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tion, 214, I. P. C.), and on the ground of public policy such an agreement would be liable to be set aside notwithstanding "*par delictum.*"

But, according to the finding of the District Munsif (and I do not see that the Sub-Judge adopts a different view) the charge of criminal trespass was false, the trespass having been committed for the purpose of asserting a right and not with any such intention as is required to constitute the offence of criminal trespass. The defendant, besides, so colored the circumstances as to render it probable that the plaintiff, if convicted, would suffer a heavier punishment than if the simple facts had been adhered to. In doing so, the defendant abused the rights which the law allowed him and the agreement was therefore, I think, rightly held by the Munsif to have been entered into by plaintiff under coercion. I concur therefore in the decree proposed.

Appellate Jurisdiction.(a)

Civil Miscellaneous Regular Appeal No. 353 *of* 1873.

KRISHNAJI KESAVA PUNDIT.....*Appellant.*

SUBBARAYA TAKKER.....*Respondent.*

Where a decree has been adjusted between the parties by a contract binding upon them a Court is not bound to issue process of execution upon the original decree in violation of the terms of the contract although the decree holder refuses to certify the adjustment of the decree under Section 206 of the Code of Procedure, especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract.

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THIS was a Regular Appeal against the order of F. M. Kindersley, the District Judge of South Tanjore dated the 11th October 1873, passed on Civil Petition No. 671 of 1873.

The facts, so far as it is necessary to state then, were as follows:—The defendant in this suit (Krishnajee Kesava Pundit, got a decree in Original Suit No. 3 of 1865 in the Civil Court of Tanjore for nearly two lacs of rupees against the senior widow of the late Rajah of Tanjore upon an agreement executed by her, promising to pay Krishnajee the amount sued for in consideration of the trouble and

(a) Present: Holloway and Innes, JJ.

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expense he might incur in recovering for her the Raj and the private estate of the late Rajah. In Original Suit No. 7 of 1868 in the same Court, Bavanisakara Josi sued Krishnajee Pundit to obtain a share of the amount recovered by Krishnajee, in Original Suit No. 3 of 1865. The plaintiff in Original Suit No. 7 of 1868 alleged that he and one Nana Takker had been joint partners in the efforts made to recover the estate for the widow of the Rajah. The suit was dismissed by the Civil Judge, but upon appeal to the High Court the decision was reversed and a decree given in favour of the plaintiff. Krishnajee Pundit preferred an appeal to Her Majesty in Council, Subroya Takker, son of Sivagankar Takker and grandson of the abovementioned Nana brought Original Suit No. 15 of 1872 in the same Court against Krishnajee Pundit to recover his share. The suit was undefended and a decree was given in favour of the plaintiff for Rupees 65,000.

On the 5th May 1873 an agreement was made between Krishnajee Pundit, Bavana Sankara Josi and Subroya Takker by which the appeal to Her Majesty in Council was withdrawn and certain arrangements made for the discharge of the two decrees then standing against Krishnajee. Subroya Takker was to receive Rupees 5,000 in full satisfaction of his decree, then amounting to Rupees 67,056-9-8. The appeal to the Privy Council was accordingly withdrawn.

Notwithstanding the agreement Subroya Takker applied for execution for the full amount of his decree and Krishnajee set up the agreement. The Civil Judge granted the application, being of opinion that he was precluded by Section 206 of the Code of Civil Procedure from taking any notice of any private adjustment of a decree not certified to the Court by the decree holder; that as an alleged payment could not be taken notice of unless certified to the Court by the decree-holder, so an alleged agreement to pay any fixed amount in satisfaction of the decree should be equally disregarded.(*a*)

(*a*) Section 206 of the Code of Civil Procedure is as follows :—
"All moneys payable under a decree shall be paid into the Court "whose duty it is to execute the decree, unless such Court or the "Court which passed the decree shall otherwise direct. No adjust- "ment of a decree in part or in whole shall be recognised by the "Court, unless such adjustment be made through the Court or be "certified to the Court by the person in whose favor the decree has "been made or to whom it has been transferred."

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Subraya Takker admitted the execution of the agreement, but alleged that it had never taken effect and Krishnajee himself had sought to evade it.

Krishnajee appealed to the High Court. In answer to an issue sent the District Judge found that the decree in Original Suit No. 15 of 1872 has been adjusted between the parties by a contract binding upon the parties and effective for that purpose.

Gould, for the appellant.

Miller and *T. Rama Rau,* for the respondent.

The Court delivered the following

JUDGMENT :—We disposed on the last occasion of the agreement in support of the order based upon the conduct of the defendant. That conduct was, as is usual with him, slippery and unsatisfactory. He did not, however, attempt to repudiate his agreement but moved tht Court to put upon it a wholly unsustainable construction. This could in no circumstances entitle Sivasangara Takker to get out of his own part of the agreement. Still less could it do so when the act of the defendant did not touch that part. The facts are simple and indeed undisputed. The decree against Krishnajee had been passed and was under execution. Its complete execution would have swept away all that he had. The plaintiff in the second suit, therefore, prudently came to an agreement with him in the first, and the defendant, by which he would get Rupees 5,000 down. The primary plaintiff also abandoned something and on consideration of this agreement the appeal to Her Majesty in Council was abandoned, and that abandonment and the grounds of it communicated to this Court. In pursuance of it the appeal was withdrawn. This secondary plaintiff, having reaped the full advantage of this agreement, now seeks to get the full amount of his decree as if there were no agreement, in fraud of the primary plaintiff, of the defendant who has altered his situation both by withdrawing his appeal to England by leaving unimpeached the second decree against which he would doubtless have appealed, of the Courts whose proceedings have been affected by the communica-

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tion of the arrangement and especially of the Civil Court, whose process has been grossly abused by this fraudulent conduct.

The Civil Judge would have had no doubt but for Section 206 of the Civil Procedure Code. To our mind there is no inconsistency in those who hold that an action cannot be maintained either for money voluntarily paid out of Court with a full knowledge of the facts, or under a subsisting process into Court, (3, H. C., 188) also holding that there is nothing in a mere rule of procedure to prevent a Court from setting aside a process fraudulently issued upon a decree which has been validly discharged by matter subsequent. No one could doubt that the plaintiff could have been compelled to carry out his agreement and to take all steps necessary to render it effective. The question becomes no longer one of mere procedure, but of material law, and full effect will be given to the rule of the Procedure Code if it is construed as preventing the Court from entering upon investigations of disputed payments in satisfaction. It would be going a step further to say that the Court is forbidden to enquire whether the obligation created by the decree which the process is to follow has altogether gone. The words manifestly refer to adjustments by payment, and even if any rule of procedure ought to be construed to prevent a Court from setting aside its own process on account of fraud, certainly the words should not be stretched for that purpose. Here the contract between the parties amounted to a complete release of the obligation and the creation of another. It was no performance but an extinction by novation. When it is said that fraud vitiates all proceedings, the expression points to a rule altogether outside specific rules even of material law. If there is *dolus* in the exercise of a right valid on ordinary legal rules, the Courts will restrain that exercise. If a decree subsists and so long as it subsists, by no form of ordinary legal means can the sums paid under it be recovered. When it is set aside for fraud the state of things which it has been used as the fraudulent instrument of disturbing will be restored. We see nothing more sacred in the execution accessory—than

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in a decree the principal. That fraud of the specific character there needed is a ground for impeaching a decree even of Her Majesty in Council, as it is in England of one confirmed by the House of Lords (*Regular Appeal No.* 14 *of* 1874) we have recently decided. Rules of procedure are applicable to all ordinary legal means, and, in such application, cannot be modified by equitable considerations; this results from their being rules of public law. They by no means, however, exclude those extraordinary legal means which are the offspring of the principle that fraud cannot be permitted to prevail. Itself a source of rights of the widest scope, this rule is connoted by every other legal rule denoting a legal right. You have the right because the facts required to invest you with it exist, unless there has been fraud in the mode of its creation. You are normally entitled to exercise every right resident in you, and this among them, unless there are circumstances which would render its exercise a fraud.

There can be no doubt that the plaintiff could have been compelled to take every step required to effectuate the valid contract into which he had entered deliberately and with peculiar circumstances of solemnity and publicity. One of the remedies incidental to that relief would have been an injunction against executing the decree which had been discharged by the agreement valid for the purpose, because in the sense applicable to this matter, it was not yet final (VI, M. H. C). 137(*a*). The question then is, whether the defendant should be driven to a suit in the same Court to attain that remedy which, on the admitted facts of this case, must be conceded to him. If the relief were not within the jurisdiction of the same Court, it might be otherwise; but as it is so, we are of opinion that we should not allow the plaintiff to obtain that which he would undoubtedly be compellable to return. "*Dolo facit qui petit quod redditurus est.*" The process of execution must be set aside and the parties restored to the exact condition which has been disturbed by it.

(*a*) Moparti Pitchi Naidu *v.* Vuppala Kondamma.