

on its records, it is unenforceable in execution, because it is not the decree. Then as to whether such an arrangement is otherwise enforceable, *i. e.* enforceable as a valid agreement, I think it is not. The decree is still subsisting and capable of being enforced, and there is no consideration for the agreement on either side. The determination of this question, however, is not important, because it is now only sought to enforce the agreement in execution as having taken the place of the decree. I agree in reversing without costs the decree of the Civil Judge, and in the directions proposed.

1871.
March 1.
C. Mis. R. A.
No. 280 of
1870.

APPELLATE JURISDICTION.

Referred Case No. 10 of 1871.

Suit No. 18 of 1871. } GOVINDAPPAH *Plaintiff.*
 } KONDAPPAN SASTRULU... *Defendant.*

(Decree Execution) GOVINDAPPAH..... *Petitioner.*
 Case 50 of 1871.) } KYATADOO..... *Defendant.*

(Decree Execution) MALLAPPAH..... *Petitioner.*
 Case 49 of 1871.) } NAGANNA and another... *Defendants.*

A certificate under Act XXVII of 1860 is not necessary to give to a person, claiming to be the representative of a deceased creditor, the right to institute a suit to recover a debt due to the estate of the deceased, or the right to present an application for execution of a decree obtained by the deceased. But such certificate, or a probate, or letters of administration, must be produced by the person proceeding as representative before a decree or order can be passed, or process of execution issued for payment of the debt due, except the Court should think that payment is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.

The effect of the provision in the note to Article 12, Schedule 1, of the Court Fees' Act [No. VII of 1870] on the operation of a certificate duly granted, which has become liable to cancellation under that provision, but has not been cancelled, considered.

CASE referred for the opinion of the High Court by P. Terumala Rao, the District Munsif of Purghee, in Suits Nos. 57 and 131 of 1866 (Decree Execution Cases 50. and 49 of 1871) and in Suit No. 18 of 1871.

1871.
March 3.
R. C. No. 10.
of 1871.

Original Suit No. 18 of 1871 was brought against defendant on the 16th January 1871, on a bond, dated 17th January 1868, executed in favor of plaintiff's deceased father.

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

1871: Plaintiff stated that he had applied to the District Civil Court
 March 3. for a certificate, under Act XXVII of 1860, that he would
 C. No. 10 produce it before applying for execution of the decree, and
 of 1871. that he brought this suit to save the Act of Limitation.

Decree Execution Case No. 50 of 1871 was an application for execution of the decree obtained by applicant's deceased father in Original Suit 57 of 1866. The applicant stated that he had applied for a certificate under Act XXVII of 1860, and that he would produce it before he received the money from the Court. He urged that process of execution might be issued at once, as the judgment-debtor was about to dispose of his property.

Decree Execution Case No. 49 of 1871 was an application for execution of the decree obtained by the applicant's deceased father in Original Suit No. 131 of 1866. The applicant stated that he had first obtained a certificate under Act XXVII of 1860 for Rupees 2,000, and had collected debts to that amount. That on his presenting a second application for a renewed certificate to enable him to recover a further sum of Rupees 1,300, it was rejected. He prayed that, notwithstanding his inability to produce a fresh certificate, process of execution might be immediately issued, as defendants were about to dispose of their property.

On these facts the District Munsif referred the following questions :—

I. Can the representative of a deceased person sue for the recovery of a debt, and obtain a decree; and can such representative of a decree-holder apply for the execution of a decree; without the production of the required certificate, under Act XXVII of 1860, but on the condition of producing it before he receives the decree amount?

II. Can the Court allow the certified representative, either to sue, or to move for the execution of a decree, on his producing a certificate granted to him, under Act XXVII of 1860, on a date more than one year before, but not renewed under Article 12, Schedule I, Act VII of 1870? (a)

(a) Act VII of 1870, Sch. I, Art. 12, provides that the fees on a certificate granted under Act XXVII of 1860, or under Bombay Regulation VIII of 1827 shall (if the amount or value of the property in respect of which the probate or letters or certificate shall be granted

III. Are the renewed certificates under Article 12, Schedule I, Act VII of 1870, necessary even in suits or applications for the execution of decrees, the amount of which do not exceed 1,000 Rupees ?

1871.
 March 8.
R. C. No. 10
of 1871.

IV. Where a representative obtained a certificate to recover a sum of Rupees 2,000, which he then stated was due to the deceased person, and applied subsequently to the District Court for another certificate for the sum of Rupees 1,300, stating that the money for which the former certificate was granted was recovered ; but the District Court declined to grant another certificate on the ground that the second application was quite inconsistent with the former, which laid the debt at Rupees 2,000.—Can this representative sue for the execution of a decree obtained by a deceased person ? If not, what is his remedy ?

Miller for Scharlieb, for the petitioner in Decree Execution Case No. 49 of 1871.

The Court delivered the following

JUDGMENT :—In answer to the first question referred by the District Munsif, we are of opinion that a certificate under Act XXVII of 1860 is not necessary to give to a person, claiming to be the representative of a deceased creditor, the right to institute a suit to recover a debt due to the estate of the deceased, or the right to present an application for execution of a decree obtained by the deceased. But that such a certificate, or a probate, or letters of administration must be produced by the person proceeding as representative, before a decree or order can be passed, or process of execution issued for payment of the debt due, except the Court should think that payment is withheld from fraud-exceeds one thousand Rupees) be two per cent. on such amount or value.

“ **NOTE**.—The person to whom any such certificate is granted or his representative, shall, after the expiration of twelve months from the date of such certificate and thereafter whenever the Court granting such certificate requires him so to do, file a statement on oath of all monies recovered or realized by him under such certificate.

If the monies so recovered or realized exceed the amount of debts or other property as sworn to by the person to whom the certificate is granted, the Court may cancel the same and order such person to take out a fresh certificate and pay the fee prescribed by this schedule for such excess.

In default of filing such statement within the time allowed, the Court may cancel the certificate.”

1871. *Mad. L. 3.*
C. No. 10
of 1871. dulent or vexatious motives, and not from any reasonable doubt as to the party entitled. This, we consider, is the right construction of Section 2 of the Act. (a)

A person claiming to be the representative of a deceased creditor can hardly be said to compel a debtor to the deceased's estate to pay his debt by simply instituting a suit or applying for execution against him. But even assuming that the prohibitive words of the section might be so read, we think that the qualifying provision which follows :—
 “ Unless the Court shall be of opinion that the payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled,” imports plainly the pendency of a suit or proceeding in which the Court is to consider and determine whether the debt is so withheld. Unavoidable delay or difficulty in obtaining a certificate is not, therefore, an obstacle to saving the remedy against the debtor to the estate of a deceased person from the operation of the Act of Limitations.

The other three questions referred depend upon one point, namely, the effect of the provision in the note to Article 12 of the first Schedule to the Court Fees' Act (No. 7 of 1870) on the operation of a certificate duly granted, which has become liable to cancellation under that provision, but has not been cancelled.

We are of opinion that the validity of such subsisting certificate, as proof of the representative right of the person to whom it was granted to enforce by a suit or process of execution payment of a debt, is unaffected by that provision. Its apparent object is not to prevent the realization of monies due by means of an existing certificate ; but to secure payment of the stamp revenue on all sums so realized by a suit or other proceeding, in excess of the amount or value of the property in respect of which the certificate was granted. The power of cancellation is given only upon its appearing from the statement on oath required of the certificated

(a) Section 2 of Act XXVII of 1860 provides that “ no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.”

representative, that the monies "received or realized" under certificate exceed the amount sworn to on the granting of it, and in case of default on the part of the representative by not filing such statement within the time allowed for that purpose. Until cancellation has taken place on one of those grounds the certificate remains in full force as proof of the representative right to sue or obtain execution whatever be the amount of the debt sought to be realized. This opinion affords an answer to the three questions.

1871.
March 3.
R. C. No. 10
of 1871.

APPELLATE JURISDICTION (a)

Referred Case No. 11 of 1871.

Section 89 of the Code of Civil Procedure renders an attachment before judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit, whether obtained before or after the attachment.

CASE referred for the opinion of the High Court by Arnáchala Áyyar, the District Munsif of Tinnevely, in Suits Nos. 38 and 42 of 1871.

1871.
March 13.
R. C. No. 11
of 1871.

The plaintiff in Original Suit No. 42 of 1871 on the District Munsif's side of the Court, applied for attachment before judgment of defendant's moveable property, under Section 81 of the Civil Procedure Code. The property was accordingly attached and sold, and the sale proceeds held in Court in deposit pending the final disposal of the suit. Meantime another plaintiff brought Suit No. 38 of 1871 on the Small Cause side, against the same defendant, and obtained judgment subsequently to the date of attachment before judgment in Suit No. 42. The latter plaintiff asked under Section 237 of the Civil Procedure Code, the money in deposit on account of Suit No. 42 to be attached and paid her.

On these facts the Munsif referred the question,— Whether the attachment after judgment in Suit No. 38, made subsequent to the date of attachment before judgment in Suit No. 42, affects the right of the latter plaintiff to have the property attached made available for his debt, in case he also obtains judgment.

No counsel were instructed.

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