1874. *January* 22. *S. A. Nos.* 324, *&* 634 *of* 1873.

It is manifest that the number and nature of the alienations are no unimportant elements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question in order to secure the soundness of the particular decision and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same.

In our opinion a discretion as to procedure has here been exercised in a manner not to the advantage of substantial justice.

The costs hitherto incurred in all the Courts will be provided for in the Subordinate Judge's revised decree.

*In S. A. No.* 634 *of* 1873.—In the case from North Tanjore there is less difficulty in reversing the decree; for the Subordinate Judge has, in a similar case, dismissed the suit upon appeal after a full decision upon the merits in the Original Court.

The decree of the Lower Appellate Court will be reversed and the appeals remanded for investigation on the merits. The costs in this and the Lower Appellate Court will be provided for in the revised decree.

*Special Appeals allowed.*

---

## Appellate Jurisdiction. (a)

*Referred Case No.* 24 *of* 1873.

EATHAMUKALA SUBBAMMAH.....*Plaintiff.*

RAGIAH.....*Defendant.*

Suit brought on 24th April 1873 for principal and interest due on a bond dated 30th October 1850. The debt was payable by 8 annual instalments on failure of any one of which the whole amount was to be payable on demand. No instalment was paid and when the suit was brought defendant pleaded that the suit was barred as three years had elapsed from the date on which the last instalment became due.

*Held*, that the usual clause, that on failure to pay one instalment the whole amount shall be payable on demand, gave a mere election to plaintiff of converting the obligation into a different one. That that election was never exercised, and that the document continued one securing the payment of a debt by instalments as to all of which the action had long been barred. That it was unnecessary, therefore, to consider whether, in the present case, "on demand" must not be construed according to its meaning at the period at which the words were written.

(a) Present: Holloway, Ag. C. J. and Innes, J.

1873. *July* 2. *R. C. No.* 24 *of* 1873.

THIS was a case referred for the opinion of the High Court by K. Kristnasami Rau, the District Munsif of Kavali, in Suit No. 211 of 1873.

The following is taken from the Munsif's statement of the case.

"This is a suit brought for the recovery of Rupees 50, being principal and interest due under a bond executed on the 30th October 1850 to the plaintiff's late husband by the defendant's father (now deceased.)

'The defendant pleads that the plaintiff's claim is barred by lapse of time. The suit was instituted on the 24th April 1873. The bond sued on runs in these terms:— 'Bond executed to Vencata Ramireddi by Ramanatham Ayyappah on the 10th day of Asweeja Bahula in the year Sadarana (30th October 1850). On a settlement of accounts I have found myself indebted to you in the sum of Rupees 30. I have agreed to discharge this amount *by* 8 *annual instalments* which shall fall due in the full moon of Ashada in (*Here follow the dates*). The first 7 instalments shall consist of each Rupees 4 and the last instalment of Rupees 2. I shall pay the amounts of the said instalments without fail. But if I fail I shall pay you *on demand* the whole amount due with interest at one per cent. per Rupees 120 per mensem from this date.'

It is admitted that no payments were made by the defendant or his father. The plaintiff avers that she demanded the payment of the debt on the 10th January 1873. Defendant denies this demand.

'The plaintiff's Vakil argues that, as far as his client is concerned, the debt sued for is one payable on demand; that the first demand was made on the defendant on the 10th January 1873; and as this suit was instituted within three years from the date of the demand his client's claim is not barred. The defendant's Vakil contends that on the failure of the obligor to pay the instalments when they became due, the Act began to run against the plaintiff's claim, and that, as three years have elapsed since the date of even the last of the

1873.
*July* 2.
*R. C. No.* 24
*of* 1873.

instalments, his client is entitled to a decree on the plea of limitation.

" The decision of the point raised in this suit mainly depends upon the right construction of the suit bond. In my opinion, it evidences two distinct obligations :—1st, the discharge of the debt by certain specified instalments ; 2nd, the payment of it to the creditor on demand." Construing the document thus, the Munsif held that the instalments not having been paid the debt sued for was one payable on demand, and that the suit was governed by the provisions of Art. 58 of the 2nd Schedule of Act IX of 1871.

The question submitted for the decision of the High Court was—What is the proper provision of the Indian Limitation Act IX of 1871 applicable to the present case ?

The following judgment was delivered by

HOLLOWAY, Ag. C. J.—The construction of the document is sufficient to show that the Munsif's opinion is wrong. The document, dated 1850, is a document securing money lent and providing for its payment by instalments. There is the usual clause that, on failure to pay one instalment, the whole amount shall be payable on demand. This gave a mere election to plaintiff by his act of converting the obligation into a different one. On the statement of this case that election was never exercised, and it continues a document securing the payment of a debt by instalments as to all of which the action has long been barred.

It is unnecessary, therefore, to consider in the present case whether " on demand" must not be construed according to its meaning at the period at which the words were written.

The attempt has arisen out of the unfortunate change in the new Limitation Act. The legislature has no doubt followed the opinion of Mr. Austin (p. 484 *et. seq.*, Vol. 1.)

That learned writer declares that in case of this and similar obligations no action can be brought until demand according to the doctrines of the Roman law. It is

1873. July 2. R. C. No. 24 of 1873.

however admitted, even by Romanists who maintain the doctrine, that it has no support in the texts of the Roman law, and the highest authorities are opposed to admitting its reasonableness on principle [Sav. V, 295, Vang. I, 226 (See Dig. 45, 1, 48 de V. O.)].

Mr. Austin's reasons are founded upon two misapprehensions the old mistake that the action only exists when the demandee has committed an infraction of right—the other that there is a connection between *mora* and the birth of the action (See Sav. V, 295, p. 1.) He was no doubt struck with the fact that every man in England is allowed without necessity to drag his opponent into Court, although he would have paid without compulsion, and inflict a heavy penalty on him by way of costs. This monstrous iniquity, however, is no essential part of the doctrine. A man's right is protected by the action at the moment of its arising. It may well be, however, that he, who needlessly drags his opponent to Court, ought in justice not only not receive costs but ought to pay them. This is a question altogether apart from the one under discussion. I cannot, therefore, but lament that this legislative novelty, opposed to the opinion of nearly all great lawyers, has been introduced.

INNES, J.—I agree in the opinion of the Acting Chief Justice as to the construction of the document.

---

## Appellate Jurisdiction. (a)

*Referred Case No. 53 of 1873.*

STRI SESHATHRI AYYENGAR.....*Plaintiff.*

SANKARA AYEN.....*Defendant.*

Under the provisions of Section 49 of Act VIII of 1871 an unregistered bond, though immovable property be made by the terms of it collateral security, is admissible in evidence in a suit to enforce the personal liability of the person executing the bond. It is only excluded where it is offered as evidence of a transaction affecting immovable property.

1873. November 24. R. C. No. 53 of 1873.

THIS was a case referred for the opinion of the High Court by J. Wallace, the Acting Judge of the Court of Small Causes at Madura, in Suit No. 1182 of 1873.

(a) Present: Morgan, C. J. and Holloway, J.