Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of G. F. Fischer v. *Kamala Naicker, Zemindar of Ammanaiknoor, from the Sudder Dewanny Adawlut of Madras; delivered 7th March*, 1860.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THIS was a suit in the Civil Court of Madura, to recover damages from the Respondent for the breach of an agreement. Judgment passed in that Court for the Appellant, and this judgment was reversed in the Sudder Adawlut. The present appeal is brought for the purpose of procuring a reversal of that decree.

The facts on which the case arise are in substance these:—On the 25th October, 1846, the agreement in question was entered into between the Respondent on the one hand, and Narisahma Chettyar on the other, who is thus described in the commencement of it: "a dealer in silk thread, an agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad." Narisahma was in truth acting as Fischer's (the Appellant's) agent, whose residence was at Salem, and he was at the time absent on circuit as described.

The agreement is set out page 40 of the Joint Appendix.

On the day of the execution of this instrument the

Respondent also executed a bond, and a conditional mortgage of a village attached to his Zemindaree, for a loan of 1,000 rupees from Narisahma, which were then advanced, and were to be repaid on the 1st November following; this was to meet one of the debts enumerated in the preceding agreement. In this transaction also Narisahma was acting as, and was described in the instrument to be, "the agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad."

The Appellant did not return by the 1st November, nor until some days after the 9th, on which day, in violation, as the Appellant alleges, of the agreement to which he claims to have been the principal party, the Respondent executed a lease of the Zemindaree to one Mr. Fondclair.

This led to proceedings in which Narisahma was made the Plaintiff, for the purpose of enforcing the performance of the agreement. These proceedings failed, and the lease to Fondclair was supported; whereupon the Appellant determined to institute the present action for damages, and Narisahma being dead, it was thought desirable for him to institute it in his own name; but the original agreement having provided that the lease should be made to Narisahma, and he having been the ostensible party to the previous proceedings, the following assignment was procured from his son, Condiah Chettyar (see Appendix 4, No. 12). The action and appeal then followed, which have been already mentioned.

The decree of the Sudder Adawlut did not pass on the merits, nor on any point raised in the Court below; but it having been objected that the suit disclosed a case of champerty, the Court resolved to entertain the objection; because, as they say, they thought themselves responsible for upholding the law in its integrity: they confined the addresses of the Pleaders on either side to that one question, and decided the case against the present Appellant on that point only.

Their Lordships are clearly of opinion that the decree of the Sudder Adawlut in this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the law which the Court was administering, those acts which in the English law are

denominated either maintenance or champerty, and are punishable as offences, partly by the common law, and partly by statute, are forbidden ; and also, if so forbidden, whether the point was in this case so raised by the pleadings or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing, that although it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognizance *motu proprio* of any objection, manifestly apparent on the face of the proceeding, which showed that it was against morality or public policy ; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation or answer by counter-evidence, it is highly inconvenient, as well as contrary to the Ordinance which regulates the practice of the Court, and may lead to the most direct injustice, to enter into the inquiry, if the issue has not been presented by the pleadings, or the points recorded for proof. But assuming that in the present case the Court properly instituted the inquiry, their Lordships do not agree with them in the conclusion to which they conducted it.

The Court seem very properly to have considered that the champerty, or, more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law : it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the substance of the transaction, and not merely the language of the instruments. Now here it is clear that the Appellant was the real party to the original agreement, and the person really interested in its performance ; he was to advance the loan ; the profits that were expected to result from the loan were to be his ; he might have intervened in the first instance, and conducted the litigation, which first ensued, in his own name. Narisahma was but an agent, contracting for the Appellant in his own name, but avowedly as agent only, not undertaking to borrow from the Appellant the money, and then lend it to

the Respondent, but to procure for him the loan of it from the Appellant. All this was perfectly consistent with his being put forward as the ostensible party, with the full knowledge of the Respondent. This was the substance of the contract, and the Court should have treated the assignment from Condiah Chettyar as merely an unnecessary precaution, unwisely adopted perhaps, and furnishing an argument for an objector, yet not really altering the quality of the transaction, nor affecting that point on which the whole question of maintenance depended, which was this—Was the Appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest, and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment? If this had been borne in mind, their Lordships think that the Court would have arrived at a different conclusion from that which they in fact came to.

Here, therefore, their Lordships would have stopped, simply recommending that the judgment should be reversed; but in the commencement of the argument it was arranged, with the consent of the Counsel on both sides, that if their Lordships should be of opinion that the decision of the Court below could not be sustained on the grounds on which it had been based, they should proceed to consider the whole case on its merits, and finally dispose of it—a course by which it was probable that much litigation and expense might be saved to the parties.

Their Lordships have, therefore, examined the facts of this case as they appeared before the Civil Court of Madura. As it is indisputable that a lease of the Zemindaree has not been granted to the Appellant or his agent Narisahma, it is clear that the Appellant ought to recover if there was ever a binding contract between the parties to grant one, unless the non-performance of that contract be in any way justifiable. The first of these must be ascertained by an examination of the agreement of the 25th October, 1846, of the circumstances attending its execution, and of the remaining facts of the case. The instrument commences with a recital, that the Respondent was under an obligation to pay his creditors the sum of 19,035 rupees 2 annas

7 pice, made up of items, of which an enumeration follows, and this enumeration shows that the money was wanted without the least loss of time, that the pressure on him was urgent. It then recites a promise from Narisahma to procure the amount from the Appellant on his return to Madura, and then it promises to grant the lease; but only "in the event of Narisahma getting the said sum accordingly." It then proceeds to stipulate for a number of payments to be made, things to be done, and conditions to be observed by the lessee, after the lease granted, and during the continuance of the term; and it concludes thus: "As the gentleman aforesaid (the Appellant) is not here at present, I shall, on his arrival, execute a document in detail on stamped cadjan in the manner dictated by him."

On the face of the instrument, it is obviously a contract incomplete in itself and conditional; nothing in it binds the Respondent to the granting of the lease, unless the money were procured for him from the Appellant on his return to Madura, and it is clear also that nothing in it binds the Respondent to advance the money, when he should return. Further, it is obvious that no time being specified for this return, the parties must either by some collateral agreement have fixed a day for that return, or must be taken to have contemplated, what the law would imply from their language, a return within a reasonable time, all the circumstances considered. For the Respondent setting out his urgent necessities, showing the pressure that was on him, and professedly borrowing the money, not to meet future casual or uncertain expenses, but to liquidate the debts which occasioned the pressure then upon him, it would be highly unreasonable to suppose that a return after any indefinite period, however long, could have been in the contemplation of the parties. And this conclusion is strengthened by the circumstance that there is no evidence of any previous authority from the Appellant constituting Narisahma his agent to make the contract; indeed, the instrument itself shows that he was not bound, that it was uncertain whether he would on his return adopt and ratify the act of Narisahma; and the conclusion is therefore irresistible, that the Respondent was bound to wait only for that ratification and

performance until the Appellant's return on a specified day, or a return within a reasonable time.

The Respondent contends that the time was fixed by a collateral parol contract, and limited to the 1st of November, or to eight days from the 25th of October; the Appellant, that the return was to be within a reasonable time, that he did return within such reasonable time, and forthwith ratified the act of his agent, but that the Respondent had in the meantime put it out of his power to fulfil the contract, by granting the lease to Fondclair. The undisputed facts of the case are these.

On the 25th of October, the date of the agreement in question, the Respondent executed the mortgage and bond to Narisahma, as already stated. This appears to their Lordships to have been substantially part of the principal transaction, and to be most material on the point now under consideration; it was a loan of 1,000 rupees to meet one of the demands specified in the agreement, which may be presumed to have been peculiarly pressing, and the 1,000 rupees are stipulated to be repaid on the 1st November, in default of which the mortgage of a single village was to take effect. Their Lordships think there is every reason for presuming that the repayment was intended to be made out of the 19,000 rupees to be advanced by the Appellant on his return to Madura; and if that be so, it is clear that his return was contemplated to take place on or before that day.

The next fact is that, on the 9th or 10th November, the lease was executed to Fondclair; and the remaining fact is the return of the Appellant on the 13th November, as their Lordships understand the evidence; this would be nineteen days after the execution of the agreement.

There is a good deal of parol evidence to the effect either that a period of eight days, or that the

looking at all the circumstances which appear on the face of the two documents, the first of which discloses the nature of the debts due from the Respondent, which were mostly judgment debts, or debts on which the execution was pending, or for which warrants had issued, and the second that a portion of the money contracted for was advanced at once, and to be repaid on the 1st November, that it was understood by both parties that a reasonable time for the Appellant's return would be within a few days, and that the delay of nineteen days was unreasonable. Such a delay would probably defeat the whole purpose of the loan; and there is not the slightest evidence that either by reason of distance, difficulty of conveyance, or the necessary or usual business of the circuit, a delay of nineteen days could have been considered probable.

On this ground their Lordships are prepared to recommend to Her Majesty that the Appeal be dismissed; but as they do this on wholly different grounds from those relied on by the Court below, that the dismissal should be without costs.