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deceased] ; or the son, whose [father's] assets are not held by another [anan:yáshrita] : but of one having no son, the other heirs [rikthinah, must pay the debts : or may levy them, para. 18.]' * * * * *

"And first of all, he who has received the estate ; on failure of him, the person who takes the wife ; and on failure of him, the son, possessed of unalienated wealth [ananyáshrita]. If there be none, it must be paid by the grandsons, *but the principal only*. If they be not in existence, then the great-grandson, the wife, daughter, or other heirs [rikthinah], if they have received the estate, must pay the debt—such is the meaning. It is not to be paid by the great-grandson, the wife or the others, if they have not taken the estate. But receipt of ever so small a portion of the estate, imposes the liability of liquidating the debts, to whatever amount. For there is no such law, as [that payment shall follow only on receipt of property] equal or more than equal [to the debts to be paid.]" *Vyavahára Mayúkha*, Chap. V., Sec. IV., § 12, 16, 17—Stokes, H. L. Bks., pp. 122-123.—ED.

June 21.

Special Appeal No. 47 of 1865.

TIMMARSA' PURA'NIK .....*Appellant.*

BADIYA', son of KUPPAGOUDA' .....*Respondent.*

Forfeiture—Landlord and Tenant—Lease—Rent—Relief—Equity—Múlgeni Tenure.

The acceptance of rent by a landlord, after the institution of a suit to recover possession of the land, is not a waiver of a forfeiture by the tenant under a condition in the lease.

A tenant, upon payment of all costs of the suit, will be relieved from the consequence of such a forfeiture, in accordance with the practice of Courts of Equity in England and America.

THIS was a special appeal from the decision of F. D. Melvill, Acting District Judge of Cánará, in Appeal Suits Nos. 88 and 95 of 1864, against the decree of the Munsif of Bhatkhal in Original Suit No. 110 of 1862.

The facts of the case sufficiently appear from the following judgment recorded in the District Court :—

"This action was instituted by Timmársá Puránik to recover land yielding a produce of 33¾ mudás of rice, and balance of rent for Durmati (A.D. 1860-61) Rs. 36, and interest thereon Rs. 3. Badiyá admitted the lease ; but pleaded full payment of the rent.

"The Bhatkhal Munsif decreed that Badiyá should pay the rent claimed for the year Durmati, as the receipt produced

by him to prove that payment was not proved; and that he should continue to pay the plaintiff 33½ mudás of rice in certain fixed instalments, the revenue authorities being informed of these payments; and in the event of his failing to make these payments, he should make over the land to the plaintiff, who on his side was forbidden to sell or in any way alienate the land. The claim for the land was thrown out, on the ground that the plaintiff, by receiving and passing receipts for the rent of years subsequent to that claim, had forfeited his right to resume possession.

"Timmarsá Puránik appeals on the following ground:—The terms of the lease had not been superseded.

"Badiyá appeals on the following grounds:—(1) The Munsif has over-estimated the rate of rice in Durmati; (2) The receipt No. 1 was passed; (3) The Munsif, having ruled that the terms of the lease had been superseded, should not have made those same terms binding on him in regard to future payments.

"The points at issue are—(1) Is receipt No. 1 proved; (2) If not, has plaintiff a right of re-entry on the land; (3) If not, can the Munsif's decree be confirmed, as it at present stands.

"I am by no means satisfied with the evidence concerning the receipt No. 1. * * *

"It appears that, after the suit was brought, the plaintiff passed two receipts for rent due for subsequent years. I do not consider, however, that, under the circumstances of the case, it must be presumed that the rent for the year claimed had been paid. The plaintiff has produced several witnesses who depose that, after the date of the alleged receipt No. 1, the defendant had admitted that the rent was due.

"I do not think the evidence is sufficient to prove the receipt. I, accordingly, find on the first issue that the receipt is not proved.

"The defendant has urged that the plaintiff never had a right of re-entry, on forfeiture of payment of the rent. This is not the case. The lease is very explicit on that point; and the plaintiff undoubtedly had that right. The only

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question, then, is whether he has forfeited that right, by accepting payment of rent subsequent to the year Durmati. If that rent had been received prior to the institution of this suit, there would have been no doubt that he had forfeited his right. But this was not the case. His right was good when he instituted this suit. Can he then, by any subsequent act, place it out of the power of the Court to decree in his favour, if the decree could have been passed on the day the suit was instituted? This question, I think, must be answered in the affirmative. If the plaintiff had executed a fresh lease to the defendant, it would have been impossible to decree in the plaintiff's favour. Though no fresh document has been executed, he has virtually renewed the lease; for, the terms of the lease having been broken, he was no longer entitled to receive rent. The defendant's possession had become wrongful; and the plaintiff would have been entitled to receive mesne profits for the period during which the suit was pending.

"I find on the second point at issue that the plaintiff has now no right of re-entry on the land.

"The Munsif has in his decree adjudicated on matter which was not pleaded by the other party. He has no right to attempt to regulate the future conduct of the parties. I find on the last point at issue that the decree cannot be confirmed as it at present stands.

"I amend the decree of the Munsif, by confirming merely such portion of it as awards payment of the rent claimed, and throws out the claim to re-entry on the land; and reversing the remainder: costs in each appeal on the respective appellant."

The special appeal came on for hearing on the 14th of June, before COUCH and NEWTON, JJ.

Shántárám Náráyan for the appellant.

Reid (with him *Fakírappá Lingappá*) for the respondent.

The lease, being translated to the Court, was found to contain a condition as follows:—"I shall bring to your house, from year to year, rice as above; and having given the same

to you in your house, I shall get a receipt from you showing your acceptance. Should any obstruction occur in the payment of the above rent, and should it fall into arrears I shall, without urging my múlgeni (*a*) right, surrender the land to you."

Cur. adv. vult.

COUCH, J. :—We are of opinion that the Judge was wrong in holding that the acceptance of the rent by the landlord after the institution of the suit was a waiver of the forfeiture. In *Doe d. Morecroft* v. *Meux* (*b*), Lord *Tenterden* expressed a clear opinion that it was not, and in *Jones* v. *Carter* (*c*) the Court of Exchequer in England agreed in that opinion. It is true that those decisions are not binding upon this court; but there are the same reasons in India as in England for holding it not to be a waiver.

It was urged by Dr. Reid, for the respondent, that a condition of this kind could not be annexed to an estate in perpetuity; but if the learned counsel had referred to Blackstone's Commentaries, Vol. II., p. 154, he would have found that in Littleton, Sec. 325, the case is put of a man who enfeoffs another in fee, reserving to himself a yearly rent, with an express condition annexed that, if the rent be unpaid, the feoffer and his heirs may enter and hold the lands free of the feoffment.

(*a*) Múlgeni, permanent tenure, as opposed to chálgeni, temporary tenure.

"The múlgeni tenants obtained from the landlord (mulgár), generally on the payment of a fine, a grant in perpetuity, to them and their heirs, of a certain portion of land, on the condition of paying annually a specified rent. Subject to that condition, they are at liberty to sub-rent, mortgage, or sell their interest in the land; and are rather a description of subordinate landlords than mere tenants. The only manner in which their title in the land is liable to cease is on failure of heirs, in which case it lapses to the landlord.

"In granting land upon múlgeni tenure many conditions are now often imposed, which are never found in the ancient deeds: such for example as, that the right shall not be alienable; and that upon the rent falling into arrears, or the trees standing on the land being wilfully destroyed, the right shall immediately revert to the múlgar." Chamier's *Land Assessment and Tenures of Canara*, Mangalore, 1853, p. 70.—ED.

(*b*) 1 C. & P. 346. (*c*) 15 M. & W. 718.

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In this case the appellant has recovered the rent due to him, and, in accordance with the practice of Courts of Equity both in England and America (Story's Equity Jurisprudence, Sec. 1315; Eden on Injunctions, 23), we are of opinion that the respondent ought to be relieved upon payment of all the costs of the suit.

The allegation that the respondent produced a receipt for the rent which the Munsif found was a forgery is not, as it appears from the Judge's statement, supported by the Munsif's finding; and we do not consider that the resisting the claim to rent is alone sufficient to disentitle the respondent to relief.

Although a Court of Law in England cannot give relief, unless the rent and costs are paid, or tendered, before the trial; a Court of Equity may do so, if the proceeding for relief is taken within six months after execution has been had in the suit to recover the land.

We confirm the decree of the court below; but order that all the costs of the suit be borne by the respondent in the special appeal.

June 26.

Special Appeal No. 118 *of* 1865.

SHIVLA'L BIN KHUBCHAND.....*Appellant.*
BALVANTRA'V VINA'YAK.....*Respondent.*

Attachment—Suit to raise—Mortgagee.

A and B borrowed money from D, with C as their surety, mortgaging their house to C to secure him from loss; the same house having been previously mortgaged by them to D. C had to pay the debt to D; but the house was attached by E, in execution of a decree against A and B. C sued D and E to raise the attachment: *Held* that the action did not lie.

THIS was a special appeal from the decision of C. Walter, District Judge of Puná, in Appeal Suit No. 390 of 1863, reversing the decree of the Munsif of Puná in Original Suit No. 343 of 1862.

In the original suit Balvantráv sued Shivlál and Dámodhar, alleging: (1) That his bháiband Dhundiráj and Ganpatráv had borrowed money from Dámodhar, with him as