating to alienation was that the villages were not to be alienated so as to deprive the choultry of the receipt of the portion of the produce fixed by the rázináma for its support. That the security of the cultivation of the land and the application of the fixed portion of the produce to the maintenance of the choultry was all that the parties intended to effect. That there was nothing in the record to show that the payment of that fixed portion had been rendered less certain by the transfer of the villages to the mortgagees. That, consequently, the beneficial interest of the plaintiff, as trustee under the rázináma, was not impaired, and the mortgages were not made in violation of the provisions of Exhibit A.

By HOLLOWAY, J.—That the right set up was based upon a purely capricious exercise of the plaintiff's will, in the effectuation of which he had no conceivable interest : that contractual words seeking to create a right of this sort are ineffective to create it, and that, consequently, the alienations by mortgage were wrongly declared void.

1871
June 7.
S. A. No. 27
of 1871.

THIS was a Special Appeal against the decision of C. R. Pelly, the Acting Civil Judge of Tranquebar, in Regular Appeal No. 71 of 1870, reversing the decree of the Judge of the Court of Small Causes at Negapatam, on the Principal Sadr Amin's Side, in original Suit No. 85 of 1869.

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

1871.
June 7.
S. A. No. 27
of 1871.

Plaintiff, as managing trustee of the Peruvastan choultry, sued to set aside certain alienations of the lands with which it was endowed, made by 2nd, 3rd and 4th defendants to 6th and 7th defendants, and for an injunction, under Section 93 of the Civil Procedure Code, to compel payment of the Sirkar kist, which they had allowed to fall in arrears contrary to the conditions of Exhibit A, muchalka, dated the 8th March 1846, and the decree in Original Suit 19 of 1864, on the file of the Principal Sadr Amin of Negapatam. 1st defendant allowed the suit to proceed *ex-parte*. 2nd, 3rd and 4th pleaded, amongst other pleas, that a simple mortgage to third parties was not opposed to the muchalka, or detrimental to the institution and payment of the kist. 6th and 7th defendants upheld the mortgages to themselves and stated that no kist was due. The Lower Court dismissed the suit, and the plaintiff appealed.

The judgment of the Civil Judge was, in part, as follows :—

" The case stands thus :—The ancestors of plaintiff and defendants 1 to 5 assigned the lands of the villages Nedumbalam, Manikal, Chettiarcorichi, and Serukalatur for the support of the choultry in question. In 1819, an arrangement was made, by which the management of the charity was vested in one Rámalinga Mudali, plaintiff's uncle ; and on his death, about 35 years ago, he was succeeded by plaintiff's father, one Paramesivara Mudali, who had exclusive management of the two villages Chettiarcorichi and Serukalatur, while, as regards the other two, he held one moiety, and the other parties the remaining one. Disputes then arose, when the Revenue authorities attached the lands for arrears due to Government, and the matter resulted in plaintiff's elder brother and his co-parceners, the father of 1st defendant, and the father of 3rd, 4th and 5th defendants executing Exhibit A, the muchalka in question. This was in 1846. Matters continued thus for a time, when differences again arose, and the lands were a second time attached by the Revenue authorities, and so held by them for some years, but eventually released under the muchalka, Exhibit B, which was signed by the parties to Exhibit A, with a single exception, viz. Sámi Mudali, a brother of plaintiff,

1871.
June 7.
A. No. 27 of 1871.

for whom he signed; and by this document they bound themselves to adhere to the terms of Exhibit A. Disputes, however, again arose, and in 1864, plaintiff sued the other parties in the Court of the Principal Sadr Amin of Negapatam (Original Suit 19 of 1864) for the lands and produce from 1854 to 1862, alleging that they had alienated a portion of the lands and failed to deliver the choultry's share of the produce. The Principal Sadr Amin then decreed plaintiff the produce from 1859 to 1863, was silent relative to the lands, but in the 24th para. of the judgment, wrote thus :—" As the Court has held that the charity has not ceased, it seems to follow necessarily that the villages allotted for its support cannot be alienated, and that any alienation of the allotted property is further opposed to the express stipulation in muchalka A, by which the Court considers the subscribing parties are bound." This judgment was passed on the 30th September 1865 ; and on the 16th September, 6th and 8th November 1868, and 15th May 1869, the 2nd, 3rd and 5th defendants raised Rupees 7,350 on four bonds executed in favor of 6th and 7th defendants, mortgaging portions of the lands, and plaintiff consequently instituted the suit now under consideration to have these bonds set aside as alienations barred by the muchalka A ; and, further, to have defendants 1 to 5 compelled by an injunction, under Section 93, to pay the kist allowed to fall into arrears, consequent on which the Revenue authorities have again attached a portion of the lands held by them. The Principal Sadr Amin, however, held the mortgages not to be such alienations as he contemplated in the above para., and hence this appeal.

The points for determination in his appeal are, 1st, whether with regard to the terms of Exhibits A and B, and the nature of the mortgages under D, E, F and No. II, the latter constitute such alienations as are barred by Exhibit A ; and 2nd, if so, whether plaintiff is entitled to a perpetual injunction under Section 93 of the Code of Civil Procedure.

Exhibit A sets forth as follows—" In support of the choultry founded by ou ancestors in the Peruvalundan

1871.
June 7.
S. A. No. 27
of 1871.

alias Jahal village, our mirási grain-rent villages of Nedumbalam, Manaikul, Serukalatur and Chethiarcorichi were set apart by us. The villages of Serukalatur and Chethiarcorichi were held in common, and the lands of the other two villages, Nedumbalam and Manikal, were held, half by Paramesivara Mudali, and the other half by Subba Mudali, &c. three persons. With the income of the two first mentioned villages and with the mirásiwaram paid by the holders of the said two moieties, the deceased Paramesivara Mudali was maintaining the charity. Subba Mudaliar and others having refused payment of the mirásiwaram unless the accounts of receipts and expenses of the charity were rendered to them, and the said Paramesivara Mudali having on the other hand refused to render such accounts, the moiety of lands held by Subba Mudaliar, &c. in Nedumbalam and Manikal were attached and placed in charge of the Sircar, by whom the produce has been estimated and cut. Now, however, the disputes among us have been ended by the following amicable adjustment, that is to say :—

That of the four villages of Nedumbalam, Manikal, Serukalatur and Chethiarcorichi set apart in common for the support of the said charitable object (choultry), the lands of Serukalatur and Chethiarcorichi should be cultivated by the said Paramesivara Mudali's son, Sámi Mudaliar, who should appropriate the mirásiwaram (after paying the kudiwaram and melwaram from the produce) for the charity. From the gross produce of the remaining two villages of Nedumbalam and Manikal, the melwaram or the Sircar share and the kudiwaram or the ryot's share are to be deducted, and after paying out of the mirásiwaram the kaul fees due to Sircar, the net mirásiwaram $253\frac{1}{4}$ kallams of paddy are to be paid for the support of said charity—thus $126\frac{7}{12}$ kallams by Sámi Mudaliar, who should cultivate a moiety of the lands in the said two villages and $126\frac{7}{12}$ kallams by the said Subba mudaliar, &c., the three persons who should cultivate the other moiety of lands in the said two villages. With the funds so paid, Paramesivara Mudaliar's son Sami Mudaliar should, as usual, keep up the choultry efficiently, and should not appropriate said funds to his personal use. As the lands of Subba Mudaliar, &c., are under zaft by Sircar from Fasli

1871.
June 7.
R. A. No. 27
of 1871.

1274, no kudimaramut, such as strengthening the banks of fields, digging nullahs, &c., has been executed in respect of those lands, and it is now to be carried out with the mirás tundwaram for Fasli 1254, which is in the hands of the said Subba Mudaliar. The mirásiwaram, or landlord's share, amounting to Rupees 198-2-11 up to Fasli 1253, is in deposit with the Sircar, and it is to be drawn by Vadapadymungalum Sokkappa Mudaliar, who should expend it on the repairs of the choultry. As we have thus adjusted the differences between us, we bind ourselves to abide by the above adjustment in future. We pray for an order to pay the said Rupees 198-2-11 now in Sircar deposit to the said Vadapadymungalum Sokkappa Mudaliar, and to release from attachment the lands of Subba Mudaliar, and others. Moreover, we are only entitled to cultivate the said four villages and to maintain the said choultry with the income therefrom as above stated ; and we have no right to alienate the said lands by sale, &c. Such is the muchalka given with our free-will."

I deem the following passages fatal to the right to mortgage advanced by defendants 1 to 5, viz. " Moreover we are only entitled to cultivate" and " we have no right to alienate the said lands by sale, &c.," in the vernacular

The above clearly sets forth that they " are only" entitled to cultivate, while on reference to Exhibits D, E, F and No. II, I find them to be in effect very little short of sales. D is an usufructuary mortgage for the large sum of Rupees 2,500 on 7 V. 2 M. $41\frac{2}{6}$ G. of dry , wet and other lands. E is a similar document for 1,250 Rupees on 3 V. 13 M. $49\frac{1}{2}$ G. F. the same for Rupees 2,350 on 7 V. 1 M. 7 G. and No. II, the same for Rupees 1,250 on 3 V. 13 M. 86 G.; and unless the mortgagors think fit to refund the above sums, the mortgagees may continue to hold for any number of years ; and taking into consideration that Fxhibit A, to which the mortgagors were admittedly parties, "only" gives them the right to cultivate, the above to my view will fall within the scope of the alienations which may reasonably be presumed to be included in the term " etceter " which thus following the word

"sale" not improbably primarily contemplated an alienation of this very nature.

It has been contended that as the above exhibits provide for payment to the choultry of its share, they can entail no injury on the institution. This, however, even admitting it to be material when there is a written document to be construed, is very questionable. So long as the lands continue under the management and in the possession of the parties to Exhibit A, the descendants of the grantees, payment of the kist and recovery of the produce may be easily enforced. Affairs, however, will be in a very different position if they are allowed to pass into the hands of mortgagees who may sub-mortgage, or, by letting the kist fall into arrears entail sale on the part of Government, and so sub-division among any number of purchasers; and I am of opinion that when Exhibit A, by which defendants 1 to 5 are admittedly bound, clearly limits their right to cultivation, usufructuary mortgages of the above nature will constitute alienations prejudicial to the interests of the institution."

The Civil Judge, accordingly, reversed the decree of the Principal Sadr Amin and granted the injunction prayed for.

The 6th defendant preferred a Special Appeal on the grounds, amongst others, that

The Civil Judge misconstrued Exhibit A and the Judgment in Suit No. 19 of 1864, and that the disputed alienation did not affect the charity.

The *Acting Advocate-General*, for the special appellant, the 6th defendant.

O'Sullivan and *Sanjiva Rau*, for the special respondent, the plaintiff.

The Court delivered the following judgments:—

SCOTLAND, C. J.—I am of opinion that the only substantial question open for determination in this suit was whether the mortgages mentioned in the plaint were made in violation of the rázináma (Exhibit A) and therefore invalid : and considering the question as one of construction merely, I think the mortgages are not invalid. The reasonable construction which it seems to me the Court is bound to put

1871.
June 7.
A. No. 27
of 1871.

upon the portion of the rázináma relating to alienation, is that the villages were not to be alienated so as to deprive the choultry of the receipt of the portion of the produce fixed by the rázináma for its support out of the returns from the regular cultivation of the land of the villages. The contrary strictly literal construction upheld by the Civil Court would prevent even a beneficial lease of any portion of the land to a tenant for cultivation, and it is hardly possible to suppose that the parties intended the stipulation to have such an effect. Reading the stipulation together with the other provisions in the rázináma, I think the security of the cultivation of the land and the application of the fixed portion of the produce to the maintenance of the choultry is all that the parties can be considered to have intended to effect by it.

Upon this construction the mortgages were not made in violation of the stipulation, for they contain express provisions binding the mortgagees to pay the fixed portion of the produce for the support of the choultry, and there is nothing in the record to show that the regular cultivation of the land and the payment of that portion have been rendered less certain by the transfer of the villages to the mortgagees. Consequently, the beneficial interest of the plaintiff as trustee under the rázináma is not impaired. Upon this ground, I think that the decree of the Lower Appellate Court is not sustainable and must be reversed.

With respect to the further question raised on behalf of the respondent, whether the plaintiff possessed a proprietary right as trustee of the choultry, independently of the rázináma, which entitled him to invalidate the mortgages, I abstain from giving any opinion, considered the question at variance with the cause of action in the former suit, brought by the respondent in 1864, the plaintiff may, if so advised, litigate it in another properly framed suit.

HOLLOWAY, J.—The question here is whether the Judge has rightly cancelled these alienations on the ground that they are opposed to the words of the rázináma on which the suit is brought. The question is strictly the only one

which the plaintiff raised, and the only one which the Court determined.

It was attempted by Mr. O'Sullivan to bring in the larger question of whether the endowment was not entitled to the whole of the produce, and not merely to the 250 kallams which the agreement declares payable. That would depend upon questions altogether beyond the scope of this suit. This agreement may itself be a fraud upon the institution, but the only question here is whether, assuming it to be valid, these alienations by mortgage can be set aside. It is not disputed that the whole sum which the agreement secures to the Pagoda is secured by the mortgage, and nothing was adduced to show that the security for payment was smaller (it appears to be rather greater),or that the transaction in any way worsened the condition of the institution as settled by the rázináma. No one, therefore, having the least interest, so far as the present case discloses, in the continued personal occupation of the mortgagors, ought the contractual words to be allowed to uptet an alienation of this kind? Attached to the right of occupation by the general principles of law, is the right of dealing as the defendants have dealt. Within certain limits the contract of private persons may modify the operation of rules of law, but, without considering at the present moment whether this is a principle susceptible of such modification, I put my judgment upon the broad ground that every right capable of being enforced must have for its contents some conceivable human interest, but not necessarily a pecuniary one. This principle will be found to be of fruitful application in every branch of law, in servitudes, obligations, institutions. So far as the present case discloses, the right set up is based upon a purely capricious exercise of the plaintiff's will, in the effectuation of which he has no conceivable interest. I do not stop here to show how this principle lies at the root of many propositions of English law. It is, undoubtedly, the general principle of jurisprudence to which, with some vagueness, the Privy Council adverted in *Renaud* v. *Guillet* (L. R. 2 P. C., 4), a case quoted by the Advocate-General. "You shall not sell" is void. "If you sell you shall give

1871. *June* 7. *A No.* 27 *of* 1871.

me the first offer" may be perfectly valid. "You shall not alienate" is void. "You shall not alienate so as to destroy the rights of your son" is perfectly valid, of course provided that the form necessary to effectuate the limitation is observed. The distinction on the principle stated is perfectly intelligible. On the ground, therefore, that contractual words seeking to create a right of this sort are ineffective to create it, I am of opinion that the alienations by mortgage have been wrongly declared void. Then, it was sought to show that the declaration in the former suit of the incapacity to alienate prevented us from coming to this conclusion. Now, the decree in that suit was a dismissal of the plaintiff's claim to get possession of these very lands, and, in the judgment, in the course of showing that there was no such right, the Judge chose to say that the agreement was such as to entitle the plaintiff to the produce and to prevent the plaintiff from alienating. Assuming for the moment that any part of a judgment, by which a plaintiff's suit is dismissed, could make any statement against a defendant *res-judicata*, a matter by no means clear, it is quite plain that this was not a decision on a matter of fact which it was necessary to determine to reach the conclusion, and, even upon the most liberal views as to the scope of *res-judicata*, this is necessary. It is manifest that this was not and could not be any decision upon the point. I am of opinion that the decree of the Civil Judge ought to be reversed with costs.

There has been no appeal as to this perpetual injunction, and I wish to guard myself against being supposed to think that this remedy was properly sought or properly given in this suit.

Appeal allowed.