APPELLATE JURISDICTION (*a*)

Regular Appeal No. 93 *of* 1870.

G. LEE MORRIS, ESQUIRE, receiver of the estate of the late Rájah of Tanjore. } *Appellant.*

SAMBAMURTHI RÁYAR, and another.....*Respondents.*

Suit brought by plaintiff, as receiver of the Tanjore Rajah's property, in April 1869, for rent for Faslis 1272, 73, 74 and 75. At the first hearing it was objected that the suit was barred, as to the claim for Faslis 1272-74, by Sec. 1, Clause 8 of the Limitation Act. Against this it was urged that a suit had been pending for upwards of 2 years, and that time ought to be allowed under Section 14. The suit in question was brought in May 1866 by one Surfogi, who had assumed the management of the property, for the same cause of action against the present 1st defendant, and dismissed in November 1868, because the plaintiff had failed to produce any evidence. Before November 1868, the title assumed by Surfogi was set aside by the High Court, the present plaintiff was appointed and applied to the Court to make him a supplemental plaintiff, but his application was rejected. *Held*, [affirming the judgment of the Civil Judge that the claim was barred] that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogi's contract, and that, having elected to affirm it, he should have been admitted into the former suit, but that in the present action he is in this dilemma,—Coming in as successor to Surfogi and suing upon the obligation created by his contract, the plaintiff is barred by *res judicata* Coming in paramount to him, and upon a discordant title, Surfogi's proceedings were no interruption of the period of limitation, because then Surfogi is not the person through whom he claims.

As to Fasli 1275, it was objected that pattahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on 1st January 1866. *Held*, reversing the decision of the Civil Judge that Act VIII of 1865 was inapplicable to the case.

The general principle is that rights already acquired shall not be affected by the retro-action of a new law Rules as to Procedure are an exception, but the question here was not one of processual but of material law.

1871. *February* 23. } *A. No* 93 *of* 1870.

THIS was a Regular Appeal against the decision of P. P. Hutchins, the Acting Civil Judge of Tanjore, in Original Suit No. 4 of 1869.

The Suit was brought in April 1869 by the plaintiff, as receiver of the Tanjore Rájah's property, to recover arrears of rent due for Faslis 1272, 73, 74 and 75, under a lease. The facts are sufficiently set forth in the following extract from the judgment of the Civil Judge :—

" On this case coming on for hearing, the vakil for the 1st defendant submitted that there were two preliminary objections fatal to the suit. I allowed them to be argued before going into the evidence, and as I am of opinion that the ob-

(*a*) Present : Holloway, and Kindersley, JJ.

1871.
February 23.
R. A. No. 93 *of* 1870.

jections are well founded, and it is conceded that if so, they bar the suit, I proceed at once to give judgment.

The first objection is that the claim for rent for Faslis 1272-74 is barred by the Law of Limitation, the suit not having been instituted till April 1869. Against this it was urged that a suit had been pending for upwards of two years, and that time must be allowed under Section 14.

The suit for which an allowance is claimed was brought by the 2nd defendant, for the same cause of action, against the same party, the 1st defendant. It was brought in May 1866, and dismissed under Section 148 on 5th November 1868, because the plaintiff (2nd defendant) had failed to produce any evidence. Before November 1868, the title assumed by the 2nd defendant had been set aside by the High Court, and the present plaintiff had been appointed to manage the palace property. Before the decree he applied to the Court, under Section 73, to make him a supplemental plaintiff—his application was rejected, and thereupon the suit was dismissed. If plaintiff had a right to come in at all, it is clear that he might have appealed against the rejection of his application, and the decree (4M.H.C.Rep., 22). He is, therefore, in this dilemma—either he is claiming under the 2nd defendant and had a right to be allowed to continue that suit, in which case his remedy was in appeal, and Section 14 cannot help him—or he does not claim under the 2nd defendant, in which case a suit brought by the 2nd defendant will not help him under Section 14. And there is yet another objection to his availing himself of this suit, namely, that it was not dismissed for any cause which would fall under Section 14. The words "other cause" must, of course, mean a cause *ejusdem generis*, and the only cause anything like a defect of jurisdiction which I can see here, is to suppose that the Principal Sadr Amin *thought himself unable* to make the order asked for under Section 73. But here the same dilemma comes in—if he was wrong, the remedy was an appeal; if right, the plaintiff, if not barred by *res-judicata*, can at all events derive no advantage from the judgment.

I am, therefore, of opinion that the claim for Faslis 1272-74 is barred by limitation. That for Fasli 1272, I

1871. *bruary* 23. *A. No.* 93 *of* 1870.

may observe, would have been barred, even allowing the time for which the suit of 1866 was pending.

Then, as to Fasli 1275 (1865-6), the objection raised is that pattahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on the 1st January 1866. It is conceded that the plaintiff is a land-holder of the 1st class described in Section 1, but it is said (1) that having got a muchalka he can sue; that it is only the tenant's concern to see that he has a pattah, and that, if he does not ask for one, he must be presumed to have dispensed with it; (2) that the Act contemplates the interchange of pattahs and muchalkas at the beginning of the Fasli when the Act was not in force. The first argument seems to me opposed to the plain sense of Section 7 of the Act, and, if sound, would make the provisions of that Section a dead letter—a muchalka by itself is nothing more than an agreement to pay rent, and if it alone is sufficient there would be no necessity for the elaborate distinction drawn by the Act between the two classes of land-holders, and the formalities required will work no injustice, for not only can the landlord compel his tenant to accept a pattah, but even a mere tender will enable him to sue, and as to a dispensation to raise the presumption contended for, there must be something more than the mere neglect to take out a pattah, or the Act will in this way also be a mere dead letter. The second argument at first sight seems plausible enough, but the words of the Act are express. It can hardly have escaped notice that by introducing the Act in the middle of the Fasli some difficulty would be caused, and yet there is no saving clause as to subsisting agreements for that year; and, after all, the difficulty would be very slight, for the Act was duly promulgated some months before it came into force, and in January, or at latest in February (Section 9) the few recusant tenants who did not come under the old Regulations could have been forced to receive pattahs. It is not suggested that under these rent agreements there would be any distinction in this respect between the rent for the last half of 1865 and that for the first half of 1866.

1871.
February 23.
R. A. No. 93
of 1870.

The result is that I find the claim for Fasli 1275 also to be unsustainable, and I dismiss this suit with costs.

The plaintiff appealed.

Mayne, for the appellant, the plaintiff.

Sanjiva Rau, for the 1st respondent, the 1st defendant.

The following judgment was delivered by

HOLLOWAY, J.—The first question is whether the suit for instalments, otherwise barred, is saved by Section 14.

The fact is that Surfogi, whose title to the land had been set aside by the decree of this Court, had been suing upon a contract with defendant and his suit had been dismissed. If the time of the currency of that suit is deducted, the action is in time. The Small Cause Court Judge refused to admit the plaintiff in place of Surfogi, although he had manifestly taken all interest in the land as representing the persons for whom he was receiver. It seems to me that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogi's contract, and that, having elected to confirm it, he should have been admitted into the suit. Then, however, comes the dilemma :—Coming in as successor to Surfogi and suing upon the obligation created by his contract, the plaintiff is barred by *res judicata*. Coming in paramount to him and upon a discordant title, Surfogi's proceedings were no interruption of the period of limitation, because then Surfogi is not the person under whom he claims. It is very melancholy that substantial justice should be defeated by suprasubtile procedure, and specially in Small Cause Courts, in which such mischievous devices are peculiarly mischievous. If the plaintiff had asked that a case be stated, and it had been stated, doubtless the result would have been different. As to these instalments the judgment of the Civil Judge must, therefore, be affirmed.

With respect, however, to the instalment due within the time, I am of a different opinion. I do not at present seek to solve Act VIII of 1865, for I am of opinion that it is inapplicable to the case. The relation of landlord and tenant which rendered this money due was created previ-

1871. January 23. A. No. 93 of 1870.

only to its enactment, and to apply it to this relation would be to give the Act a retrospective operation. The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are an exception. The law as to the acquisition of rights is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of suit. Care must, however, be taken to distinguish between laws which are merely processual, and such as under that fictitious appearance are really material. To declare a certain right, which would be validly created by certain matters of fact, not creatable without the addition of some other, is material and not formal law. The non-distinguishing has led to very great injustice.

The doctrine in *Le Roux* v. *Brown* (12 C. B. N. S., 801), which Mr. Justice Willes has said that he was never able to understand, is erroneous through this confusion. *Ex-parte Melbourn* (L. R. VI., Ch. Ap., 64) seems another example. It seems manifest that the question here was not one of processual, but of material law. Now to declare that to a certain action a certain matter of fact shall be essential is to alter the right itself upon its actionable side. The judgment of the Exchequer Chamber in *Phillips* v. *Eyre* (L. R. VI., Q. B., 30), except as treating the action as an accessory right, comes nearer than any English case of which I am aware to the true doctrine. Now to say that the right of the landlord shall not exist upon its actionable side, unless something is done which was not necessary before, is to affect an acquired right by matter subsequent, and this is not processual but material law, and no retrospective effect should be given to it. I am, of course, by no means deciding that the suit was properly dismissed if the Act did apply. I am clear that it does not. Then, if Act VIII of 1865 does not apply, assuming for the purposes of the argument that there were any regulations affecting the relation of landlord and tenant when brought in question, not before a Revenue Officer, but before a Court of Justice, it is manifest that there was none applicable to this defendant.

1871.
February 23.
R. A. No 93 *of* 1870

As to the last instalment, I am, therefore, of opinion that the judgment of the Acting Civil Judge is erroneous, and that the case must be remitted for determination upon the merits. The costs will be provided for in the final decree. Note—Bar. Int. Priv. and Strafrecht, Sections 116 and 123.

KINDERSLEY, J.—I concur in this judgment.

APPELLATE JURISDICTION (*a*)

Civil Mis. Regular Appeal No. 280 *of* 1870.

B. VENKATARÁMANNA..... ... *Appellant.*

CHAVELA ATCHIYAMMA, mother and guardian of NARÁYÁNASAMI and another..... } *Respondent.*

Petitioner, a decree holder attached the defendant's property in execution. Subsequently to the attachment petitioner's Vakil presented a razinama petition to the Court on behalf of his client, praying that the attachment might be removed and execution stayed. An order was made granting the petition and allowing the decree amount to be paid by instalments. Some months afterwards, the petitioner, charging that the Vakil had presented the former petition fraudulently and without authority, applied to have his decree executed. The Civil Judge refused to alter the former order, or to notice Petitioner's allegations against his Vakil. On appeal, the High Court directed the Judge to investigate these allegations. The Civil Judge found that the Vakil was authorized to present the petition and that his conduct was not fraudulent. *Held*, that such a petition as that presented by the Vakil, even of within the scope of his duty, should not be permitted to alter the terms of a final decree.

The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the Vakil's authority in the particular matter for which he was employed.

1870.
December 19.
1871.
March 1.
C. Mis. R. A. No. 280 *of* 1870.

THIS was an appeal against the order of H. Morris, the Civil Judge of Rajahmundry, dated 17th August 1870, passed on Miscellaneous Petition No. 945 of 1870.

The petitioner was plaintiff in Original Suit No 4 of 1867 on the file of the Civil Court of Rajahmundry, had got a decree against the defendant in that suit, and in execution thereof attached the defendant's property. Subsequently to the attachment razináma petitions were presented by plaintiff's pleader on behalf of plaintiff and by defendant's pleader on behalf of defendant, requesting that the attachment of the said defendant's property, which had been made in execution of the decree in Original Suit No. 4 of

(*a*) Present : Holloway and Innes, JJ.