

JUDGES OF THE HIGH COURT.

(1ST JANUARY—31ST DECEMBER 1912.)

CHIEF JUSTICES.

The Hon'ble Sir CHARLES ARNOLD WHITE, *Kt.* (Bar.-at-Law)
(*On leave from 15th July to 18th October 1912.*)

The Hon'ble Sir RALPH SILLERY BENSON, *Kt.*, M.A., LL.B.
(Bar.-at-Law), I.C.S. (*Offg. Chief Justice from
15th July to 19th October 1912.*)

PUISNE JUDGES.

The Hon'ble Sir RALPH SILLERY BENSON, *Kt.*, M.A., LL.B.
(Bar.-at-Law), I.C.S. (*Till 15th July and from 18th
October 1912.*)

The Hon'ble Sir JOHN EDWARD POWER WALLIS, *Kt.*, M.A.
(Bar.-at-Law).

The Hon'ble Mr. LESLIE CREERY MILLER, I.C.S. (*Joined on
the 9th January 1912.*)

The Hon'ble Sir C. SANKARAN NAIR, B.A., B.L., *Kt.*, C.I.E.

The Hon'ble Mr. ABDUR RAHIM, M.A. (Bar.-at-Law).

The Hon'ble Mr. P. R. SUNDARA AIYAR, B.A., B.L.

The Hon'ble Mr. WILLIAM BOCK AYLING, I.C.S. (*On
furlough from 12th November 1912.*)

The Hon'ble Mr. C. G. SPENCER. (*Offg. up to 9th January
1912.*)

The Hon'ble Mr. C. F. NAPIER. (*Offg. from 15th July to 18th
October 1912.*)

The Hon'ble Mr. J. FRANCIS DU PRE OLDFIELD, I.C.S.
(*Offg. from 27th November 1912.*)

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(iv)

TEMPORARY ADDITIONAL JUDGES.

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The Hon'ble Mr. T. SADASIVA AIYAR, B.A., M.L., Diwan Bahadur. (*From 12th February 1912.*)

ADVOCATES-GENERAL.

The Hon'ble Mr. P. S. SIVASWAMI AIYAR, B.A., B.L., *up to 27th February 1912.*

The Hon'ble Mr. C. F. NAPIER. (*Ag. from 27th February to 15th July 1912.*)

The Hon'ble Mr. J. L. ROSARIO. (*Ag. from 15th July to 21st October 1912.*)

The Hon'ble Mr. FREDERIC HUGH MACKENZIE CORBET (Bar-at-Law). (*From 21st October 1912.*)

(1912) I.L.R., 35 MAD.

TABLE OF CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

	PAGE
In the matter of Krishnasami Aiyar	543
Shamu Patter v. Abdul Kadir Ravuthan	807
Vasudeva Mudaliar v. Sadagopa Mudaliar	191

FULL BENCH.

Chinnu Pillai v. Kalimuthu Chetti	47
Narayanan Chetty v. Muthiah Servai	63
Syed Ajam Sahib v. Ananthanarayana Aiyar	95
Tuljaram Row v. Alagappa Chettiar	1
Visweswara Sarma v. Nair	567

ORIGINAL CIVIL.

Mallikarjuna Dugget v. Secretary of State for India	21
Thiruvengadathamiah v. Mungiah	26
Ranganisiki Ammal v. Ramenuja Aiyangar	728

APPELLATE CIVIL.

Abdul Khadir v. Ahammad Shaiwa Ravuthar	670
Ankinedu v. Subbiah	744
Arimuthu Chetty v. Vyapuripandaram	588
Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa	124
Bayya Naidu v. Paradesi Naidu	219

	PAGE
Bayya Sao v. Narasinga Mahapatro	209
Bhogaraju Venkatrama Jogiraju v. Addepalli Seshayya	560
Chidambaram Chetty v. Karuppan Chetty	678
Chinnasami Pillai v. Kunju Pillai	152
akir Nynar Muhamed Rowther v. Kandasawmy Kulathu Vandan	120
Gopalasami Ayyar v. Subramania Sastri	636
Govindasami Pillai v. Dakshinamurthi Poosari	92
Hanumanthaiyan v. Meenatchi Naidu	183
Kalliani Amma v. Govinda Menon	648
Kandasami Asari v. Somaskanda Ela Nidhi, Ltd.	177
Kota Subbaya Gupta Garu v. The Secretary of State for India	555
Kovvuri Basivi Reddi v. Tallapragada Nagamma	39
Krishnasami Chettiar v. Ramasami Chettiar	44
Kunyl Parkum Puthukkayi Kottayi Kanaran v. Varanakot Illoth Ganapathi Nambudri	168
Kuttayan v. Mammanna Ravuthan	681
Mahalakshammam v. Sriman Madhwa Sidhanta Oonahini Nidhi, Ltd.	642
Mahamed Kasim Sahib v. Panchapakesa Chetti	578
Maharaja of Bobbili v. Zamindar of Chundi	108
Muthia Chetty v. Sinna Velliam Chetty	626
Muthurakkoo Thevan v. Orr	618
Nalain Padmanabham v. Sait Badrinadh Sarda	582
Nanjappa Chettiar v. Ganapathi Gounden	598
Parthasarathy Naicken v. Lakshmana Naicker	231
Ponnusami Nadar v. Letchmanan Chettiar	659
Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty	75
Raja Ramachandra Appa Row v. Secretary of State for India	197
Rajah Venugopal Bahadur v. Kadirveluswami Naicker	743
Rajai Tirumal Raju v. Pandla Muthial Naidu	114
Ramaiyar v. Saminatha Ayyar	726
Raman Namboodri v. Achuta Pishurodi	42
Ramu Aiyar v. Palaniappa Chetty	35
Ramsay & Co. v. The Official Assignee of Madras	712
Sanka Krishnamurthi v. The Bank of Burma	692
Seshadri Aiyangar v. Ranga Bhattar	631
Shaik Mohideen Sahib v. Official Assignee of Madras	142
Sheik Ibrahim Tharagan v. Rama Aiyar	685
Sreepada Venkataramanna v. Sreepada Ramalakshamma	592
Sree Raja Venkata Narasimha Naidu v. Mayya	139
Sreevadhu Yerranna v. Donkira Kannamma	704
Subbarayalu Chetti v. Kamalavallithayaramma	147
Subramanian Chetty v. Muthia Chetty	639
Sundaramayya v. Sitamma	628
Thandayuthapani Kangiar v. Ragunatha Kangiar	239
The Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju.	162
Unni Koya v. Umra	622
Vedapuratti v. Koppan Nair	708
Vibudapriya Thirthaswamy v. Esoof Sahib	28

ORIGINAL CRIMINAL.

	PAGE
King-Emperor v. Nilakanta	247
Venkateswara Sastri, <i>In re</i>	789

APPELLATE CRIMINAL.

Golla Hanumappa v. Emperor	243
Kali Mudaly, <i>In re</i>	701
Mahomed Ismail Rowther, <i>Re</i>	596
Marigowda v. Srinivasa Rangachar	594
Muthukumaraswami Pillai v. King-Emperor	397
Sellamuthu Servaigaran v. Pallamuthu Karuppan	186
Velu Nattan, <i>Re</i>	606

TABLE OF CASES CITED IN THIS VOLUME.

A

	PAGE
Abdul Karim v. King-Emperor. (1904) 1A.L.J., 110	481, 520
Abdul Karim v. Salimun. (1900) I.L.R., 27 Calc., 190	619
Abdula v. Chekkootti. (1910) 20 M.L.J., 368	652, 654
Abdulla v. Mammod. (1903) I.L.R., 26 Mad., 156	586
Abdus Subhan v. Korban Ali. (1908) I.L.R., 35 Calc., 294	683
Achutha Varrier v. Chappanni Kurup. Second Appeal No. 1351 of 1909 (unreported)	89
Adaikkalam Chetti v. Marimuthu. (1889) I.L.R., 22 Mad., 326	687, 689
Adakkalam v. Theethan. (1899) I.L.R., 12 Mad., 505	70
Adhar Chandra Dass v. Lal Mohun Das. (1897) I.L.R., 24 Calc., 778	623, 624
Agra Bank v. Cripps. (1885) I.L.R., 8 Mad., 455	683, 688
Aimadar Mandal v. Makhan Lal Day. (1906) I.L.R., 33 Calc., 1015	237
Aiyyagari Venkataramayya v. Aiyyagari Ramayya. (1902) I.L.R., 25 Mad., 690 at pp. 709, 718	48, 50, 53, 54, 55, 56, 59, 60
Aiyathurai Ravuthan v. Santhu Meera Ravuthan. (1908) I.L.R., 31 Mad., 252	42
Ajodhya Roy v. Hardwar Roy. (1909) 9 C.L.J., 485	48, 57
Alagappa Chetti v. Vellian Chetti. (1895) I.L.R., 18 Mad., 33	689, 690
Ali Muhammad v. Lalta Bakhsh. (1878) I.L.R., 1 All., 655	120
Aliyamma v. Kunhammed. (1910) 20 M.L.J., 946	565
Amanat Bibi v. Imdad Husain. (1888) 15 I.A., 106	223
Ambrose v. Kerrison. (1851) 10 C.B., 776	738
Ammu v. Ramakrishna Sastri. (1879) I.L.R., 2 Mad., 228	234, 236
Anakaran Kasmi v. Saidamadath Avulla. (1878) I.L.R., 2 Mad., 79	117
Ananda Chandra Sen v. Parbati Nath Sen. (1906) 4 C.L.J., 198	656
Angamuthu Pillai v. Kolandavelu Pillai. (1900) I.L.R., 23 Mad., 190	689
Annamalai v. Rangasami. (1883) I.L.R., 6 Mad., 365	672
Annamalai v. Subramanyan. (1892) I.L.R., 15 Mad., 298	727, 728
Annamalalai Chetty v. Murugesu Chetty. (1903) I.L.R., 26 Mad., 544	180
Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee. (1871) 14 M.I.A., 101	232, 238
Appasamy Pillai v. Somaesundara Mudaliar. (1903) I.L.R., 26 Mad., 437.	4, 6, 9, 17
Appovier v. Rama Subba Aiyar. (1866) 11 M.I.A., 75	59, 241
Arakel Kunhi Kuttyali v. Imbichi Ammah. (1871) 6 M.H.C.R., 416	173, 176
Ardesir Bejonji Surti v. Syed Sirdar Ali Khan. (1909) I.L.R., 33 Bom., 610	98
Arumugam Chetti v. Raja Jagaveera Rama Venkateswara Ettappa. (1905) I.L.R., 28 Mad., 444	135

	PAGE
Arumugam Chetti v. Raja Venkateswara Ettappa. L.P.A. Nos. 35 to 61 of 1905 (unreported)	135
Arunachala v. Vythialinga. (1883) I.L.R., 6 Mad., 27	688, 689, 690
Arunachalam Chetty v. Meyyappa Chetty. (1898) I.L.R., 21 Mad., 91 ...	229, 230
Ata-ullah v. Azim-ullah. (1890) I.L.R., 12 All., 494	683
Atlas Assurance Company, Limited, v. Ahmedbhoy Habibbhoy. (1910) I.L.R., 34 Bom., 1	4, 10, 19
Atwood and Robbin's Case. (1787) 1 Leach Cr. L., 464	438, 501
Aveline v. Whisson. (1842) 61 R.R., 662	103

B

Baboo Hurdey Narain Sahu v. Pundit Baboo Rooder Perakash Misser. (1883) 11 I.A., 26 at p. 27	50
Babu Lal v. Ishri Prasad Narain Singh. (1878) I.L.R., 2 All., 582 at p. 585	225
Baikunt Nath Chakrabarti v. Hara Lal Pal Chowdhury. (1911) 13 C.L.J., 234	687
Bajrangi Singh v. Manokarnika Bakhsh Singh. (1908) I.L.R., 30 All., 1 ...	182
Balaram v. Chiloji. (1905) I.L.R., 29 Bom., 368	21
Balbir Singh v. The Secretary of State for India in Council. (1900) I.L.R., 22 All., 96	32
Balobind Das v. Narain Lal. (1893) I.L.R., 15 All., 339 at pp. 348, 353. Balkrishna Moreswar Kunte v. The Municipality of Mahad. (1886) I.L.R., 10 Bom., 32	51, 61, 62
Ballard v. Dyson. (1808) 9 R.R., 770	689
Balaram Ramkissen v. Bai Pannabai. (1911) I.L.R., 35 Bom., 213 at p. 218	32
Balusami Pandithar v. Narayana Rao. (1897) I.L.R., 20 Mad., 342 at p. 348	4
Balwantrao v. Ramkrishna. (1901) 3 Bom. L.R., 682	160
Banchbaram Majumdar v. Adyanath Bhattacharjee. (1909) I.L.R., 36 Calc., 936	181
Bangarayya Garu v. Jagannatha Raju Garu. (1910) M.W.N., 485 (S.C.), Second Appeal No. 879 of 1904 (unreported)	167
Bank of England v. Vagliano Brothers. (1891) L.R.A.C., 107	69, 70, 72
Bank of New South Wales v. O'Connor. (1889) 14 A.C., 273 at p. 284 ...	498
Barber Maran v. Ramana Goundan. (1897) I.L.R., 20 Mad., 461	46
Barton v. Taylor. (1886) L.R., 11 A.C., 187	687, 688, 691
Bashyakarl Naidu v. Gundapaneni Subbanna. (1904) I.L.R., 27 Mad., 4 ...	633
Beatty v. Cullingworth. (1896) 60 J.P., 740	140, 141
Behari Lal Shaha v. Jagodish Chunder Shaha. (1904) I.L.R., 31 Calc., 798	520
Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee. (1879) I L.R., 4 Calc., 327	584, 58 6
Beni v. Puram Das. (1905) I.L.R., 27 All., 190	233
Bessela v. Stern. (1877) 2 Com. Pleas. Div., 265	98, 101
Bhavanishankar v. Timmanna. (1906) I.L.R., 30 Bom., 508	412
Bhawani Koer v. Mathura Prasad. (1908) 7 C.L.J., 1 at p. 31	632
Bhikanbhai v. Hiratal. (1900) I.L.R., 24 Bom., 622	646
Rholanath Khettry v. Kartick Kissen Das Khettry. (1907) I.L.R., 34 Calc., 372	586
Bhujendro Bhnsan Chatterjee v. Trigunanath Mookerjee. (1882) I.L.R., 8 Calc., 761	48, 57
	719

	PAGE
Bhulai Singh v. Emperor. (1910) 11 Cr. L.J., 117; S.C., 5 J.C., 357; S.C., 130; C. 7	408
Bhyah Ram Singh v. Bhyah Ugur Singh. (1870) 13 M.L.A., 373 at p. 392 ...	161
Bibi Jawahir Kumari v. Chatterput Singh. (1905) 2 C.L.J., 343	97, 107
Bijoy Gopal Mukerji v. Krishna Mahishi Debi. (1907) I.L.R., 34 Calc., 329 ...	181
Boja Sellappa Reddy v. Vridhachala Reddy. (1907) I.L.R., 30 Mad., 35. ...	558
Bradshaw v. Beard. (1862) 12 C.B.R. (N.S.), 344	738
Briggs v. Calverly. (1800) 8 T.R., 629	213
Brindaban Chandra Shaha v. Sureswar Shaha Paramanick. (1909) 10 C.L.J., 283	594
Brojonath Koondoo Chowdry v. Khelnt Chunder Ghose. (1871) 14 M.L.A., 144	233, 238
Brown v. Kempton. (1850) 19 L.J.C.P., 169	718
Brown v. Hawkes. (1891) 2 Q.B.D., 718	603
Brown v. McLachlan. (1872) 4 P.C., 543	498
Bryan v. White. (1850) 2 Rob., 315 at p. 317	610, 614, 615
Bryant Powis & Bryant v. Quebec Bank. (1893) A.C., 170	698
Burdett v. Spilsbury. (1843) 10 Cl. & Fin., 340	610, 614, 616
Buta v. Municipal Committee of Lahore. (1902) I.L.R., 29 Calc., 854 ...	91
Byari v. Puttanna. (1891) I.L.R., 14 Mad., 38	120

C

Casement v. Fulton. (1845) 3 M.L.A., 395	610, 614
Chandra Sekhar Kar v. Nafar Chandra Kundu. (1906) 4 C.L.J., 555	738
Chappan v. Moidin Kutti. (1899) I.L.R., 22 Mad., 68	4, 13
Chaudhri Mehdi Hasan v. Muhammad Hasan. (1906) I.L.R., 28 All., 439 at p. 448	131
Chidambaram Chettiar v. Gauri Nachiar. (1879) I.L.R., 2 Mad., 83	242
Chidambaram Pillai v. Emperor. (1909) I.L.R., 32 Mad., 3	326, 328, 329
Chidambara Patter v. Ramasamy Patter. (1904) I.L.R., 27 Mad., 67	175
Chidambara Rao v. The Secretary of State for India. (1903) I.L.R., 26 Mad., 66	199
Chinnasami Mudali v. Arumuga Goundan. (1904) I.L.R., 27 Mad., 432	9, 11, 14, 17
Chinnaswami Padayachi v. Arayambal. (1910) 20 M.L.J., 228	97, 101
Chinnayya Rawutan v. Chidambaram Chetti. (1878) I.L.R., 2 Mad., 212 ...	117
Churaman Sahu v. Gopi Sahu. (1910) I.L.R., 37 Calc., 1	629, 630
Clark v. Alexander. (1894) I.L.R., 21 Calc., 200 at p. 203	590
Clarke v. Bradlaugh. (1881) 8 Q.B.D., 63	591
Cleaver v. Mutual Reserve Fund Life Association. (1892) 1 Q.B., 147. ...	165, 167
Colonial Sugar Refining Company v. Irving. (1905) A.C., 369	680
Commercial Bank of India, Limited v. Sabja Sahab. (1901) I.L.R., 24 Mad., 252	2, 5, 8, 19
Commercial Bank of Tasmania v. Jones. (1893) A.C., 313	647
Cooch v. Goodman. (1842) 11 L.J.Q.B., 225	103
Cotterell v. Stratton. (1872) 8 Ch., 295	46

D

Dadan Gazi v. Emperor. (1906) I.L.R., 33 Calc., 1023	447
Dalal Kunwar v. Ambika Partap Singh. (1903) I.L.R., 25 All., 266	738
Dalsukhram v. Kalidas. (1902) I.L.R., 26 Bom., 42	145

TABLE OF CASES CITED.

	PAGE
Dāmodar Gopāl Dikshit v. Chintāman Bālkrishna Karve. (1893) I.L.R., 17 Bom., 42	728
Davis v. Reilly. (1898) L.R., 1 Q.B., 1	641
Dayachand Nemchand v. Hemchand Dharamchand. (1880) I.L.R., 4 Bom., 515 at p. 522	176
Deanuth Biswas v. Issur Gine. (1870) 14 W.R., 52	176
Deendyal Lal v. Jugdeep Narain Singh. (1878) I.L.R., 3 Calc., 198	48, 50, 61, 62
Defries v. Creed. (1865) 34 L.J. Ch., 607	580
Denobundhoo Chowdhry v. Kristomonee Dossee. (1877) I.L.R., 2 Calc., 152	225
Deo Nandan Pershad v. Emperor. (1906) I.L.R., 33 Calc., 640	342, 480
DeSouza v. Coles. (1868) 3 M.H.C.R., 384 at p. 387	3, 4, 5, 7, 16, 18, 19
Dinobundhu Shaw Chowdhry v. Jogmaya Dasi. (1902) L.R., 29 I.A., 9	648
Doedem Pring and another v. Pearsey. (1827) 7 B. & C., 304	32
Doorga Proshad Dass v. Sheo Proshad Pandah. (1880) 7 C.L.R., 278	93

E

Ebrahim v. Fackhrunnissa Begum. (1879) I.L.R., 4 Calc., 531	2, 3, 10, 18
Edwards v. Edwards. (1876) 2 Ch.D., 291	580
Ekambara Ayyar v. Meenatchi Ammal. (1904) I.L.R., 27 Mad., 401	706
Elahee Buksh. (1866) 5 W.R. Cr.R., 80	337, 341, 343, 348, 405, 406, 440, 442, 474, 478, 508, 521
Ellis v. Smith. (1754) 1 Ves. Jun., 11	610, 612, 613, 614, 617
Emperor v. Akbar Badoo. (1910) I.L.R., 34 Bom., 599	408
Emperor v. Baji Krishna. (1904) 6 Bom. L.R., 481	408
Emperor v. Bazid. (1905) I.L.R., 27 All., 298	190
Emperor v. Harischandra. (1908) 10 Bom. L.R., 201	740
Emperor v. Harisingh Ganpatsingh. (1910) 12 Bom. L.R., 899	407, 417, 435, 458, 537
Emperor v. Jangi Singh. (1904) I.L.R., 26 All., 194	190
Emperor v. Lakshman. (1902) I.L.R., 26 Bom., 558	188
Emperor v. Lalit Mohan Chuckerbutty. (1911) I.L.R., 38 Calc., 559	250, 342, 405, 413, 480, 511, 538
Emperor v. Narayan Raghunath Patki. (1908) I.L.R., 32 Bom., 111	408, 409, 425, 515, 541
Emperor v. Smither. (1903) I.L.R., 26 Mad., 1	405, 478, 509
Empress v. Jadab Das. (1899) 4 C.W.N., 129	535
Empress of India v. Ganraj. (1879) I.L.R., 2 All., 444	277, 406
Ex parte Mathew. (1884) L.R., 12 Q.B.D., 506	641

F

Fanindranath Banerjee v. Emperor. (1909) I.L.R., 36 Calc., 281	274, 353, 413, 432, 447, 491, 541
Farquhar v. Newbury Rural Council. (1908) 2 Ch., 586	38
Fazl Karim v. Maula Baksh. (1891) I.L.R., 18 Calc., 448	688

TABLE OF CASES CITED.

	PAGE
Filburn v. People's Palace and Aquarium Company. (1890) 25 Q.B.D., 258	709
Ford v. Kettle. (1882) L.R., 9 Q.B.D., 139	610

G

Ganga Dei v. Shiam Sundar. (1903) I.L.R., 26 All., 69	610, 616
Gangadhara v. Sivarama. (1885) I.L.R., 8 Mad., 246	185
Gathercole v. Smith. (1831) 17 Ch.D., 1	586
Gauri Shankar v. Mumtaz Ali Khan. (1879) I.L.R., 2 All., 411	587
Geyles v. Hall. (1728) 2 P.W., 377	45
Girdharee Lal v. Kantoo Lal. (1874) 22 W.R., C.R., 56; (S.C.) (1874) 1 I.A., 321; (S.C.) (1874) 14 B.L.R., 187	691
Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee. (1899) I.L.R., 26 Calc., 246	610
Gnanu Sambhanda Pandara Sannadhi v. Velu Pandaram. (1900) I.L.R., 23 Mad., 271	93
Gobind Chunder Addya v. Afzul Rabbani. (1883) I.L.R., 9 Calc., 426	225, 227
Gobind Chunder Koondoo v. Taruck Chunder Bose. (1878) I.L.R., 8 Calc., 145	225, 227
Gokuldoss Gopaldoss v. Rambux Seochand. (1884) L.R., 11 I.A., 126	646
Gooroo Doss Roy v. Issur Chunder Bose. (1874) 22 W.R., 246	621
Gopal Chandra Bose v. Surendra Nath Dutt. (1908) 12 C.W.N., 1010	639
Gopal Chunder Sreemany v. Herembo Chander Holdar. (1889) I.L.R., 16 Calc., 523	647
Gopinath Pati v. Moheshwar Pradban. (1908) I.L.R., 35 Calc., 1096	4, 9, 18
Gorakala Kanakayya v. Janardana Padhi. (1910) M.W.N., 841 at p. 844	240
Goverdhandās Gokuldās Tejpal v. The Bank of Bengal. (1891) I.L.R., 15 Bom., 48	738
Goucher v. Clayton. (1865) 34 L.J. Ch. (N.S.), 239	89
Goutiere v. Robert. (1870) 2 N.W.P., 353	602
Grand Junction Canal Company v. Petty. (1888) 21 Q.B., 273	34
Grayson v. Atkinson. (1752) 2 Ves. Sen., 454	610, 612, 613
Guddappa v. Tirkappa. (1901) I.L.R., 25 Bom., 189	230
Gunnaiyan v. Kamakchi Ayyar. (1903) I.L.R., 26 Mad., 339	706
Gundeo Singh v. Chandrikah Singh (1907) 5 C.L.J., 611 at p. 633	185
Gurlingapa v. Nandapa. (1897) I.L.R., 21 Bom., 797	50, 60
Gurupadāpā Basūpā v. Virbhadrāpā Irsangāpā. (1883) I.L.R., 7 Bom., 459	624
Guruvu v. Subbarayudu. (1890) I.L.R., 13 Mad., 366	38
Gurvappa v. Thimma. (1887) I.L.R., 10 Mad., 316	688

H

Hadley v. The London Bank of Scotland, Limited. (1865) 46 E.R., 562	71, 74
Haigh v. West. (1893) 2 Q.B., 19 at p. 29	31
Hanuman Kamat v. Hanuman Mandur. (1892) I.L.R., 19 Calc., 123	41
Hardi Narain Sahu v. Ruder Perakash Misser. (1884) I.L.R., 10 Calc., 626 at p. 636	48, 50, 54, 61, 62
Herman v. Fisher. 98 E.R., 998[(1774) 1 Cowper, 117]	717

	PAGE
Harrison v. Duke of Rutland. (1893) 1 Q.B., 142 at p. 149	33
Harrison v. Stickney. (1848) 2 H.L., 108	200
Hemangini Dasi v. Kedarnath Kundu Chowdhry. (1899) I.L.R., 16 Calc., 758	149
Hem Chunder Sanyal v. Sarnamoyi Debi. (1895) I.L.R., 22 Calc., 354 ...	721
Hickman v. Maissey. (1900) 1 Q.B., 752 at p. 755	33
Hicks v. Faulkner. (1878) 8 Q.B.D., 167 at p. 175	603
Hirji Jina v. Narran Mulji. (1875) 12 B.H.C.R., 129	19
His Highness Shrimant Mahārāj Yashvantrāy Holkar v. Dādābhāi Cursetji Ashburner. (1890) I.L.R., 14 Bom., 353	71
Holmes v. Bellingham. (1859) 29 L.J.C.P., 132 at p. 134	31
Hope Mills v. Vithaldas. (1910) 12 Bom. L.R., 730	680
Hormasji Motabhai v. Pestanji Dhanjibhai. (1888) I.L.R., 12 Bom., 422.	686
Howard v. Wilson. (1879) I.L.R., 4 Calc., 231	3, 9, 18
Hakdar Syed Bacha Sahib v. Karuppanna Pillay. Second Appeal No. 1957 of 1908 (unreported); (1911) 1 M.W.N., 69,	90
Hunooman Persand Panday v. Mussumat Babooee Muraj Koonweree. (1856) 6 M.I.A., 393	110, 112
Hunter v. Parker. (1840) 7 M. & W., 322 at p. 343	98
Hurjivan Virji v. Jamsetji Nowroji. (1885) I.L.R., 9 Bom., 63	67, 69, 70
Hurriah Chunder Chowdhry v. Kalisunderi Debi. (1883) I.L.R., 9 Calc., 482 at p. 493 [P.C.]	9, 16, 17, 18
Husainara Begum v. Rahamennessa Begum. (1911) 13 C.L.J., 3	687
I	
Ibrahim Goolam Ariff v. Saiboo. (1908) I.L.R., 35 Calc., 1 at p. 23	128, 130*
Imam-ud-din v. Liladhar. (1892) I.L.R., 14 All., 524	689, 690
Imbichi Koya v. Kakkunnat Upakki. (1878) I.L.R., 1 Mad., 391	173
Indar Kuar v. Lalta Prasad Singh. (1882) I.L.R., 4 All., 532	564
Indur Chunder Singh v. Radhakishore Ghose. (1892) I.L.R., 19 Calc., 507	697
In re A debtor, Ex parte The Debtor. (1908) L.R., 1 K.B., 344	641
In re Bai Amrit. (1884) I.L.R., 8 Bom., 380	570, 572
In re Crawford. (1874) 9 Ch. App., 752	726
In re Dhānjibhāi Kharsetji Ratnāgar. (1873) 10 Bom. H.C.R., 327	718, 724
In re Eaton & Co. Ex parte Viney. (1897) 2 Q.B., 16	718
In re Evans. (1887) 34 Ch.D., 597	698
In re Hallett's Estate. (1879) 13 Ch.D., 696	721
In re Jennings' Estate. (1885) 15 I.R., 277	647
In re Johnson (Shearman v. Robinson). (1880) 15 Ch.D., 548	698
In re Kuppan. (1909) 5 M.L.T., 355	479
In re Lake. (1901) 1 Q.B., 710	725
In re Meunier. (1894) 2 Q.B., 415	268, 339, 406
	412, 439, 481
	492, 505, 523
In re R. O. Clay & Sons. (1896) 3 Manson, 31	717
In re South American and Mexican Company. (1895) 1 Ch.D., 37	86, 88, 89, 90
In re T. Murugesu Mudaliar. (1903) 13 M.L.J., 69	740
In re Whites' Charities, Charity Commissioners v. Mayor of London. (1898) 1 Ch., 659 at p. 666	31
In the matter of Southekal Krishna Rao. (1888) I.L.R., 15 Calc., 152; (1887) L.R., 14 I.A., 154	550

	PAGE
In the matter of the petition of Kally Soondery Dabia. (1881) I.L.R., 6 Calc., 584 at p. 599	6, 17
Irish Land Commission v. Ryan. (1900) Ir.R., Vol. 2, 565 at p. 584 ...	84
Irrawaddy Flotilla Company v. Bugwandas. (1891) I.L.R., 18 Calc., 620 [P.C.]	738
Isab Mandal v. Queen-Empress. (1901) I.L.R., 28 Calc., 348	408, 540
Ishan Chandra Mitter v. Raja Ramranjan Chakrabutty. (1905) 2 C.L.J., 125	621
Ittiachan v. Velappan. (1885) I.L.R., 8 Mad., 484	691

J

Jaggivan Javherdas Seth v. Magdum Ali. (1883) I.L.R., 7 Bom., 487 ...	570
Jamadar Singh v. Serazuddin Ahamad Chaudhuri. (1908) I.L.R., 35 Calc., 979	228
Jamiruddi Masalli v. Emperor. (1902) I.L.R., 29 Calc., 782	342, 480, 511
Jangu v. Ahmadullah. (1891) I.L.R., 13 All., 419	683
Jayanti Subbiah v. Alamelu Mangamma. (1904) I.L.R., 27 Mad., 45 at p. 48	150
Jehangir Cowasji v. The Hope Mills (Limited). (1909) I.L.R., 33 Bom., 216	19
Jenkins v. Robertson. (1867) 1 H.L., Sc. & Div., 117	87
Jenkins v. Tucker. (1788) 1 H.Bl., 91	738
Jijoyamba Bai Sahiba v. Vengalakeshmi Ammal. (1910) 7 M.L.J., 117 ...	25
Jogendra Chandra Roy v. Shyam Das. (1909) I.L.R., 36 Calc., 543 ...	498
Jogeswar Narain Deo v. Ram Chund Dutt. (1896) 23 I.A., 37 at p. 44 ...	59
Johnson and Porto Novo Cundaswamy v. The Madras Railway Company. (1905) I.L.R., 28 Mad., 479	411
Johurra Bibee v. Sreegopal Misser. (1876) I.L.R., 1 Calc., 470	695
Jonmenjoy Coondoo v. Watson. (1884) 9 A.C., 561	700
Jotindra Mohan Tagore v. Bejoy Chand Mahatap. (1905) I.L.R., 32 Calc., 483	27
Joy Narain Giri v. Gurish Chunder Myti. (1879) I.L.R., 4 Calc., 434; (1878) 5 I.A., 228	241
Joykisto Cowar v. Nittyanand Nundy. (1878) I.L.R., 3 Calc., 738 ...	698
Judoonath Shaha v. Nobin Chunder Shaha. (1874) 21 W.R., 289	584

K

Kadar v. Ismail (1886) I.L.R., 9 Mad., 119	70
Kailash Mondul v. Baroda Sundari Dasi. (1897) I.L.R., 24 Calc., 711 ...	227
Kaki Subbanadri v. Muthu Rangayya. (1909) I.L.R., 32 Mad., 532	97, 98, 99, 100, 101, 105, 106
Kalian Rai v. Ram Chandar. (1902) I.L.R., 24 All., 128 at pp. 132-134 ...	155, 156, 158
Kali Amma v. Palappakara Manakal. (1910) 20 M.L.J., 347	678, 680
Kālidās Kevaldās v. Nathu Bhagvān. (1883) I.L.R., 7 Bom., 217	689
Kalidas Mullick v. Kanhaya Lal Pundit. (1885) I.L.R., 11 Calc., 121 at p. 135	129
Kallapā Bin Girmallāpā v. Venkatesh Vinayak. (1878) I.L.R., 2 Bom., 676	59
Kamakshi Ammal v. Chakrapany Chettiar. (1907) I.L.R., 30 Mad., 452...	630
Kamala Prasad v. Sital Prasad. (1901) I.L.R., 28 Calc., 339	342, 405, 412, 480, 511

	PAGE
Rameswara Pershad v. Rajkumari Ruttan Koer. (1893) I.L.R., 20 Calc., 79.	229, 230
Kandasami Mudali v. Subroya Mudali. (1902) I.L.R., 32 Mad., 478	33
Kanna Fisharody, K.P. v. Narayanan Somayajipad, P.M. (1881) I.L.R., 3 Mad., 234	688, 689, 690
Kannan v. Tenju. (1882) I.L.R., 5 Mad., 1	657
Karan Singh v. Bakar Ali Khan. (1883) I.L.R., 5 All., 1	235, 236
Karnam Venkatakrishna Pillai v. Muthialu Reddi. (1910) 26 M.L.J., 821.	140
Kashi Gir v. Jogendro Nath Ghose. (1905) I.L.R., 27 All., 136	97, 101
Katankandi Koma v. Siva Sankaran. (1910) 20 M.L.J., 134	652
Kaulesara v. Jorai Kasandhan. (1906) I.L.R., 28 All., 233	736
Keighley Maxsted & Co. v. Durant. (1901) A.C., 240	180
Khajooroonissa v. Rowshan Jehan. (1877) I.L.R., 2 Calc., 184	131
Khelat Chunder Ghose v. Bhuggobutty Churn Mookerjee. (1870) 14 W.R., 144	175
Khiarajmal v. Daim. (1905) I.L.R., 32 Calc., 206	118
Khushalchand Lalchand v. Bai Mani. (1887) I.L.R., 11 Bom., 247	733
Kindambi Ragava Chariar v. Tirumalai Assari Nallur Ragavachariar. (1903) I.L.R., 26 Mad., 113	94
King, The v. The Mayor, Aldermen, and Common Council of London. (1787) 8 T.R., 209 (100 L.R.), 96	635
King-Emperor v. Malhar. (1902) I.L.R., 26 Bom., 193	343, 412, 479, 480
King-Emperor v. Mohiuddin Sahib. (1902) I.L.R., 25 Mad., 143	348, 405, 478, 509
King-Emperor v. Nilakanta. (1912) I.L.R., 35 Mad., 249	402, 452
King-Emperor v. Shrinivasa. (1905) 7 Bom. L.R., 969	479
Kinnaird v. Trollope. (1839) 42 Ch.D., 610	46
Kirani Ahmedula v. Subabhat. (1884) I.L.R., 8 Bom., 28 at p. 30	5
Kishen Pershad Panday v. Tilukdhari Lall. (1891) I.L.R., 18 Calc., 182.	3, 9, 18
Kishen Prasad v. Har Narain Singh. (1911) 15 C.W.N., 321	688
Kissorymohun Roy v. Hursook Dass. (1889) 17 I.A., 17	602
Koroth Amman Kutti v. Perungottil Appu Nambiar. (1906) I.L.R., 29 Mad., 322	653, 654
Kottā Rāmasāmi Chetti v. Bangāri Sēshama Nāyanivāru. (1881) I.L.R., 3 Mad., 145	111
Krishna Ayyangar v. Venkatarama Ayyangar. (1906) I.L.R., 29 Mad., 115	160
Krishna Bai v. Harigovind. (1907) I.L.R., 31 Bom., 15	82
Krishna Govinda Jawadar v. Banka Behari Shaha. (1906) 13 C.W.N., 698	621
Krishnan Nambiar v. Kannan. (1898) I.L.R., 21 Mad., 8	41
Krishnasami Naidu v. Somasundaram Chettiar. (1907) I.L.R., 30 Mad., 335	37, 173
Krishna Satapasti v. Sarasvatula Sambasiya Row. (1908) I.L.R., 31 Mad., 177	37
Kristnasamy Tatacharry v. Gomatam Rangacharry. (1886) 4 M.H.C.R., 63	632
Kristo Kissor Neoghy v. Kadermoye Dossee. (1878) 2 C.L.R., 583	736
Kudatamma v. Narasimha Charyulu. (1907) 17 M.L.J., 528	629, 630
Kumarasamia Pillai v. Udayar Nadan. (1909) I.L.R., 32 Mad., 170	605
Kunhacha Umma v. Kutti Mammi Hajee. (1893) I.L.R., 16 Mad., 201	652, 653

Kunhamed v. Kntti. (1891) I.L.R., 14 Mad., 167	719
Kunhamina v. Kunhambi. (1909) I.L.R., 32 Mad., 315	652, 654
Kuppusami Chetti v. Rathnavelu Chetti. (1901) I.L.R., 24 Mad., 511	6, 17, 20
Kureemchand Gurain v. Oodung Gurain. (1866) 6 W.R., 158	158

L

Labouchere v. Tupper. (1857) 11 Moo. P.C., 198	696
Lakshminarasamma v. Jaganadham. (1882 I.L.R., 5 Mad., 291) approved.	153
Lakshminarayana Nainar v. Valliammal. (1911) I.L.R., 34 Mad., 250	113
Lakshmanaswami Naidu v. Rangamma. (1903) I.L.R., 26 Mad., 31	82
Lalla Ram Sahoy Lall v. Bibee Chowbain. (1874) 22 W.R., 287	69
Lallubhai Bapubhai v. Cassibai. (1881) I.L.R., 5 Bom., 110 at p. 121	157
Lallubhai Bapubhai v. Mankuvarbai. (1878) I.L.R., 2 Bom., 388 at p. 431	157
Land v. Land. (1874) 43 L.J., Ch. 311	697
Land Mortgage Bank v. Sudurudeen Ahmed. (1892) I.L.R., 19 Calc., 358.	71
Leggott v. Metropolitan Railway Company. (1870) L.R., 5 Ch. App. Cases, 716	627
Liquidation Estates Purchase Company v. Willoughby. (1898) A.C., 321.	647
London and North-Western Railway v. Westminster Corporation. (1902) 1 Ch. 289	31
Lovell & Christmas v. Beauchamp. (1894) A.C., 607 at p. 611	696
Lowther v. Heaver. (1889) 41 Ch.D., 248 at p. 264	107
Lutf Ali Khan v. Asgur Reza. (1890) I.L.R., 17 Calc., 455	18

M

Madhavrao v. Deonak. (1897) I.L.R., 21 Bom., 695	24
Mahabalaya Bin Parmaya v. Timaya Bin Appaya. (1875) 12 B.H.C.R., 138	59
Mahabir Pershad Singh v. Macnaghten. (1889) I.L.R., 16 Calc., 682 (P.C.) Mahabir	38, 222
Mahadar Mohanta v. Balaram Gagoi. (1908) I.L.R., 35 Calc., 413	711
Mahadeva Pandia v. Rama Narayana Pandia. (1903) 13 M.L.J., 75	164
Maharaja Manindra Chandra Nandy v. Upendra Chandra Hazra. (1909) 9 C.L.J., 343	229
Maharajah Dheraj Mahtab Chand Bahadoor v. Hurdeo Narain Sahoo. (1871) 16 W.R., 119	175
Maharajah of Jeypore v. Papayamma. (1900) I.L.R., 23 Mad., 329	5
Maharanees Ram Bunsee Koonwaree v. Maharanees Soobh Koonwaree (1867) 7 W.R., 321	734, 735
Mahomed Buksh Khan v. Hossini Bibi. (1888) I.L.R., 15 Calc., 684 at p. 702	128, 129, 130
Mahomed v. Ezekiel. (1905) 7 Bom. L.R., 772	749
Mahomed Mira Ravuth v. Savvasi Vijaya Raghunadha Gopalar. (1900) I.L.R., 23 Mad., 227	38
Mahomed Shumsool v. Shewukram. (1874) L.R., 2 I A., 7	652
Maidin Saiba v. Nāgāpā. (1883) I.L.R., 7 Bom., 96	621
Makhan Lal Pal v. Bunku Behari Ghose. (1892) I.L.R., 19 Calc., 623	98
Malhar Gopal Kulkarni v. Anandram Valad Hukumchand. (1889) P.J. 51	215
Manawar Hussain v. Jani Bijai Shankar. (1905) I.L.R., 27 All., 619	624
Manchester Brewery Company v. Coombs. (1901) 2 Ch. D., 608	107

	PAGE
Man Kuar v. Tara Singh. (1885) I.L.R., 7 All., 583	719
Maney-Kyaw Dev v. Makyin and Narayanan Chetty—Upper Burma Rulings, Vol. II, p. 570	711
Manly v. Patterson. (1881) I.L.R., 7 Calc., 339	18
Mannada Mudali v. Nallaya Gounden. (1909) I.L.R., 32 Mad., 527 at p. 529	33
Mannu Lal v. Harsukh Das. (1880) I.L.R., 3 All., 233	173
Marquis of Stafford v. Coyney. (1827) 7 B. & C., 257	33
Marudamuthu Pillai v. Rangasami Mooppan. (1901) I.L.R., 24 Mad., 401, 585, 586, 587	
Maruthamuthu Pillai v. Krishnamachariar. (1907) I.L.R., 30 Mad., 143. 2, 4, 5, 6, 8	17, 20
Mati Lal Pal v. Preo Nath Mitra. (1909) 9 C.L.J., 96	71, 74
Mayor of Portsmouth v. Smith. (1885) L.R., 10 A.C., 364	446
Minalal Shadiram v. Kharsetji. (1906) I.L.R., 30 Bom., 395	83, 90
Misir Raghobardial v. Sheo Baksh Singh. (1883) I.L.R., 9 Calc., 439	222
Mobaruk Shah v. Toofany. (1879) I.L.R., 4 Calc., 206	32
Modhu Sudan Singh v. Rooke. (1908) I.L.R., 25 Calc., 1	181
Mohabir Pershad Singh v. Macnaghten. (1889) I.L.R., 16 Calc., 682 (P.C.)	38
Mohabir Prosad Singh v. Adhikari Kunwar. (1894) I.L.R., 21 Calc., 473, 6, 19, 20	
Mohesh Lal v. Mohunt Bawan Das. (1883) L.R., 10 I.A., 62	646
Mohesh Narain v. Nawbut Pathak. (1905) 1 C.L.J., 437	656
Mohsin Ali v. Masoom Ali. (1911) 8 All. L.J., 1020	673
Moidin Kutti v. Kunhi Kutti Ali. (1902) I.L.R., 25 Mad., 721	173
Monmohan Karmokar v. Dwarka Nath Karmokar. (1910) 12 C.L.J., 312, 663, 668	
Monshee Buzloor Ruheem a. Shumsoonissa Begum. (1867) 11 M.I.A., 551 at p. 604	411
Moodoo Krishna Naik v. Tandavaray Naik. (1852) Madras Decisions, 105, 732	
Moon v. Durden. (1848) 78 R.R., 479	680
Morgan v. Jeffreys. (1910) 1 Ch., 620	749
Moro Sadāshiv v. Visaji Raghunath. (1892) I.L.R., 16 Bom., 536	679
Mowla Buksh v. Kishen Pertab Sabi. (1876) I.L.R., 1 Calc., 102	18
Muhammad Ismail v. Chatter Singh. (1881) I.L.R., 4 All., 69	225
Muhammad Mumtaz Ahmad v. Zubaida Jan. (1889) I.L.R., 11 All., 460, 128, 130	
Mullic Abdool Guffoor v. Muleka. (1884) I.L.R., 10 Calc., 1112	128
Muni Reddi v. Venkata Reddi. (1886) 3 M.H.C.R., 241	732
Munisami Naidu v. Perumal Reddi. (1900) I.L.R., 23 Mad., 616	140, 141
Munshi Bajranji Sahai v. Unit Narain Singh. (1906) 10 C.W.N., 932	118
Musiligadu v. Nannigadu. (1905) 15 M.L.J., 492	181
Mussamut Amirruneesa v. Baboo Behary Lall. (1876) 25 W.R., 529	18
Mussamut Brij Coomaree v. Ramrick Dass. (1901) 5 C.W.N., 781	4, 8, 18, 20
Muthusami v. Muthukumarasami. (1893) I.L.R., 16 Mad., 23 at p. 30	161
Muttalagiri v. Muttayyar. (1883) I.L.R., 6 Mad., 357	589, 590
Muttia v. Virammal. (1887) I.L.R., 10 Mad., 283	688
Muzaffar Ali Khan v. Parbati. (1907) I.L.R., 29 All., 640 at p. 641	120

N

Nachiappa Chettiar v. Chinnayasami Naicker. (1908) I.L.R., 29 Mad., 453	109
Nagappa v. Devu. (1891) I.L.R., 14 Mad., 55	70

	PAGE
Nagappa v. Venkat Rao. (1901) I.L.R., 24 Mad., 265	82
Nallamuttu Pillai v. Betha Naikan. (1900) I.L.R., 23 Mad., 37	234, 236, 238
Namasevayam Pillay v. Annammai Ummal. (1869) 4 M.H.C.R., 339	732, 733
Nānābhāi Ganpatrāv Dhairāvān v. Janārdhan Vāsudev. (1888) I.L.R., 12 Bom., 110	734
Nand Lal v. Hanuman Das. (1904) I.L.R., 26 All., 368	97, 98, 101
Narayana Ayyar v. Venkatramana Ayyar. (1902) I.L.R., 25 Mad., 220	195
Narayanasaami Reddi v. Osuru Reddi. (1902) I.L.R., 25 Mad., 548	738
Narayana Sah v. Parasurama Sah. (1909) C.C.C.A. No. 1 (unreported).	101
Natesa Gramani v. Venkatarama Reddi. (1907) I.L.R., 30 Mad., 511	136, 137, 227
Natia Bapiraju v. Puran Achuta Rajujee. (1910) M.W.N., 549	585
Neaverson v. Peterborough Rural Council. (1902) 1 Ch., 557 at p. 573	34
Netietom Damodren Nambudry v. Tayanbarry Parameshevaren Nambudry. (1869) 4 M.H.C.R., 472	173
Nilakant Banerji v. Suresh Chandra Mullick. (1886) I.L.R., 12 Calc., 414, 236	
Nil Madhub Sarkar v. Brojo Nath Singha. (1894) I.L.R., 21 Calc., 236	227
Nilmamnd Sarkar v. Boul Das. (1909) 14 C.W.N., 73	97, 100, 101
Nimbaji Tulsiram v. Vadia Venkati. (1882) I.L.R., 16 Bom., 633	590
Nocury Lall Chuckerbutty v. Brindaban Chunder Chuckerbutty. (1882) I.L.R., 8 Calc., 708	657
Norendra Nath Sircar v. Kamalbasini Dasi. (1896) I.L.R., 23 Calc., 563 at p. 571	411, 498

O

Oorhya Koor v. Rajoo Nye Sookool. (1870) 14 W.R., 208	158
Owen v. Moberly. (1900) 64 J.P., 88	410

P

Padmanabha Chettiar v. Williams. (1900) I.L.R., 23 Mad., 252	5
Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadur. (1872) 12 B.L.R., 391 (P.C.)	222
Paramasami Iyengar v. Pusala Tevan. (1910) 20 M.L.J., 142	135
Parbati v. Nannihal Singh. (1909) I.L.R., 31 All., 412 at p. 421	51, 59
Parbati Kunwar v. Chandar Pal Kunwar. (1909) I.L.R., 31 All., 457	25
Parvathi Kattilammah v. Ramachandra Ejaman. (1910) 1 M.W.N., 124, 652, 654	
Pateshri Partap Narain Singh v. Rudra Narain Singh. (1904) I.L.R., 28 All., 628	690
Pattatheruvath Pathumma v. Mannamkunniiyil Abdulla Haji. (1908) I.L.R., 31 Mad., 228	652, 654
Patumma v. Idivi Beari. (1903) 13 M.L.J., 265	623
Periakaruppa Pillai v. The Manager of the Lessees of the Sivaganga Zamindari. (1908) I.L.R., 31 Mad., 22	140, 141
Pichuvayengar v. Oliver. (1903) I.L.R., 26 Mad., 260	141
Piercy v. Fynney. (1887) L.R., 12 Eq., 69	687
Pingala Lakshmiopathi v. Bommireddipalli Chalamayya. (1907) I.L.R., 30 Mad., 434	708
Pittapur Raja v. Buchi Sitayya. (1885) I.L.R., 8 Mad., 219	219, 227
Poole v. Huskinson. (1843) 63 R.R., 782	33
Prabhakarbhut v. Vishwambhar Pandit. (1884) I.L.R., 8 Bom., 313	569, 570
	573, 575

xx

TABLE OF CASES CITED.

	PAGE
Pranjivan Govardhan Das v. Bajji. (1880) I.L.R., 4 Bom., 34	71, 74
Prannath Roy Chowdry v. Rookea Begum. (1859) 7 M.L.A., 323	235, 238
Premji Ludha v. Dossu Doon Gersey. (1886) I.L.R., 10 Bom., 358	145
Prohlad Teor v. Kedar Nath Bose. (1898) I.L.R., 25 Calo., 302	821
Purmanand Das Jiwandas v. Dharsey Virji. (1886) I.L.R., 10 Bom., 101.	69, 70
Purna Chandra Mandal v. Radha Nath Dass. (1906) I.L.R., 33 Calo., 867.	624
Purnamal Chund v. Venkata Subbarayalu. (1897) I.L.R., 20 Mad., 486	647
Q	
Quartz Hill Gold Mining Company v. Eyre. (1883) 11 Q.B.D., 674	603, 604, 605
Queen v. Avery. (1845) 1 Cox. C.C., 206	504
Queen, The v. Coll. (1889) 24 L. R. Ir., 522	520
Queen v. Dowling. (1848) 7 St. Tr. (N.S.), 381	413
Queen v. Lilleyman. (1896) 2 Q.B., 167	520
Queen, The v. Mohesh Biswas. (1873) 19 W.R. Cr. R., 16	348, 350, 406
Queen v. Nawab Jan. (1867) 8 W.R. Cr. R., 19	413, 476, 519
Queen v. Nidheeram Bagdee. (1872) 18 W.R. Cr. R. 45	521
Queen v. Nanhoo and four others. (1868) 9 W.R. Cr. R., 28	476
Queen v. Sadhu Mundul. (1874) 21 W.R. Cr. R., 69	476
Queen, The v. Stubbs. (1855) 25 L.J.M.C., 16; Dearsly C.C., 555 (See Reg.)	342, 476, 510
Queen, The v. The Leeds and Bradford Railway Company. (1852) 21 L.J.M.C. (N.S.), 193	518
Queen-Empress v. Arumuga. (1889) I.L.R., 12 Mad., 196	411, 439, 483
Queen-Empress v. Babu Lal. (1884) I.L.R., 6 All., 509 (F.B.)	504, 521
Queen-Empress v. Baldeo. (1886) I.L.R., 8 All., 509	681
Queen-Empress v. Bastiano Bin Alexander Silva. (1891) I.L.R., 15 Bom., 514	405, 478, 509
Queen-Empress v. Bepin Biswas. (1884) I.L.R., 10 Calo., 970	440, 490, 534
Queen-Empress v. Bhairab Chunder Chuckerbutty. (1898) 2 C.W.N., 702.	348, 348
Queen-Empress v. Bharmappa. (1889) I.L.R., 12 Bom., 123	702
Queen-Empress v. Chagan Dayaram. (1890) I.L.R., 14 Bom., 331	271, 350, 406
Queen-Empress v. Doodhar Singh. (1900) I.L.R., 27 Calo., 144	413, 431, 443, 458, 518
Queen-Empress v. Gobardhan. (1887) I.L.R., 9 All., 528	443, 447
Queen-Empress v. Imdad Khan. (1886) I.L.R., 8 All., 120	405
Queen-Empress v. Jabanulla. (1896) I.L.R., 23 Calo., 975	337, 342, 412
Queen-Empress v. Jagrup. (1885) I.L.R., 7 All., 646	512, 513
Queen-Empress v. Krishnabhat. (1886) I.L.R., 10 Bom., 319	405, 479, 511
Queen-Empress v. Kunjan Menon and Sankunni. (1891) 1 M.L.J., 397	289, 343, 411
Queen-Empress v. Maganlal and Mohilal. (1890) I.L.R., 14 Bom., 115	412, 424, 481, 511
Queen-Empress v. Murphy. (1887) I.L.R., 9 All., 663	348
Queen-Empress v. O'Hara. (1890) I.L.R., 17 Calo., 642	247
Queen-Empress v. Ram Saran. (1886) I.L.R., 8 All., 306	277, 406, 534
	348, 406, 479
	405, 479, 524
	337, 343, 406
	412, 479, 512, 513
	607
	482, 469
	348, 406, 412
	480, 511

Queen-Empress v. Rayapadayachi. (1896) I.L.R., 19 Mad., 240	187, 188, 190
Queen-Empress v. Tribhovan Maneckchand. (1885) I.L.R., 9 Bom., 131.	273, 407, 413
	435, 458, 537

R

R. v. Atwood. (see Atwood Robbin's case <i>infra</i>)	501
R. v. Dimes. (1911) 76 J.P., 47	522
R. v. Ellsom. (1911) 76 J.P., 38	412, 442, 521, 522
R. v. Mellor. (1833) Vide Roscoe Cr. Ev., Ed. XIII, p. 108	503
R. v. R. (1891) I.L.R., 14 Mad., 88	2, 4, 8, 16, 17, 19
R. v. Salt. (1843) Vide Roscoe Cr. Ev., Ed. XIII, p. 108	503
R. v. Saunders. (1842) Vide Roscoe Cr. Ev., Ed. XIII, p. 108	503
R. v. Smith and Davis. (1784) 1 Leach Cr.L., IV, Edn., 479 (note)	501
R. v. Wells. (1829) 1 M. & M., 326	438, 504
Radha Pershad Singh v. Mussamut Talook Raj Koor. (1873) 20 W.R., 38.	564
Radha Proshad Wasti v. Esuf. (1881) I.L.R., 7 Calo., 414	680
Raghunath Lalman v. Nathu Hirji Bhat. (1895) I.L.R., 19 Bom., 626	585, 586
Raghunathji Tarachand v. The Bank of Bombay. (1910) I.L.R., 34 Bom., 72	694, 696
Rahimbhoy Hibibhoy v. Turner. (1890) 18 I.A., 1	14
Rairu Nayar v. Moidin. (1890) I.L.R., 13 Mad., 39	120
Rai Sham Kissen v. Damar Kumari Debi. (1906) 11 C.W.N., 440	673, 677
Rajamma v. Ramakrishnayya. (1906) I.L.R., 29 Mad., 121	164, 167
Raja Muthu Ramalinga Setupati v. Perianayagam Pillai. (1874) 1 I.A., 209	23
Raj Chander Roy v. Shama Soondari Debi. (1879) I.L.R., 4 Calo., 583	602
Raj Lukhee Dabee v. Gokool Chunder Chowdhry. (1869) 13 M.L.A., 269.	564
Raja of Kalahasti v. Achigadu. (1907) I.L.R., 30 Mad., 454	100
Rajani Kumar Dass v. Gaur Kishore Shaha. (1908) I.L.R., 35 Calo., 101.	118
Raja of Venkatagiri v. Narayana Reddi. (1894) I.L.R., 17 Mad., 456	65, 67, 68, 69, 71, 72
Raja Saraneni Venkata Papayya Rao v. Secretary of State for India in Council. (1903) I.L.R., 26 Mad., 51	200
Rajendranath Ghose v. Taragini Dasi. (1905) I.C.L.J., 248	227
Rajib Panda v. Lakhan Sindh Mahapatra. (1900) I.L.R., 27 Calo., 11	498
Raju Babu v. Krishnarav Ramachandra. (1878) I.L.R., 2 Bom., 273 at p. 285	74
Rama Ayyan v. Srinivasa Patter. (1896) I.L.R., 19 Mad., 230	662, 667
Ramachandra v. Narasimhacharya. (1900) I.L.R., 24 Bom., 251	4
Ramachandra v. Narayanasami. (1887) I.L.R., 10 Mad., 229	140
Ramachandra Rayaguru v. Modhu Padhi. (1898) I.L.R., 21 Mad., 326	195
Ramaier v. Dorasami Aiyar. L.P.A. No. 5 of 1900 (unreported)	19
Ramakrishna v. Namasivaya. (1884) I.L.R., 7 Mad., 295	688
Ramakrishna Reddy v. Panaya Goundan. (1899) 9 M.L.J., 51	637
Ramakrishna Sadashiv v. Chothmal. (1889) I.L.R., 13 Bom., 348	647
Raman v. The Secretary of State for India. (1901) 11 M.L.J., 315	23, 24
Ramanathan Chettiar v. Subramania Sastrial. (1903) I.L.R., 26 Mad., 179	589
Ramasami v. Muniyandi. (1910) I.L.R., 20 M.L.J., 709	680

	PAGE
Ramasami Ayyar v. Vengidusami Ayyar. (1899) I.L.R., 22 Mad., 113 ...	629, 630
Ramasami Chetti v. Manikka Mudali. (1899) 9 M.L.J., 155 ...	680
Ramasami Naik v. Ramasami Chetti. (1907) I.L.R., 30 Mad., 255 ...	565, 566
Ramasami Pattar v. Chinuan Asari. (1901) I.L.B., 24 Mad., 449 ...	749
Ramaswami Ayyar v. Muthusamy Ayyar. (1907) I.L.R., 30 Mad., 12 ...	638
Ramaswami Ayyar v. Vythinatha Ayyar. (1903) I.L.R., 28 Mad., 760 ...	229, 230
Ramaswami Gounden v. Emperor. (1904) I.L.R., 27 Mad., 271 ...	270, 344, 406 412, 424, 441, 478, 509 513, 522
Ramayya v. Venkataratnam. (1894) I.L.R., 17 Mad., 122 ...	689
Ramji v. Bai Parvati. (1903) I.L.R., 27 Bom., 91 ...	610
Ram Koomar Sein v. Prosunno Coomar Sein. (1864) W.R., 375 ...	235, 236
Ram Lal v. Masum Ali Khan. (1903) I.L.R., 25 All., 35 ...	234, 238
Ramlal Thakursidās v. Lakshmichand Muniram et al. (1861) 1 Bom. H.C.R., appx. 51 ...	695
Ram Lochun Sircar v. Hogg. (1868) 10 W.R., 430 ...	580
Ram Sonji v. Krishnaji. (1902) I.L.R., 26 Bom., 312 ...	214
Ramsebuk v. Ramlall Koondoo. (1881) I.L.R., 6 Calc., 815 ...	689, 690
Rangasami v. Krishnayyan. (1891) I.L.R., 14 Mad., 408 ...	48, 49, 50, 52, 53, 55, 57, 58, 59, 60, 62 610, 616
Ranu v. Laxmanrao. (1909) I.L.R., 33 Bom., 44 ...	603
Ratcliffe v. Evans. (1892) 2 Q.B.D., 524 ...	70
Reference under Stamp Act, section 46. (1894) I.L.R., 17 Mad., 280 ...	412
Reg. v. Cooper. (1877) 41 J.P., 470 ...	481
Reg. v. Cramp. (1880) 14 Cox. C.C., 390 ...	31
Reg. v. East Mark. (1848) 75 R.R., 653 ...	489, 508, 521
Reg. v. Farler. (1837) 8 C. & P., 106 ...	476
Reg. v. Fattechand Vastāchand et al. (1868) 5 Bom. H.C.R. C.C., 85 ...	268, 270, 338, 412, 424, 439, 481, 504, 533
Reg. v. Gallagher. (1883) 15 Cox. C.C., 291 ...	343, 348
Reg. v. Imamvalad Bāban. (1867) 3 Bom. H.C.R. C.C., 59 ...	504
Reg. v. Jellyman. (1838) 8 C. & P., 604 ...	271, 350, 406, 412, 418, 431, 443, 477, 485, 486, 518
Reg. v. Malápabin Kapaná. (1874) 11 Bom. H.C.R., 196 ...	188
Reg. v. Martin. (1881) 8 Q.B.D., 54 ...	526, 413, 439, 502
Reg. v. Mullins. (1848) 7 St. Tr. (N.S.), 1111, Appx. A, S.C., 3 Cox. C.C., 526 ...	270, 344, 405 411, 424, 441, 477, 509
Reg. v. Ramasami Padayachi. (1878) I.L.R., 1 Mad., 394 ...	503
Reg. v. Sparks. (1858) 1 F. & F., 388 ...	411, 439, 483, 504, 521
Reg. v. Stubbs. (1855) 25 L.J.M.C., 16 S.C., Dears C.C., 555 (See Queen) ...	268, 337, 344, 412, 424, 439, 478, 504, 510, 522, 523
Regina v. Boyes. (1861) { 1 B. and S., 311 9 Cox. C.C., 32 } ...	81
Regina v. East Mart Tything. (1848) 17 L.J.Q.B., 177 ...	188
Regina v. Hicklin. (1868) 3 Q.B., 360 ...	595
Regina v. Jeans. (1844) 1 Carrington and Kirman, 539 ...	

	PAGE
Regina v. Lovett. (1839) 9 C. & P., 462 at p. 466 ...	188
Regina v. Pratt. (1855) 99 R.R., 792 ...	33
Rex v. Abrahams. (1904) 2 K.B., 859 ...	498
Rex v. Addis. (1834) 6 C. & P., 388 ...	439, 521
Rex v. Beauchamp. (1909) 73 J.P., 223 ...	505
Rex v. Clarke. (1817) 2 Stark, 241 ...	520
Rex v. Dixon. (1814) M. & S., 11, 15 ...	188
Rex v. Everest. (1909) 73 J.P., 269 ...	340, 343, 482,
Rex v. Harborne. (1835) 2 A. and E., 540 ...	510
Rex v. Hastings. (1835) 7 C. & P., 152 ...	505
Rex v. Jones. (1809) 2 Camp., 131 ...	504
Rex v. Moores. (1836) 7 C. & P., 270 ...	504
Rex v. Neal. (1835) 7 C. & P., 168 ...	412, 439
Rex v. Noakes. (1832) 5 C. & P., 326 ...	439
Rex v. Osborne. (1905) I.K.B., 551 ...	438, 521
Rex v. Owens. (1828) I.M.C.C., 205 ...	442, 520
Rex v. Tate. (1908) 2 K.B., 680 ...	595
Rex v. The Inhabitants of Leake. (1833) 39 R.R., 521 at p. 529 ...	268, 339, 345, 412, 424, 439, 452, 482, 504, 506, 523
Rex v. Warren. (1909) 73 J.P., 359 ...	34
Rex v. Webb. (1834) 6 C. & P., 595 ...	482, 505
Rex v. Wells. (1829) 1 M. & M., 326 ...	439, 521
Rex v. Wilkes. (1836) 7 C. & P., 272 ...	438, 504
Reyelle Jogayya v. Venkataratnamma. (1910) 20 M.L.J., 412 ...	348, 412, 521
Roberts v. Phillips { (1855) 4 E. & B., 450 ... 24 L.J.N.S., Q.B., 171 at pp. 174 and 175 ... }	110
Robinson v. Canadian Pacific Railway Company. (1892) A.C., 481 ...	610, 614, 615
Roy Radha Kissen v. Nauratan Lall. (1907) 6 C.L.J., 490 ...	498
Run Bahadur Singh v. Lucho Koer. (1885) I.L.R., 11 Calc., 301 ...	565
Rupabai v. Audimulam. (1888) I.L.R., 11 Mad., 345 ...	226
Rustam v. King-Emperor. (1910) 7 A.L.J., 468 ...	185
Rutechputty Dutt Iha v. Rajunder Narain Rai. (1839) 2 M.I.A., 133 at pp. 154-158 ...	274, 353, 408, 413, 447, 491, 541

S

Sabbapathi Chetti v. Narayanasami Chetti. (1902) I.L.R., 25 Mad., 555.	2, 4, 20
Sadagopa Chariar v. Krishnamoorthy Rao. (1907) I.L.R., 30 Mad., 185...	33
Sadagopachariar v. Rama Rao. (1903) I.L.R., 26 Mad., 376 ...	33
Sadsya Pillai v. Amurtha Chari. (1910) 1 M.W.N., 741 ...	173
Sahasranama Iyer v. The Secretary of State for India. S.A. No. 201 of 1904 (unreported) ...	558
Sakharam Mahadev Dange v. Hari Krishna Dange. (1882) I.L.R., 6 Bom., 118 ...	240, 242
Sakrābhai v. Magaulal. (1902), I.L.R., 26 Bom., 206 ...	695
Saminathiyar v. Saminathiyar. (1868) 4 M.H.C.R., 153 ...	97
Sami Pillai v. Krishnasami Chetti. (1898) I.L.R., 21 Mad., 417 ...	623, 624

	PAGE
<i>Sandhu Taraganar v. Hussain Sahib.</i> (1905) I.L.R., 28 Mad., 87 ...	37
<i>Sangili v. Mookan.</i> (1893) I.L.R., 16 Mad., 350 at p. 353 ...	242
<i>Sarat Chandra Bannerjee v. Bhupendra Nath Bosa.</i> (1898) I.L.R., 25 Cal., 103 at p. 108 ...	112
<i>Sardhari Lal v. Ambika Pershad.</i> (1888) I.L.R., 15 Cal., 521; S.C., 15 I.A., 123 ...	37, 172
<i>Satis Chandra Das Bose v. Queen-Empress.</i> (1900) I.L.R., 27 Cal., 172.	247
<i>Satyendra Nath Bose v. Anil Chandra Ghosh.</i> (1908) 14 C.W.N., 65 ...	69, 72
<i>Savarimuthu v. Aithurusu Rowthar.</i> (1902) I.L.R., 25 Mad., 103 ...	727
<i>Seal v. Claridge.</i> (1881) L.R., 7 Q.B.D., 516 at p. 519 ...	610
<i>Seetharama v. Venkatakrishna.</i> (1893) I.L.R., 16 Mad., 94 ...	185
<i>Seetharama Raju v. Bayanna Pantulu.</i> (1894) I.L.R., 17 Mad., 275 ...	98
<i>Sellappa Chettiar v. Velayutha Tevan.</i> (1907) I.L.R., 30 Mad., 498 ...	227
<i>Seshachalam Chetti v. Rajam Chetty.</i> (1898) 8 M.L.J., 203 ...	672, 673
<i>Seshadri Ayyangar v. Nataraja Ayyar.</i> (1898) I.L.R., 21 Mad., 179 ...	632, 633, 634
<i>Seshagiri Row v. Nawab Askur Jung Aftab Dowla.</i> (1903) I.L.R., 26 Mad., 502 ...	2, 3, 6, 20
<i>Seshan Patter v. Veera Raghvan Patter.</i> (1909) I.L.R., 32 Mad., 284 ...	689
<i>Shamrathi Singh v. Kishan Prasad.</i> (1907), I.L.R., 29 All., 311 ...	690
<i>Shamu Patter v. Abdul Kadir Ravuthan.</i> (1908) I.L.R., 31 Mad., 215 ...	609
<i>Sharp v. Jackson.</i> (1899) A.C., 419 ...	717, 725
<i>Sharpe v. Birch.</i> (1881) L.R., 8 Q.B.D., 111 at p. 114 ...	610
<i>Sheo Karan Singh v. Maharaja Prabhu Narain Singh.</i> (1909) I.L.R., 31 All., 276 ...	96, 97, 98, 100, 101
<i>Sheosagar Singh v. Sitaram Singh.</i> (1897) I.L.R., 24 Cal., 616 (P.C.) ...	220
<i>Sheo Shankar Gir v. Ram Shewak Chowdhri.</i> (1897) I.L.R., 24 Cal., 77 at p. 82 ...	181
<i>Sheoamber Sahoo v. Bhowanadeen Kulwar.</i> (1870) 2 N.W.P.H.C.R., 223.	234, 236
<i>Shivapa v. Dod Nagaya.</i> (1887) I.L.R., 11 Bom., 114 at p. 118 ...	172, 176
<i>Shridhar v. Hirālāl Vithal.</i> (1888) I.L.R., 12 Bom., 480 ...	732, 736
<i>Shri Raghunadah v. Sri Brozo Kishoro.</i> (1876) 3 I.A., 154 ...	114
<i>Shunmuga Mudaly v. Palnati Kuppu Chetty.</i> (1902) I.L.R., 25 Mad., 613.	141
<i>Singheeram Poddar v. Bhagbat Chunder Nundi.</i> (1910) 11 C.L.J., 543 ...	97, 107
<i>Smith and Davis's case.</i> (1784) 7, 1 Leach Cr. L., 479 (note) ...	501
<i>Somasundaram Chetti v. Administrator-General.</i> (1876) I.L.R., 1 Mad., 148.	8, 19
<i>Sonbāi, widow of Fazul Habibhāi v. Ahmedbāi Habibhāi.</i> (1872) 9 Bom. H.C.R., 398 at p. 406 ...	4, 7, 13, 16, 19
<i>Soonabia v. Tribhovan Das.</i> (1908) 10 Bom. L.R., 337 ...	3, 19
<i>Sreemutty Soorjeemoney Dossee v. Denobundo. Mullick.</i> (1856) 6 M.I.A., 526 ...	652
<i>Sri Gopal v. Pirthi Singh.</i> (1898) I.L.R., 20 All., 110 ...	227, 229
<i>Sri Gopal v. Pirthi Singh.</i> (1902) I.L.R., 24 All., 429 ...	221, 228
<i>Srimantu Raja Yarlagadda Durga Prasad Nayudu v. Srimantu Raja Yarlagadda Mallikarjuna Prasad Nayudu.</i> (1901) I.L.R., 24 Mad., 358.	4, 6, 8, 17, 19
<i>Srimut Rajah Moottoo Vijaya Raghunatha Bodha Gooroo Sawmy Periya Odaya Tevar v. Katama Natchiar, Zemindar of Shivagunga.</i> (1866) 11 M.I.A., 50 ...	221
<i>Srinivasa Charlu v. Venkataraju.</i> (1907) 17 M.L.J., 218 ...	65, 68, 71, 72

	PAGE
<i>Srinivasa Pillai v. Vasudeva Mudaliar.</i> Appeal No. 164 of 1902 (unreported) ...	238
<i>Srinivasa Swami Aiyangar v. Athmarama Aiyar.</i> (1909) I.L.R., 32 Mad., 281 ...	117
<i>Stainback v. Read & Co.</i> (1854) 62 Amer. Decns. 648 ...	700
<i>Steel v. Prickett.</i> (1819) 20 R.R., 717 ...	32
<i>Subbakka v. Maruppakkala.</i> (1892) I.L.R., 15 Mad., 157 ...	637, 638
<i>Subbammal v. Avudaiyammal.</i> (1907) I.L.R., 30 Mad., 3 ...	585
<i>Subba Ran v. Devu Shetti.</i> (1895) I.L.R., 18 Mad., 126 ...	117, 118
<i>Subbaraya Mudali v. Manika Mudali.</i> (1896) I.L.R., 19 Mad., 345 ...	240, 243
<i>Subbayya v. Maddulethiah.</i> (1907) 17 M.L.J., 469 ...	70
<i>Subbarayudu v. Narasimha Rao.</i> Second Appeal No. 973 of 1904 (unreported) ...	66, 69, 71
<i>Subramania Chetty v. Mahalingasami Sivan.</i> (1910) I.L.R., 33 Mad., 41 ...	558
<i>Subramania Iyer v. Rungappa Reddi.</i> (1910) I.L.R., 33 Mad., 232 ...	737
<i>Subrahmanya Ayyar v. King-Emperor.</i> (1902) I.L.R., 25 Mad., 61 A.C.	409, 516
<i>Subrahmanya Ayyar v. Poovan.</i> (1904) I.L.R., 27 Mad., 28 ...	627
<i>Suppa Pillai v. Nagayasami Thumbichi Naicker.</i> (1908) I.L.R., 31 Mad., 19.	136, 137
<i>Suraj Bansi Koer v. Sheo Persad Singh.</i> (1880) I.L.R., 5 Cal., 148 at p. 166.	48, 51, 54, 56, 61
<i>Surajmal v. Manekchand.</i> (1904) 6 Bom. L.R., 704 ...	602
<i>Surat Lal Chowdhry v. Emperor.</i> (1902) I.L.R., 29 Cal., 211 ...	702, 703
<i>Suraya v. Lakshminarasamma.</i> (1882) I.L.R., 5 Mad., 291 ...	155, 156, 158
<i>Surjiram Marwari v. Barhamdeo Persad.</i> (1906) 1 C.L.J., 337 ...	227
<i>Sutton v. Sutton.</i> (1886) 26 S.C., 33 ...	669
<i>Syed Bacha Sahib v. Karuppanna Pillai.</i> Second Appeal No. 1957 of 1908 (unreported) ...	90
<i>Syed Muzhar Husein v. Bodha Bibi.</i> (1894) 22 I.A., 1 ...	14

T

<i>Tammirazu Ramazogi v. Pantina Narsiah.</i> (1871) 6 M.H.C.R., 301 ...	94
<i>Tani Bhagwan v. Hari Bin Bhawani.</i> (1887) Printed Judgment, 315 ...	215
<i>Taunton v. Pepler.</i> (1820) 56 E.R., 1055 ...	103
<i>Thakdi Hajji v. Budrudin Saib.</i> (1906) I.L.R., 29 Mad., 208 ...	602
<i>Thambi v. Avayambal.</i> S.A. No. 413 of 1908 (unreported) ...	95
<i>The Bank of Bengal v. Macleod.</i> (1849) 5 M.I.A., 1 ...	700
<i>The Belloairn.</i> (1885) 10 P.D., 161 ...	80
<i>The Justices of the Peace for Calcutta v. The Oriental Gas Company.</i> (1872) 8 Beng. L.R., 433 ...	3, 7, 9, 13, 15, 16, 18
<i>The Official Assignee of Madras v. Smith.</i> (1909) I.L.R., 32 Mad., 68 ...	716, 721
<i>The Ydan.</i> (1899) P. 236 ...	680
<i>Thithi Pakuradasu v. Bheemudu.</i> (1903) I.L.R., 26 Mad., 430 ...	586
<i>Thomson v. Moore.</i> (1889) 23 Ir. Rep., 599 ...	88
<i>Thorne v. Cann.</i> (1895) A.C., 11 ...	646
<i>Timmaji Amma v. Javvajee Subbaraju.</i> (1910) 20 M.L.J., 204 ...	565
<i>Toolsee Money Dassoe v. Sudavi Dassoe.</i> (1899) I.L.R., 26 Cal., 361 ...	4, 9, 18
<i>Towler v. Chatterton.</i> (1829) Bing., 258 at p. 264 ...	681

Tulsha v. Gopal Rai. (1884) I.L.R., 6 All., 832	...	...	...	...	PAGE
Turner v. Walsh. (1881) 8 A.C., 636	...	...	...	...	736
Turner v. Wight. (1841) 49 E.R., 252	...	...	...	...	31
Turof Sahib v. Esuf Sahib. (1907) I.L.R., 30 Mad., 322	...	...	...	...	71, 74
	...	...	...	...	95, 97, 98,
	...	...	...	...	99, 100, 101, 105, 108

U

Udaram Sitaram v. Ranu Panduji and Venku Panduji. (1874) 11 B.H.C.R., 76 at p. 81	...	...	...	...	59
Ulfatunnissa Elahijan Bibi v. Hosain Khan. (1893) I.L.R., 9 Calc., 520 at p. 525	...	...	...	...	78, 74
Unide Rajaba Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo. (1858) 7 M.I.A., 128 at p. 142	...	...	...	...	706
Unni v. Kunchi Amma. (1891) I.L.R., 14 Mad., 26 at p. 28	...	...	...	...	181

V

Vadapalli Narasimham v. Dronamraju Seetharamamurthy. (1908) I.L.R., 31 Mad., 163	...	...	...	...	37, 173
Vadilal v. Shah Khushal. (1903) I.L.R., 27 Bom., 157	...	...	...	...	698
Vaghoji v. Camaji. (1905) I.L.R., 29 Bom., 249 at p. 253	...	...	...	...	4, 9, 19
Vaikuntam Ammangar v. Kallipiran Ayyangar. (1900) I.L.R., 23 Mad., 512	...	...	...	...	787
(Same parties on both the sides.) (1903) I.L.R., 26 Mad., 497	...	...	...	...	737
Vairananda Nadar v. Miyakan Rowter. (1898) I.L.R., 21 Mad., 109	...	...	...	...	99
Valasubramania Pillai v. Ramanathan Chettiar. (1909) I.L.R., 32 Mad., 421	...	...	...	...	145, 146
Vama Dava Desikar v. Murugesu Mudali. (1906) I.L.R., 29 Mad., 75	...	...	...	...	140, 141
Vanangamudi v. Ramasami. (1891) I.L.R., 14 Mad., 406	...	...	...	...	6, 19
Vasudeva Mudaliar v. Srinivasa Pillai. (1907) I.L.R., 30 Mad., 426	...	...	...	...	198, 194
Vedapurati v. Vallubha Valiya Raja. (1902) I.L.R., 25 Mad., 325	...	...	...	...	98
Veerabadrar Chetty v. Nataraja Desikar. (1905) I.L.R., 28 Mad., 28	...	...	...	...	5, 6, 8, 20
Veerana Pillai v. Muthukumara Asary. (1904) I.L.R., 27 Mad., 102	...	...	...	...	280
Veeraswamy Naicker v. Ibramesa Rowther. (1909) 19 M.L.J., 221	...	...	...	...	687
Velayuda Naicker v. Hyder Hussan Khan Sahib. (1910) I.L.R., 33 Mad., 100	...	...	...	...	46
Velayutha Chetty v. Govindasawmi Naicken. (1910) M.W.N., 687	...	...	...	...	626, 627
Venkatachala Asari v. Subramania Chetti. (1909) Second Appeal No. 682 (unreported)	...	...	...	...	237
Venkatachalapati v. Krishna. (1892) I.L.R., 13 Mad., 287	...	...	...	...	218, 227
Venkatacharyulu v. Rangacharyulu. (1891) I.L.R., 14 Mad., 316	...	...	...	...	733
Venkatagiri Raja v. Pitobana. (1886) I.L.R., 9 Mad., 27	...	...	...	...	137
Venkatagopal v. Rangappa. (1884) I.L.R., 7 Mad., 365	...	...	...	...	137
Venkata Narasamma v. Seshayya. Second Appeal No. 525 of 1903 (unreported)	...	...	...	...	71
Venkata Subramania Ayyar v. Koran Kaunan Ahmod. (1908) I.L.R., 26 Mad., 19	...	...	...	...	646
Venkayya v. Raghava Charlu. (1899) I.L.R., 22 Mad., 320	...	...	...	...	673
Venketaramanya Reddi, <i>In re</i> . (1909) 6 M.L.T., 262	...	...	...	...	190
Venkoba Rao v. Muthu Aiyar. (1908) 18 M.L.J., 88	...	...	...	...	727
Vijaraghava Chariar v. Emperor. (1903) I.L.R., 26 Mad., 554	...	...	...	...	33

Vijaya Rāgava v. The Secretary of State for India. (1884) I.L.R., 7 Mad., 466	...	...	...	...	685
Virarāgavamma v. Samudrala. (1885) I.L.R., 8 Mad., 208	...	...	...	...	688
Virayya v. Hanumanta. (1891) I.L.R., 14 Mad., 459	...	...	...	...	50, 60
Vrijbhukandas v. Bai Parvati. (1908) I.L.R., 32 Bom., 26	...	...	...	...	738
Vyasacharry v. Keshavacharya. (1902) I.L.R., 25 Mad., 654 at p. 700	...	...	...	...	2, 4, 8
Vyasa Rao v. Emperor. (1911) I.M.W.N., 227	...	...	...	...	337, 345, 484, 485, 510, 620

W

Wāghelā Rājsanji v. Shekh Masludin. (1887) I.L.R., 2 Bom., 551	...	...	...	...	606
Wali Ahmed Chowdhry v. Tota Mesh Chowdhry. (1904) I.L.R., 31 Calc., 397	...	...	...	...	621
Walker v. Carleton. 97 Ill., 582	...	...	...	...	118
Walsh v. Lonsdale. (1882) 21 Ch.D., 9 at p. 14	...	...	...	...	97, 107
White v. Trustees of the British Museum. (1829) 6 Bing., 310	...	...	...	...	610, 612
Woomesh Chandra Maitra v. Barada Das Maitra. (1901) I.L.R., 28 Calc., 17	...	...	...	...	227
Wyatt v. Palmer. (1899) 2 Q.B., 106	...	...	...	...	605

Z

Zamindar of Karvetnagar v. The Trustee of Tirumalai, Tirupati, etc., Devasthanams. (1909) I.L.R., 32 Mad., 429	...	...	...	...	109
Zimble v. Abrahams. (1903) I.K.B., 577	...	...	...	...	97

GENERAL INDEX

FOR

1912.

	PAGE
ACCOMPLICE, CORROBORATION OF :—See INDIAN EVIDENCE ACT (1912) I.L.R.,	35
Mad., 247., 397	
ACTS :	
1848, 11 & 12 VICT., CAP. XXI.	
See INDIAN INSOLVENCY ACT, SEC. 24.	
1859, VIII :	
See CIVIL PROCEDURE CODE.	
1860, XLV :	
See PENAL CODE.	
1864, I :	
See REVENUE RECOVERY ACT.	
1865, V :	
See CHARTER ACT, SEC. 15.	
See RENT RECOVERY ACT.	
1865, VII :	
See WATER CESS ACT (MADRAS).	
1865, VIII (MADRAS) :	
1872, I :	
See INDIAN EVIDENCE ACT.	
1877, III :	
See REGISTRATION ACT.	
1877, XV :	
See LIMITATION ACT.	
1878, I :	
See OPIUM ACT.	
1879, XVIII :	
See LEGAL PRACTITIONERS ACT.	
1880, IX :	
See PROVINCIAL SMALL CAUSE COURTS ACT, ART. 31, SCH. II.	
1882, IV :	
See TRANSFER OF PROPERTY ACT, SEC. 55.	
1882, XIV :	
See CIVIL PROCEDURE CODE.	
1890, VIII :	
See GUARDIAN AND WARDS ACT, 31 (4)	6
1897, X :	
See GENERAL CLAUSES ACT	678
1898, V :	
See CRIMINAL PROCEDURE CODE, SECS. 21, CL. (2) AND 528, CL. (ii)	701
1899, II :	
See STAMP ACT.	
1900, I :	
See MALABAR (COMPENSATION) TENANTS IMPROVEMENT ACT	648
1908, V :	
See CIVIL PROCEDURE CODE, ORDER XXI, RULE 2	689
1909, V :	
See CIVIL PROCEDURE CODE, SEC. 48	670
1908, IX :	
See LIMITATION ACT	567, 636, 678

ADVERSE POSSESSION, WHAT TITLE AFFECTED BY—*Possession affects only title of persons entitled to possession—Adverse possession against mortgagor does not affect rights under a simple mortgage executed before adverse possession began :*

Possession adverse to the mortgagor is not adverse to and does not affect the right of a simple mortgagee not entitled to possession when the adverse possession commenced, when such mortgage was granted prior to the commencement of such possession. *Aimadar Mandal v. Makhan Lal Day*, [(1906) I.L.R., 33 Calo., 1015], followed. The interest in immoveable property which is acquired by adverse possession can only be that interest which the person entitled to immediate possession had at the time that adverse possession began. It will attach against the whole of the interest of the person so entitled to possession notwithstanding that he has subsequent to the commencement of the adverse possession alienated the whole or any part of such interest provided possession continued uninterrupted.

Parthasarathy Naicken v. Lakshmana Naicker ... (1912) I.L.R., 35 Mad., 231

AGREEMENT TO LEASE—*See REGISTRATION ACT, ss. 3, 17, 46 (1912) I.L.R., 35 Mad., 63*

ALIENATION BY MANAGER—*See HINDU LAW* ... (1912) I.L.R., 35 Mad. 177

ARMS ACT, s. 19 (c)—*Intention not necessary to constitute offence :*

An offence under section 19 (c) of the Arms Act is committed when a person enters British India with a weapon he is not lawfully entitled to possess in this country. It is not necessary that there should be any particular intention in the mind of the offender to complete the offence.

Re Mahomed Ismail Rowther ... (1912) I.L.R., 35 Mad., 596

BANKER AND CUSTOMER—*See "TRUSTEE."*

CASES—

Abdul Karim v. Salimun, [(1900) I.L.R., 27 Calo., 190], approved ... 608
Adhar Chandra Dass v. Lal Mohun Das, [(1897) I.L.R., 24 Calo., 778], not followed ... 622
Aimadar Mandal v. Makhan Lal Day, [(1906) I.L.R., 33 Calo., 1015], followed ... 231
Aiyathurai Ravuthan v. Santhu Meera Ravuthan, [(1908) I.L.R., 31 Mad., 252], followed ... 40
Aiyyagari Venkataramayya v. Aiyyagari Ramayya, [(1902) I.L.R., 25 Mad., 690], followed ... 47
Annamalai v. Subramanyan, [(1892) I.L.R., 15 Mad., 298], followed ... 727
Annamalai Chetty v. Murugesu Chetty, [(1903) I.L.R., 26 Mad., 544], referred to ... 178
Appasamy Pillai v. Somasundara Mudaliar, [(1903) I.L.R., 26 Mad., 437], dissented from ... 2
Bhavani Koer v. Mathura Prasad, [(1908) 7 C.L.J., 1 at p. 31], referred to ... 642
Chinnasami Mudali v. Arumuga Goundan, [(1904) I.L.R., 27 Mad., 432], dissented from ... 2
Oleaver v. Mutual Reserve Fund Life Association, [(1892) 1 Q.B., 147], referred to ... 162
DeSouza v. Coles, [(1868) 3 M.H.C.R., 384], commented upon ... 1
Ebrahim v. Fackhrunnissa Begum, [(1879) I.L.R., 4 Calo., 531], approved ... 1
Emperor v. Bazid, [(1905) I.L.R., 127 All., 298], referred to ... 186
Ganga Dei v. Shiam Sundar, [(1903) I.L.R., 26 All., 69], dissented from ... 608

Jirindra Nath Mukerjee v. Bejoy Gopal Mukerjee, [(1899) I.L.R., 26 Calo., 246], approved of ... 608
Gooroo Doss Roy v. Issur Chunder Bose, [(1874) 22 W.R., 246], approved of ... 618
Hanuman Kamat v. Hanuman Mandur, [(1892) I.L.R., 19 Calo., 123], followed ... 39
Hardi Narain Sahu v. Ruder Perakash Misser, [(1884) I.L.R., 10 Calo., 626], followed ... 47
Hunooman Persaud Panday v. Mussamat Babooes Munraji Koonwaree [(1858) 6 M.I.A., 393], referred to ... 108
In re A Debtor, (Ex parte The Debtor), [(1908) L.R., 1 K.B., 344], referred to ... 639
In re Meunier, [(1894) 2 Q.B., 415], approved ... 248
Jenkins v. Robertson, [(1867) 1 H.L. Sc. & Div. 117], distinguished ... 75
Joy Narain Giri v. Girish Chunder Myti, [(1878) I.L.R., 4 Calo., 434], referred to ... 239
Kali Amma v. Palappakkara Mankal, [(1910) 20 M.L.J., 347], followed ... 678
Kalian Rai v. Rama Chandar, [(1902) I.L.R., 24 All., 128], not followed ... 153
Kishen Prasad v. Har Narain Singh, [(1911) 15 C.W.N., 321], followed ... 685
Krishnan Nambiar v. Kannan, [(1898) I.L.R., 21 Mad., 8], not followed ... 39
Kumarasami Pillai v. Udayar Nadan, [(1909) I.L.R., 32 Mad., 170], followed ... 598
Lakshminarasamma v. Jagannadham, [(1882) I.L.R., 5 Mad., 291], approved ... 153
Maruthamuthu Pillai v. Krishnamachariar, [(1907) I.L.R., 30 Mad., 143], not approved ... 2
Prabhakarbhat v. Vishwambhar Pandit, [(1884) I.L.R., 8 Bom., 313], followed ... 587
Quarts Hill Gold Mining Company v. Eyre, [(1883) 11 Q.B.D., 674], referred to ... 598
Queen-Empress v. Rayapadaychi, [(1893) I.L.R., 19 Mad., 240], referred to ... 188
Ramji v. Bai Parvati, [(1903) I.L.R., 27 Bom., 91], dissented from ... 608
Ram Sanji v. Krishnaji, [(1902) I.L.R., 26 Bom., 312], followed ... 209
Rangasami v. Krishnayyan, [(1891) I.L.R., 14 Mad., 408], dissented from ... 47
Ranu v. Lazmanrao, [(1909) I.L.R., 33 Bom., 44], approved of ... 608
Reg. v. Ramasami Padayachi, [(1878) I.L.R., 1 Mad., 394], approved ... 248
Reg. v. Malapabm Kapana, [(1874) 11 B.H.C.R., 196], dissented from ... 248
Sadagopa Chariar v. Krishnamoorthy Rao, [(1907) I.L.R., 30 Mad., 185], referred to ... 28
Sakharam Mahadev Dange v. Hari Krishna Dange, [(1882) I.L.R., 6 Bom., 113], dissented from ... 239
Shamu Patter v. Abdul Kadar Ravuthan, [(1908) I.L.R., 31 Mad., 215], approved of ... 608
Subbaraya Mudali v. Manika Mudali, [(1896) I.L.R., 19 Mad., 345], followed ... 239
Turof Sahib v. Esuf Sahib, [(1907) I.L.R., 30 Mad., 322], overruled ... 95
Unni v. Kunchi Amma, [(1891) I.L.R., 14 Mad., 28 at p. 28], referred to ... 178
Veerabadran Chetty v. Nataraja Desikar, [(1905) I.L.R., 28 Mad., 28], not approved ... 2
Venkoba Rao v. Muthu Aiyar, [(1908) 18 M.L.J., 88], dissented from ... 727

CHARTER ACT, sec. 15—) ACT V OF 1865:—*See "PRESIDENCY MAGISTRATES' COURTS."*

CIVIL PROCEDURE CODE—See LETTERS PATENT.

1. —————, sec. 257 A—See RES JUDICATA.

2. ————— (ACT VIII OF 1859), sec. 246—*Judgment-debtor not served with notice not necessarily a party to an investigation under—Scope of sec. 246—Sections 278 to 282 of Act X of 1877 and Act XIV of 1882 (Civil Procedure Code), discussed :*

A judgment-debtor upon whom notice has not been served cannot be regarded as necessarily a party to an investigation under section 246 of the Code of Civil Procedure (Act VIII of 1859). A comparison of section 246 of Act VIII of 1859 with sections 278 to 282 of Acts X of 1877 and XIV of 1882 clearly lead to the conclusion that under section 246 of Act VIII of 1859 the Court could only make an order releasing the property from attachment or disallow the claim which must be one objecting to the sale of the property in execution.

Kunpil Parkum Puthukkayi Kottayi Kanaran v. Varanakot Illoth Ganapathi Wambudri (1912) I.L.R., 35 Mad., 168

3. ————— ACT XIV OF 1882, sec. 28—*Test for misjoinder—No misjoinder where claims against several defendants in respect of same matter—Limitation Act, sch. II, art. 62—Suit to recover purchase—Money where sale ab initio void governed by art. 62 :*

A suit to recover the consideration paid for a sale, which is *ab initio* void is governed by article 62 of schedule II of the Limitation Act and must be brought within three years from the date when the purchase-money was paid. *Hanuman Kamat v. Hanuman Mandur*, [(1892) I.L.R., 19 Cal., 123], followed. *Krishnan Nambiar v. Kannan*, [(1898) I.L.R., 21 Mad., 8], not followed. A purchased some land from B and paid the purchase-money. On proceeding to take possession, he was obstructed by C and he got a sale-deed from C, paying consideration for the sale. When the second sale was concluded, D undertook to get back the purchase-money from B, which was not done. A who had paid the purchase-money twice brought a suit against B, C, and D to recover from B the amount paid to him, if he should be found not to be the owner or in the alternative, if he should be the true owner, to recover from C and D the amount paid for the second sale. *Held*, that the suit was not bad for misjoinder. Section 28 of the Civil Procedure Code authorises the joinder in one suit of several defendants where the relief claimed is sought in the same matter, although the causes of action against them may be different. *Aiyathurai Ravuthan v. Santhu Meera Ravuthan*, [(1908) I.L.R., 31 Mad., 252], followed.

Kovvuri Basivi Reddi v. Tallapragada Nagamma ... (1912) I.L.R., 35 Mad., 39

4. —————, ss. 276, 280, 281, 282, 283—*Bar under s. 283 applies to parties to proceedings though subsequent to the order they become representatives of judgment-debtor—Orders under ss. 280, 281, 282 may deal with questions of titles :*

Parties to proceedings under section 278 of the Civil Procedure Code of 1882 and persons claiming through them who would be estopped by orders passed under sections 280–282 do not cease to be parties to such proceedings and to be so estopped because subsequent to such order they acquire rights which enable them to stand in the shoes of the judgment-debtor. Orders under sections 280, 281 and 282 may determine questions of title. The power of the Courts in passing such orders is not confined to determining which of the parties is in possession.

Ramu Aiyar v. Palaniappa Chetty (1912) I.L.R., 35 Mad., 35

5. —————, sec. 278—*Where decree attached, the decree-holder cannot take any steps to execute the decree :*

Section 273 of the Code of Civil Procedure prohibits the holder of a decree which has been attached in execution from applying for execution of the decree attached and any such application by him will be

infructuous as it could not be granted and will not have the effect of saving tation. The only person competent to execute will be the attaching creditor, who will be liable in damages if he allows the decree to become barred by limitation. *Adhar Chandra Dass v. Lal Mohun Dass*, [(1897) I.L.R., 24 Cal., 778], not followed.

Unni Koya v. Umma (1912) I.L.R., 35 Mad., 622

—————, sec. 295 and ss. 63, 73 of the Code (Act V of 1908)—*Realisation of assets—Transfer of decree not necessary for rateable distribution of sale-proceeds of attached property—Application for rateable distribution may be made though copy of decree not received :*

Where the same property is attached in execution of decrees by two courts of different grades, the decree-holder in the inferior court who had attached prior to realisation, may apply to the superior court for rateable distribution of the sale-proceeds of the attached property and the transfer of his decree for execution to the superior Court is not necessary to enable him to do so. Assets are realised not when the deposit is made by the purchaser, but only when the balance of the purchase-money is paid into court. An application for execution to the superior court is an essential pre-requisite of a general claim to rateable distribution. Where the Lower Court has ordered the transfer of the decree for execution to the superior court, an application after such order to the superior court before it has received a copy of the decree would be sufficient to satisfy the requirements of section 73, and to entitle the applicant to rateable distribution.

Arimuthu Chetti v. Vyapuripandaram (1912) I.L.R., 35 Mad., 588

—————, sec. 503—*Receiver appointed under section, powers of—Cannot recover from third parties whose rights date prior to his appointment :*

A receiver appointed under section 503 of the Code of Civil Procedure, in respect of any moveable or immovable property, is entitled to take possession of it from the parties to the suit, to manage it, etc. He is not entitled to recover possession from a third party, stranger to the suit whose rights date prior to his appointment. Such a receiver has no right to recover property sold before his appointment by the judgment-debtor on the ground that the sale is voidable as against the creditors on the principle embodied in section 53 of the Transfer of Property Act.

Mahamed Kasim Sahib v. Panchapakasa Chetti ... (1912) I.L.R., 35 Mad., 578

————— (ACT V OF 1908), Order 7, Rule 10—*Plaint returned for presentation to proper Court—Court to which such plaint is represented, bound to give credit for the fee levied by the Court to which the plaint was first presented :*

Where a court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper court under Order 7, Rule 10, of the Civil Procedure Code of 1908. The latter Court to which the plaint is represented is bound to give credit to the fee already levied by the former Court. This is the existing practice in this Presidency and there is nothing in the new Code of Civil Procedure in the Presidency Small Cause Courts Act or in the City Civil Courts Act to indicate that the legislature intended to interfere with such practice. *Prabhakarbhait v. Vishwambhar Pandit*, [(1884) I.L.R., 8 Bom., 313], followed.

Visweswara Sarma v. Nair (1912) I.L.R., 35 Mad., 567

—————, Order XXI Rule 2—*Assignment of decree for benefit of judgment-debtor—Execution by assignee—Civil Procedure Code (Act XIV of 1882), sec. 258 :*

A held a decree against C. It was arranged between C and B that B should advance the decree amount to C as a loan and that an assignment of the decree should be obtained in the name of B for the benefit of C.

GENERAL INDEX.

PAGE

The decree was accordingly assigned to B who applied for execution. C set up the above arrangement as a bar to execution. B contended that such arrangement amounted to an adjustment of the decree and not being certified to the court it could not be given effect to under Order XXI, Rule 2, of the Civil Procedure Code. *Held* (their Lordships differing): *Per* ABDUR RAHIM, J.—That the arrangement amounted to an adjustment of the decree and not being certified, could not be pleaded as a bar to execution. The prohibition contained in Order XXI, Rule 2, is not confined to cases where the parties to the transaction adjusting the decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor. *Per* SUNDARA AYYAR, J.—Order XXI, Rule 2, does not make uncertified adjustment invalid but merely forbids effect being given to such adjustments when it is set up as a defence to the execution of a decree by one entitled to do so. The section will not disentitle the judgment-debtor to prove facts which will show that the applicant is not the real transferee, even if the facts he relies on show that the decree has been adjusted. The prohibition regarding an uncertified adjustments will not apply where the adjustment is made with a third party.

Ponnusami Nadar v. Leitchmanan Chettiar ... (1912) I.L.R., 35 Mad., 659

sec. 48—Evasion of process of arrest is fraud within the meaning of section—Evidence Act (I of 1872), sec. 35—Admissibility of returns of serving officers—Proof of due diligence, necessity for—Whether power conferred by section 48 is discretionary—Fraud of one judgment-debtor, effect of, on execution against others:

Evasion of process of arrest is fraud within the meaning of section 48 of the Code of Civil Procedure, 1908. *Per* PHILLIPS, J.—The fraud of one of several judgment-debtors keeps the decree alive against all the judgment-debtors. *Per* SUNDARA AYYAR, J.—Returns of process-servers are admissible under section 35 of the Evidence Act as evidence of facts reported by them. Fraud at some time within 12 years prior to the date of application is sufficient under section 48 to entitle the decree-holder to apply for execution and it is not incumbent on the decree-holder to prove continuous diligence prior to such date or that, but for the fraud or force complained of, he would have realised the fruits of the decree. It is doubtful whether the language of section 48 was intended to confer on Courts a discretion to grant or refuse execution as they might think fit. The fraud of one of several judgment-debtors will keep the decree alive only against such judgment-debtor.

Abdul Khadir v. Ahammad Shaiwa Ravuthar ... (1912) I.L.R., 35 Mad., 670

COMPROMISE DECREE—See “RES JUDICATA.”

CONTRACT TO SELL—See “REGISTRATION ACT, ss. 3, 17, 40.”

CONTRACT TO ASSIGN DOCUMENT, BREACH OF—Damages awardable though no loss is proved—Measure of damages:

A, as the agent of B, took from D, a debtor of B, for the debt due, a promissory-note in favour of C. A undertook to get the note endorsed in favour of B by C. A having failed to do so for more than a year, B sued A claiming as damages the amount of the note with interest. At the settlement of issues A produced the promissory-note endorsed in favour of B.—*Held*, that B's suit was maintainable and that the endorsement after the suit was filed could not defeat B's claim. The contract to obtain the assignment not having been performed within a reasonable time the contract was broken and the right to sue accrued before the suit was brought. It could not be said that B had sustained no damage which he was entitled to recover as the note standing in the name of a third party prevented him from suing on the original obligation. A promissory-note in consideration of a pre-existing debt is only a conditional payment; and if the note remains in the hands of the original payee when it is dishonoured, the original debt revives. If however the promissory-note had been endorsed to a third party a suit on the

original debt would not be maintainable. *A debtor, In re* [(1908) L.R., 1 K.B., 344], referred to. It is not necessary that B should prove that D had become insolvent or that the money could not be recovered if a suit had been brought against D. The amount recoverable will be the amount for which the promissory-note was executed.

Subramanian Chetty v. Muthia Chetty ... (1912) I.L.R., 35 Mad., 689

CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 21, cl. (2) and 526, cl. (ii). See “PRESIDENCY MAGISTRATES' COURTS.”

ss. 154, 155, 157, 162 and 551. See “INDIAN EVIDENCE ACT” (I of 1872), ss. 25, 114, illustration (b).

See “INDIAN EVIDENCE ACT” (I of 1872), ss. 25, 114, illustration (b) 133, 157.

See “INDIAN EVIDENCE ACT” (I of 1872), ss. 25, 114, illustration (19, 133).

s. 203—Dismissal of complaint under sec. 203 without taking sworn statement of complainant:

A Presidency Magistrate may dismiss a complaint under section 203 of the Criminal Procedure Code on a police report without examining the complainant. The verification on oath of a complaint before a Magistrate is a sufficient compliance with the provisions of section 203. The omission to examine will, at the most, amount to an irregularity of the description covered by section 537, Criminal Procedure Code.

Be Velu Nattan ... (1912) I.L.R., 35 Mad., 696

s. 526, cl. 8—Application for adjournment to apply for transfer, when to be made—Hearing, commencement of in Sessions Court:

The first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused. An application for adjournment under section 526, clause 8, Criminal Procedure Code, must therefore be made before the charge is read to the accused. *Quare*—Whether a contravention of section 526, clause 8, will render the trial illegal?

In re Kali Mudaly ... (1912) I.L.R., 35 Mad., 701

DAMAGES—See “ELEPHANT.”

2.—Wrongful attachment, suit for damages for—Want of reasonable and probable cause and malice must be proved—Malice, what amounts to—Special damage, proof of—Amount of:

In a suit for damages for attachment before judgment, the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact. The provisions of section 25 of the new Code of Civil Procedure and section 491 of the old Code which empowered Courts to award compensation when the attachment was applied for on insufficient grounds, were not intended to affect the applicability of the aforesaid rule of law in regular suits brought for compensation. Malice means any improper or indirect motive, i.e., some motive other than the one which should actuate the party. No hatred or enmity is required. Where the motive for the attachment is not to defeat any intended fraud on the part of the debtor, but to enforce speedy payment, it will amount to malice. The plaintiff in such a suit must prove special damage. It is not necessary however to show pecuniary loss, or that the plaintiff was affected in a specific manner. It will be sufficient if it is shown that the allegations made against him, must damage his reputation and credit. It will be sufficient if the plaintiff must have sustained some damage such as the law takes notice of. *Quartz Hill Gold Mining Company v. Byre*, [(1883) 11 Q.B.D., 674], referred to. *Kumarasami Pillai v. Udayar Nadan*, [(1909) I.L.R., 32 Mad., 170], followed. The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount awardable as damages to the plaintiff.

Nanjappa Chettiar v. Ganapathi Gounden ... (1912) I.L.R., 35 Mad., 599

ELEPHANT, NATURE AND EXTENT OF LIABILITY FOR DAMAGE DONE BY—*An elephant belongs to a dangerous class of animals—Liability of owner and person in possession:*

It may be laid down as a rule of law that in India the elephant belongs to a dangerous class of animals. A person who keeps an animal belonging to a class that is dangerous takes the risk of any damage it may do. The absolute liability of a person for any harm done by his animal independently of any intent or negligence on his part does not depend on the manner or extent to which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed. Liability for damage done by an elephant attaches to the owner of the elephant as well as to a person in whose possession the elephant happens to be when it commits such damage.

Vedapuratti v. Koppa Nair ... (1912) I.L.R., 35 Mad., 708

EVIDENCE:—*See "REGISTRATION ACT, ss. 3, 17, 40,"*

GUARDIANS AND WARDS ACT (VIII OF 1890), sec. 31, sub-sec. (4)—*Construction of words "any person":*

The words "any person" in the last part of sub-section (4), Guardians and Wards Act (VIII of 1890), are not limited by the words "relative or friend" in the previous part of the section. The court is competent to hear a person who is not a relative or friend.

Raja Venugopal Bahadur v. Kadirveluswami Naicker ... (1912) I.L.R., 35 Mad., 743

HIGHWAY, RIGHT TO CARRY PROCESSIONS ON—*Where user of highway proved, presumption will be that the right is unrestricted—Trustees, dedication by:*

Where user as a highway, sufficient to raise a presumption of dedication has been proved, the dedication will, in the absence of evidence to the contrary, be presumed, if possible, to be unrestricted. Marching in procession on a highway is not an excessive user of the highway; and a right of unrestricted user will include the right of marching in procession on the highway. *Sadagopachariar v. Krishnamurthy Rao*, [(1907) I.L.R., 30 Mad., 185], referred to. A presumption of dedication by trustees will not be made when such dedication will contravene the purposes of the trust. The illegality of such a dedication by the trustees must be clearly proved.

Vibudapriya Thirthaswamy v. Esoof Sahib ... (1912) I.L.R., 35 Mad., 28

HINDU LAW—*Guardian of minor who is sole owner of trading firm—Liability of minor for debts contracted by agent or guardian:*

A minor member of a joint Hindu trading family is liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of section 247 of the Contract Act (IX of 1872). This rule, however, is applicable to minors who are sole owners of a business only subject to the general principles regulating the relationship between guardian and ward. In India, a guardian has no power to bind his ward by a personal covenant. Although a widow and natural guardian may, in India, carry on a family business belonging to a minor son by a manager, such guardian and not the minor is the person personally liable on contracts entered into in the course of business. Creditors of the business have no right of direct recourse against the minor; but as the guardian will be entitled to indemnity for liabilities properly incurred out of the assets of such business, creditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian. A guardian cannot invest an agent with powers larger than are reasonably proper for carrying on the business; and where as a consequence of giving such powers the guardian has become involved in liability for the fraud of the agent, the guardian has no right of indemnity against the assets of the minor nor are the creditors entitled to claim such right through the guardian.

Sanka Krishnamurthi v. The Bank of Burma ... (1912) I.L.R., 35 Mad., 603

HINDU LAW—*Joint family—Payment to one member of joint family effect of—Right of manager of undivided family to sue on behalf of the family:*

Payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all the members or creditors if the payment is fraudulently made to one and not for the benefit of all. The manager of a joint family has, as such manager, the right to represent the family in suits. A suit by him as such manager on behalf of the joint family will be maintainable without making the other members parties to the suit. *Kishen Prasad v. Har Narain Singh*, [(1911), 15 C.W.N., 321], followed.

Sheik Ibrahim Tharagan v. Rama Aiyar ... (1912) I.L.R., 35 Mad., 685

Gift—*Gift of immovable property to daughter by father—Gift valid whether made at or after marriage:*

There is a moral obligation on a Hindu father to make a gift to his daughter on the occasion of her marriage. A gift by a father to his daughter of a small portion of ancestral immovable property is binding on the undivided family, whether such gift is made at or after the daughter's marriage.

Sundaramayya v. Sitamma ... (1912) I.L.R., 35 Mad., 628

Maintenance—*Right to maintenance of widow in undivided family enforceable against the whole family and not only against the branch to which the husband belonged:*

Where a member of an undivided family, comprising several branches dies, his widow's right to maintenance is enforceable against the whole family and not only against the branch to which her husband belonged and which took by survivorship his undivided share. A suit for partition, subsequent to the widow's suit for maintenance, will not affect her right as aforesaid.

Subbarayalu Chetti v. Kamalavallithayaramma ... (1912) I.L.R., 35 Mad., 147

Marriage of a daughter of deceased Hindu may be performed by his widow—*Reasonable marriage expenses recoverable from joint family property:*

The widow of a deceased member of an undivided Hindu family is entitled to perform the marriage of a daughter of the deceased even when the father of the deceased and the other male members of the family have not wrongly or improperly refused to perform such marriage and she is entitled to recover the reasonable expenses of such marriage out of the joint family property.

Ranganaike Ammal v. Ramanuja Aiyangar ... (1912) I.L.R., 35 Mad., 728

Partition—*Decree for partition, preliminary—Effect of appeal against such decree—Decree effects severance, which is not affected by the subsequent appeal:*

A preliminary decree directing a partition effects a severance of the joint family and the divided status is not affected by filing an appeal against such decree. Subsequent births or deaths cannot deprive any of the parties or their representatives of their shares allotted to them by such decree. *Subbaraya Mudali v. Manika Mudali*, [(1896) I.L.R., 19 Mad., 345], followed. *Sakharam Mahadev Dange v. Hari Krishna Dange*, [(1882) I.L.R., 6 Bom., 119], dissented from. *Joy Narain Giri v. Girish Chunder Myti*, [(1878) I.L.R., 4 Cal., 434], referred to. Such a decree like other decrees, if right at the time it was passed, cannot be varied by reason of events subsequently happening.

Thandayuthapani Kangiar v. Ragunatha Kangiar ... (1912) I.L.R., 35 Mad., 239

HINDU LAW, SUCCESSION—Mitakshara Law—Succession among collateral sapindas—Brother's son' in Mitakshara does not include brother's grandson—Under Mitakshara Law, test in determining priority among unenumerated heirs is not spiritual efficacy but nearness of relationship—Brother's great-grandson succeeds in preference to uncle's grandson:

The word 'sons' in the text of the Mitakshara, chapter II, section I, verse 2, section IV, verses 7 and 8, and in section V, verse 1, should not be given an extended meaning so as to include the grandsons. In enumerating therefore the heirs in the ascending line or among collaterals in the passages above stated, Vignaneswara did not mean to include in the word "sons," the grandsons as well whether of the brother, the paternal uncle or the great uncle. Such grandsons cannot claim rights of inheritance as heirs enumerated in the above texts. *Lakshminarasamma v. Jaganadham*, [(1882) I.L.R., 5 Mad., 291], approved. *Kalian Rai v. Ram Chandar*, [(1902) I.L.R., 24 All., 128], not followed. In the case of competition between sapindas not enumerated in the above texts, the nearest sapinda entitled to succeed must be determined not by considerations of superior religious efficacy but by nearness of relationship and preference should be given to the sapinda belonging to the nearer line. The great principle pervading the law of inheritance under the Mitakshara system is that the nearer line excludes the more remote. The brother's great-grandson succeeds in preference to the uncle's grandson.

Chinnasami Pillai v. Kunju Pillai ... (1912) I.L.R., 35 Mad., 152

Suit by alienee of a coparcener in family property—Time when the share is ascertained:

In Hindu Law the alienee of the interest of a coparcener is entitled to enforce his claim against the share to which the vendor was entitled at the time of the alienation. The mortgagee of a Hindu father is therefore entitled to proceed against the share of a son subsequently born in family property mortgaged by the father. *Rangasami v. Krishnayyan*, [(1891) I.L.R., 14 Mad., 408], dissented from. *Aiyiyagari Venkataramayya v. Aiyiyagari Ramayya*, [(1902) I.L.R., 25 Mad., 690], followed. *Hardi Narain Sahu v. Ruder Perkash Misser*, [(1884) I.L.R., 10 Cal., 626], followed.

Chinnu Pillai v. Kalimuthu Chetti ... (1912) I.L.R., 35 Mad., 47

2. *Undivided family—Manager, position of—Alienation by Manager—Effect of subsequent assent of coparceners:*

The manager of a joint Hindu family is not, in the exercise of his powers, the agent of the family in the strict sense of the term and consequently no ratification of his act by the other members of the coparcenary is possible. The assent of the other members of the family to an alienation by the manager is only evidence of justifiable family necessity. Where therefore it is found that there was no such necessity, such assent is no evidence for that purpose. As however the property vests in the undivided family, the manager with the assent of the other members may give a good title to an alienee even though the alienation is not for any family necessity. Such assent is not that of a principal to the acts of an agent but supplies the want of capacity on the part of the manager to alienate family property. An alienation by a manager without justifiable necessity is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety. An assent by all the members at the time of alienation without taking part in it, will pass the property. An assent by some only, though evidence of necessity will not, in the face of positive evidence of the impropriety of such alienation, suffice to pass their interests. The subsequent assent of all the members will not, apart from any question of estoppel, validate an alienation by the manager, which is void in its inception for want of justifiable necessity. *Annamalai Chetty v. Murugesu Chetty*, [(1908) I.L.R., 28 Mad., 544], referred to. *Unni v. Kunchi Amma*, [(1891) I.L.R., 14 Mad., 26 at p. 28], referred to.

Kandasami Asari v. Somaskanda Ela Nidhi, Ltd. ... (1912) I.L.R., 35 Mad., 177

HINDU LAW—Unsecured debt contracted by limited owner when binding on estate—Will bind if made after due inquiry—Proof of due inquiry—Nature of right liable to be divested by adoption—Transfer of Property Act, sec. 38:

Unsecured debts contracted by a limited owner will be binding on the estate if incurred for purposes which will justify a charge on such estate. The rule laid down in the case of *Hanoomanpersaud Panday v. Mussumat Babooe Munraj Koonveree*, [(1856) 6 M.L.A., 393], as to the sufficiency of a reasonable inquiry satisfying the creditor of the existence of reasonable necessity to validate a claim against the estate in the hands of a manager applies in the case of all loans whether secured or unsecured. Representations by the borrower are evidence of the existence of such necessity but are not generally in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan is contracted. In particular circumstances however they may suffice to shift the burden of proof to the person impeaching the debt or alienation. If section 38 of the Transfer of Property Act is deemed to enact a rule as to reasonable inquiry in excess of what is required by the Privy Council in *Hanoomanpersaud Panday v. Mussumat Babooe Munraj Koonveree* it cannot override the Hindu Law settled by the Privy Council. The estate of a person whose right is liable to be divested by an adoption is not analogous to a life estate. It is that of a limited owner who represents the estate.

Maharaja of Bobbili v. Zamindar of Chundi ... (1902) I.L.R., 35 Mad., 108

Widow and Reversioner—Debt contracted by widow for constructing buildings not binding on estate—Compromise by widow not binding on reversioners, when advantage is secured at serious risk to estate—Decree on such compromise stands on no higher footing than the compromise—Dealing by reversioner with his reversionary right during life of widow, invalid—Minor not bound by admissions of guardian not connected with management of estate—Decree on compromise cannot be assumed to direct anything forbidden by law:

Where a Hindu widow borrows money for constructing a house, which is not necessary for the management of the estate and which is situate outside the premises of the estate, the debt will not be binding on the reversion. The question whether the holder of a woman's estate will be justified in building a house so as to bind her reversioners, assuming that she could do so at all, will depend on the income of the estate and her means of repaying the debt so as not to injure the reversion. A compromise by a widow of a valid claim against the estate will not bind the reversioners when a larger amount than is due, is agreed to be paid in instalments, the whole of the larger amount however being payable on default of any instalment. An adjudication against a widow after a fair contest with respect to a matter relating to the estate represented by her, will be binding on those who succeed her as owners: but a decree passed on a compromise into which she enters will have no higher effect against her successors than a contract entered into by her. The reversioner, during the life of the female heir, has only a *spes successionis* or chance of succeeding if he survive her. Any transfer by him of such interest, is invalid. The power of a guardian is restricted to the management of the minor's property and he cannot bind the minor by admissions which have no connection with the present management of the property, especially when made without receipt of any consideration on behalf of the minor. It cannot be assumed that a Court in sanctioning a compromise and passing a decree in pursuance of it, intended to do what was unlawful. Where such a decree directs the sale of a minor's property in which the minor had only a *spes successionis* as reversioner, it must be assumed that it directed the sale only of such interest as the minor then possessed in the property, which in the eye of law, was nil.

Bhogaraju Venkatrama Jogiraju v. Addepalli Seshayya. (1912) I.L.R., 35 Mad., 560

INDIAN EVIDENCE ACT (I of 1872), ss. 25, 114, Illustr. (b), 133, 157—Criminal Procedure Code (Act V of 1898), ss. 154, 155, 157, 162 and 551—Approvers' evidence, corroboration of—Admissibility of previous statements of approvers to Police Inspector—Value of such statements as corroboration—"Legally competent to investigate," meaning of—Competency of officer of Criminal Investigation Department:

Sir ARNOLD WHITE, C.J., and AYLING, J.—It is not the law either of England or India that the evidence of an accomplice must be corroborated in material particulars before it can be acted upon. Where a Court is Judge of fact as well as of law the Court as a Judge of fact is not precluded from considering the question whether the unsupported evidence of an accomplice is true or not. A Court may be warranted in declining to draw the presumption of fact referred to in illustration (b) to section 114, Indian Evidence Act (I of 1872). Section 133, Indian Evidence Act, is the substantive enactment declaring the law whereas section 114 only lays down certain propositions intended to assist the Courts in drawing inferences of fact. Where the Court is acting in the capacity of both Judge and Jury, it must direct itself and the proper direction would be:—Consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it. *In re Meunier*, [(1894) 2 Q.B., 415], approved. *Reg. v. Ramasami Padayachi*, [(1878) I.L.R., 1 Mad., 394], approved. What are the "material particulars" referred to in the Indian Evidence Act (I of 1872), illustration (b), must depend upon the nature of the charge and the facts of the particular case. Oral testimony of independent witnesses is not necessary. SANKARAN NAIR, J. (*dissentiente*).—The Indian Evidence Act, sections 133 and 114, illustration (b), embodies the rules of English law that the presumption must first be drawn that the evidence of an accomplice is unreliable and exceptional circumstances must be proved to justify its acceptance. The question is not whether a conviction based on the uncorroborated testimony of an accomplice is legal but whether there is a presumption that such testimony cannot be accepted without corroboration. A person should not be convicted except under "very special circumstances" upon the uncorroborated testimony of an accomplice. The "special circumstances" are that the grounds on which an accomplice's evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength: that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions. In cases tried by a jury, a jury has to be advised by the Judge of what I have above referred to. The CHIEF JUSTICE and AYLING, J.—It cannot be laid down as a proposition of law that previous statements of an accomplice cannot be regarded as corroborative of evidence given by him at the trial. *Reg. v. Malapa bin Kapana* [(1874) 11 B.H.C.R., 196], dissented from. SANKARAN NAIR, J. (*dissentiente*).—A previous statement by the accomplice himself or a statement by another accomplice is not the corroboration required under the rule as to material particulars. The CHIEF JUSTICE and AYLING, J.—The words "before any authority legally competent to investigate the fact" in section 157, Indian Evidence Act, are quite general and should not be restricted to police officers and to "investigations" in the technical sense in which the word is used in the Code of Criminal Procedure. The words are competent to investigate not a case but "the fact." The words "legally competent" do not mean only competent under some express provision of law. An Inspector of the Criminal Investigation Department has power to investigate in cases to which section 160, Criminal Procedure Code, applies. As such his "local area" is the Presidency of Madras. SANKARAN NAIR, J. (*dissentiente*).—The police officers entitled to investigate an offence are the police officers referred to in the Code of Criminal Procedure, i.e., a station-house officer (sections 156, 157), an officer in charge of a police station (sections 154, 155, clause 1) and police officers superior in rank to an officer

in charge of a police station (section 551). An Inspector of the Criminal Investigation Department is not such an officer and his evidence is not admissible under section 157, Indian Evidence Act, he not being "any authority legally competent to investigate the fact" under section 157, Criminal Procedure Code. The CHIEF JUSTICE and AYLING, J.—A statement of confessional nature made to a police officer by a witness is not a confession of an accused person within the purview of section 25, Evidence Act. Section 25 lays down that such a statement cannot be used against the person making it while on his trial. SANKARAN NAIR, J. (*dissentiente*).—The statements of approvers to the Police Inspector being really confessions are inadmissible in evidence against the accused under section 25, Indian Evidence Act. A confession is not the less a confession because it is sought to be used against other persons. *Per totam curiam*.—Under section 162, Criminal Procedure Code, the written record of a statement made to a police officer in the course of an investigation cannot be used as evidence but the section does not exclude oral evidence of the statement whether the statement has been taken down in writing or not.

King-Emperor v. Nilakanta ... (1912) I.L.R., 35 Mad., 247

INDIAN EVIDENCE ACT (I OF 1872), ss. 25, 114, Illustr. (b), 133 and 157—Accomplice, corroboration of—Material particulars, what are—Admissibility of previous statements of accomplice to Inspector of Police—Section 157, "authority legally competent to investigate the fact," meaning of—Competency of officer of Criminal Investigation Department—Criminal Procedure Code (Act V of 1898), ss. 162, 154, 155, 157 and 551—Act XIV of 1908—Letters Patent, clauses 25 and 26—Scope of:

On a preliminary objection raised by the Crown with reference to the jurisdiction of the Court:—*Held* that the Letters Patent, section 26, authorises the grant of a certificate by the Advocate-General in a case tried by a Special Bench appointed under the Indian Criminal Law Amendment Act (XIV of 1908). The following five points of law were raised in the certificate of the Advocate-General in this Letters Patent Appeal, viz.:—
(1) Does the evidence of an accomplice require corroboration in material particulars before it can be acted upon; is it open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true; and does not the Indian Evidence Act (I of 1872), section 133, read with section 114 illustration (b), merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances? (2) Can the previous statements of an accomplice legally amount to corroboration of the evidence given by him at the trial? (3) Is an Inspector of the Criminal Investigation Department an authority legally competent to investigate the fact within the meaning of section 157, Indian Evidence Act (I of 1872)? (4) Is a statement of a confessional nature made by a witness to a police officer a confession of an accused person within the purview of section 25, Indian Evidence Act? (5) While statements made by a person to a police officer in the course of an investigation and taken down in writing may not (by reason of section 162, Criminal Procedure Code) be proved by the production of the writing, may such statements be proved by oral evidence? *On the first point, Held*, (by BENSON, WALLIS and MILLER, JJ.) that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true. *Per* BENSON, J.—In my opinion there is nothing in the illustration (b) to section 114 which overrides or renders nugatory the plain and explicit declaration contained in section 133 or which requires us to hold that the evidence of an accomplice must always and in all circumstances be regarded as unworthy of credit unless it is corroborated in material particulars or which requires us to hold that it is not open to the Court to act on such evidence even when the Court believes it to be perfectly true (p. 422). *Per* WALLIS, J.—Section 114 of the Indian Evidence Act authorises the Court to make certain presumptions of fact. Nine well-known maxims are there given as illustrations of the section, the second

of which is "the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars." They are all presumptions which may naturally arise but the legislature by the use of the word "may" instead of "shall" both in the body of the section and in the illustrations shows that the Court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised (p. 437). *Per* ABDUK RAHIM, J.—It is well-established law that except in circumstances of an especial nature it is the duty of the Court to raise the presumption that accomplices' evidence is unworthy of credit as against the accused persons unless it is corroborated in material particulars and the failure of the Judge to direct the jury to that effect is an error in law. It will none the less be an error in law if the trial was held without a jury and the Judge or the Magistrate misdirected himself on this point and treated an accomplice's evidence like that of any other witness (p. 483). To my mind it is quite clear from the nature of the cases cited in the illustrations that, except in the special circumstances, examples of which are attached to the section, the legislature requires that the Court should make the natural presumptions referred to in the section (p. 472). No doubt there are cases and cases and while in doubtful cases the position contended for on behalf of the Crown may well be sound there is nothing at least in the Indian Evidence Act or in reason that in other cases in which there could be no two opinions that the presumption that an accomplice is unworthy of credit unless corroborated applies in full force not being either negatived or rebutted an omission to raise the obvious presumption should not be treated as an error in law. On the other hand the illustrations to section 114 furnish an indication to the contrary (p. 473). There is no foundation whatever for the suggestion that these provisions are in any respect different from those laid down in the rulings of the Indian Courts on the subject, either since the passing of the Indian Evidence Act or before it or of the English Courts (p. 474). *Per* SUNDARA AYYAR, J.—Having regard to the condition of the case law in England it would be safe to proceed to determine the law in this country by a consideration mainly, if not solely, of the provisions of the Indian Evidence Act (p. 506). Judges are entitled to lay down a rule that although the legislature has given the Court the discretion to make a particular presumption or not according to the circumstances, the proper course for the Courts to follow is to make the presumption unless there be special occasion for not doing so. This does not deprive the Court of the right given by the legislature to exercise its discretion (p. 507). There may no doubt be circumstances in any particular case which would justify the Court in not making the presumption [in illustration (b)]. But I think it would be reasonable to hold that there must be some good reason given for not making the presumption in such a case (p. 508). I entirely agree with the statement of the law by EDGE, C.J., in *Queen-Empress v. Gobardhan*, [(1887) I.L.R., 9 All., 528], where after he points out that a jury being bound to convict on the uncorroborated evidence of an approver if they believe it a Judge cannot direct them to acquit the accused in the absence of corroborative evidence, he says: "A Judge would advise a jury that it would be unsafe to act upon, in other words to believe, the uncorroborated evidence of an accomplice as he would advise a jury not to act upon the evidence of any other witness whose evidence might from any cause be open to suspicion. But in either case he would have to tell the jury that if they believed the evidence they might legally convict the prisoner."—With this addition that it is the duty of the Judge to draw the attention of the jury to any circumstance either in favour of or against the credibility of the accomplice (p. 512). On the second point, *Held* (by BENSON, WALLIS and MILLER, JJ.) that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial. *Per* BENSON, J.—I do not think there is anything in the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in section 157, nor can it be suggested that "corroborate" is used in section 157 in a different sense from that in which it is used in illustration (b) to section 114. The former statement of an accomplice is, therefore, legally admissible to corroborate his testimony at the trial but the weight to be attached to it, or, in other words, how far it does really corroborate the evidence given at the trial must vary with the facts of each case. No hard-and-fast

rule, capable of mechanical application, can be laid down. In the great majority of cases it would, no doubt, be found to be merely the repetition of tainted evidence affording no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand, if there was evidence or even a suggestion put forward by the defence that the evidence given by the witness at the trial was the result of recent influences brought to bear upon him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before the influences relied on by the defence had been brought to bear upon him (p. 427). If it is necessary in this case to determine whether the phrase "material particulars" in illustration (b) to section 114 is to be regarded, as, in some sense, a technical expression implying corroboration by independent or untainted evidence, I am unable to go so far and to say that as a matter of law the previous statement of an accomplice can never amount to corroboration in material particulars (p. 430). If there are some circumstances in which a prior statement may amount to sufficient corroboration we cannot say as a matter of law that a prior statement can never be corroboration in material particulars though no doubt in the great majority of cases it will be found that the prior statements do not add anything to the credibility of the evidence given at the trial. . . . How far a prior statement does corroborate evidence given at the trial is a matter to be determined by the jury or where there is no jury by the Judge (p. 431). *Per* WALLIS, J.—Previous statements admissible as corroboration under section 157 of the Indian Evidence Act may or may not amount to sufficient corroboration and whether they will be so or not depends on the facts and circumstances of the particular case (p. 441). Taken by itself the previous statement may of course be as tainted and untrustworthy as the evidence in the box and not supply any real corroboration; but on the other hand the circumstances in which it was made may afford strong corroboration of its truthfulness apart from the credibility of the accomplice (p. 442). *Per* MILLER, J.—I see danger and not safety in ruling out as inadmissible in the case of accomplice witnesses any tests of credibility which are available in the case of other witnesses whether the test applied tends to confirm or to discredit the evidence (p. 454). *Per* SUNDARA AYYAR, J.—The previous statement of an accomplice cannot legally amount to corroboration within the meaning of illustration (b) to section 114 of the Indian Evidence Act. The question whether it is admissible at all as corroborative evidence under section 157 for any other purpose is not free from doubt. It is possible to hold that it is admissible for proving his consistency and as disproving a suggestion that it was recently concocted by him. But I am inclined to think that it would be dangerous to admit it even for this limited purpose of proving his consistency. To do so would lead to the danger of its being relied on to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence of corroboration. The safer rule in my opinion would be to hold that section 114, illustration (b), requires the rejection of the previous statement altogether (p. 524). On the third point, *Held* (by BENSON, WALLIS and MILLER, JJ.) that an Inspector of the Criminal Investigation Department is an authority legally competent to investigate the fact within the meaning of section 157, Indian Evidence Act. *Per* BENSON, J.—I do not think that the words "investigate the fact" in section 157 of the Indian Evidence Act should be construed in a narrow sense so as to restrict competence to the police officer who under Chapter XIV of the Criminal Procedure Code is charged with the investigation of an offence (p. 433). *Per* WALLIS, J.—Sections 156 and 157 deal with the corroboration of witnesses as to relevant facts and reading the two sections together, I think section 157 should be read thus, as if the words in brackets were there, "in order to corroborate the evidence of a witness (as to a relevant fact) any former statement made by the witness as to the same fact before any authority competent to investigate the fact may be proved (p. 443)." The Presidency may well be held to be the "local area" to which the seven Inspectors in the department on whom the work of investigation must necessarily fall are appointed (p. 444). I am inclined to think that the word "investigate" in section 157 of the Indian Evidence Act cannot be read as limited to investigation

under the Code of Criminal Procedure, that the Inspector had been brought down from Madras specially to investigate the murder of Mr. Ashe and that he was not only legally competent but under a duty to investigate and in the course of such investigation to record the statements now in question (p. 445). *Per* ABDUR RAHIM, J.—One would not in my opinion be justified in construing section 157 in a loose general sense having regard to the fact that it permits a statement made in the absence of a party to a proceeding which he had no means of testing to be used in evidence against him. Such departure from the ordinary rule relating to judicial evidence must be confined within the strictest limits (p. 488). It was argued by the pleaders for the accused that the word “investigate” in section 157 in the Indian Evidence Act is used in the technical sense of the Criminal Procedure Code. But this is clearly not so. The application of that section of the Indian Evidence Act is not confined to criminal cases and the word “investigate” is obviously used in its natural and popular meaning (p. 488). The Criminal Investigation Department was created to assist the ordinary Police force in the detections of certain crimes and neither that fact nor the fact that a member of the Criminal Investigation Department holds the rank of an Inspector would by itself entitle him to exercise the same powers within the Presidency of Madras as an officer in charge of a police station has within the local limits of his station under section 157, Criminal Procedure Code (p. 489). *Per* SUNDARA AYYAR, J.—“Legally competent” must I think mean “having power under some law statutory or otherwise.” The power need not be derived from an express provision of the law as stated by the majority of the Special Bench if by that expression be meant “some definite statutory enactment” but it must be shown that there is power under some law or other to investigate. The words “authority” and “competent” support this view (p. 526). Section 21 of the Police Act (XXIV of 1859), which makes it the duty of a police officer to detect and bring offenders to justice cannot be taken to give a police officer all powers necessary for that purpose and therefore power to investigate offences and that every police officer has these powers throughout the Presidency (p. 526). It is quite impossible to hold that the mere imposition of duties of a comprehensive nature would authorise a person on whom they are imposed to restrain the rights or liberties of individuals or to exercise any specific powers over them (p. 527). It cannot be inferred that an Inspector of the Criminal Investigation Department has been appointed to any local area under section 551, Criminal Procedure Code. *On the fourth point, Held* (by BENSON, WALLIS and SUNDARA AYYAR, JJ.) that a statement of a confessional nature made by a witness to a police officer is a confession of an accused person within the purview of section 25, Indian Evidence Act. *Per* BENSON, J.—It seems to be especially undesirable to extend the language of section 25 beyond its plain meaning when the effect of doing so might tend to encourage those corrupt practices of the Police in regard to working for confessions which it is the policy of the law to prevent. Effect must be given to the language of section 25 and it renders the statements of the approvers to the Inspector inadmissible. *Per* WALLIS, J.—I think the safer, as it is certainly the simpler course is to read the words of the section in their natural meaning without putting any restrictive interpretation upon them and so reading them I hold that these confessions were inadmissible even as corroborative evidence, under section 25 of the Evidence Act. *Per* MILLER, J.—Sections 25, 26 and 27, Indian Evidence Act, were imported into the Indian Evidence Act, from the Criminal Procedure Code of 1861. . . . Those sections of the code were not dealing with the question of witnesses in criminal trials. . . . I am unable to find any reason for giving the sections (in the Evidence Act) a more extended meaning than they bore in the Code of 1861 (p. 455). I am unable to see that it is more dangerous to allow a witness to be corroborated by a self-incriminating statement made to a police officer than by a self-exculpatory statement to the same effect (p. 457). *Per* ABDUR RAHIM, J.—The word “confession” used in section 25, Evidence Act, could not have been used in the wide and popular sense in which it is used in every-day conversation as meaning an acknowledgment of some fault for that would make the section ridiculous and there can be little doubt that it is to be

understood in the technical sense of the criminal law (p. 489). Whether a statement is to be called a confession or not depends not merely upon the nature of the statement itself but also on the use which is sought to be made of it. Whenever the evidentiary value of a statement as against the person making it is in question it is then that it would be properly called an admission or confession according as the proceeding in which the question arises is of a civil or criminal nature but not when it is intended to be used as evidence against a third person (p. 490). *Per* SUNDARA AYYAR, J.—The word “confession” does not import that the admission of guilt should be by a party to the criminal proceeding before the Court. If the word “confession” in section 25 was intended to refer only to an admission made by a party to the proceeding before the Court the legislature would have said so. The expression “made by an accused person” in section 24, Evidence Act, means that the person must be an accused person at the time of the confession (p. 535). An admission of guilt made to a police officer by any person cannot be proved as against any person accused of any offence whether he be the person who made the admission or not (p. 535). *On the fifth point, Held* (*per totam curiam*), that while statements made by a person to a police officer in the course of an investigation and taken down in writing may not (by reason of section 162, Criminal Procedure Code) be proved by the production of the writing, they may be proved by oral evidence. Before the High Court has decided any point of law raised in the Advocate-General’s certificate, the accused cannot be heard on any point not included in the certificate.

Muthukumaraswami Pillai v. King-Emperor ... (1912) I.L.R., 35 Mad., 397

INDIAN EVIDENCE ACT (I OF 1872), sec. 35—Admissibility of report by Tahsildar to Collector:

A Tahsildar, in response to the requisition of the Collector, sent the following report:—“I beg to state that the village munsif of Inavaram reports that the charities referred to have not yet been commenced.” *Held*, that the report was not admissible under the first part of section 35 of the Evidence Act to prove that the charities referred to were not performed on the date of the report. Although in certain cases an isolated document may be considered a book or register within the meaning of the first part of section 35, it does not follow that every report regarding a fact from a public servant to his official superior in pursuance of directions from the latter, is admissible evidence to prove such fact.

Mallikarjuna Dugget v. Secretary of State for India ... (1912) I.L.R., 35 Mad., 21

INDIAN INSOLVENCY ACT (1848), II & 12 Vict., Cap. XXI, sec. 24:—See “TRUSTEE.”

INDIAN LIMITATION ACT, XV OF 1877, ss., 19, 20, 21—Acknowledgment by one partner binding on others:

The mere fact that one of the partners of a going concern is in charge of a branch of such concern cannot lead to the inference that such partner has authority to bind the firm by an acknowledgment when pressed for payment. A letter by one of two partners to a creditor acknowledging the debt due and asking such creditor to correspond with and supply goods to, the other partner on behalf of the firm, cannot be construed as authorising such other partner to make an acknowledgment which will bind the firm for the purposes of limitation.

Shah Mohideen Sahib v. Official Assignee of Madras ... (1912) I.L.R., 35 Mad., 142

INDIAN LIMITATION ACT (IX OF 1908), sch. II, art. 49—Limitation begins to run upon refusal to return property detained.

Where a person to whom moveable property is entrusted to be returned on the fulfilment of certain conditions, retains such property after such conditions are fulfilled, he will be deemed to be in possession on behalf of the person entitled, until he refuses delivery: mere silence on demand being made will not constitute such refusal. The period of limitation for a suit to recover the property thus detained will, under

article 49 of schedule II of the Limitation Act, run from the date when the defendant refuses to deliver such property.

Gopalasami Ayyar v. Subramania Sastri ... (1912) I.L.R., 35 Mad., 636

2. —, sec. 6, ART. 184—*Application to set aside ex parte decrees made after coming into force of Act governed by article 184—Section 7 of old Act XV of 1877, does not apply—Section 6 of General Clauses Act (X of 1897) does not make the new Act inapplicable:*

A decree was passed *ex parte* against A, a minor, on the 4th September, 1894. A became a major on 16th January, 1909, and applied on 25th January, 1909, to set aside the decree. *Held*, that the Limitation Act (IX of 1908) which came into force on 1st January 1909, applied and the application was barred under article 184 of the Act. Under section 6 of the Act, the plea of minority was available only in the case of suits and applications for execution. Section 6 of the General Clauses Act (X of 1897) had not the effect of making the new Act inapplicable. *Kali Amma v. Palappakkara, Manakal*, [(1910) 20 M.L.J., 347], followed.

Chidambaram Chetty v. Karuppan Chetty ... (1912) I.L.R., 35 Mad., 678

3. —, sec. 28, sch. II, arts. 124, 144:—*See* “RELIGIOUS FOUNDATION.”

4. —, sch. II, arts. 148, 144:—*See* MORTGAGE VALIDITY OF.”

INDIAN PENAL CODE, ACT XLV OF 1860, sec. 149—*Existence of common object before commencement of fight not necessary to constitute offence—Criminal Procedure Code, ss. 237, 238, 423 (b)—Appellate Court has power to convict accused of an offence of which he is acquitted in cases not falling under ss. 237, 238:*

To constitute an offence under section 149 the existence of a common object before the commencement of the fight is not necessary. It is enough if the common object is adopted by all the accused. The power of an Appellate Court under section 423 (b) of the Criminal Procedure Code to alter the finding while maintaining the sentence is not confined to cases falling under sections 237 and 238 of the Code. The finding which an Appellate Court may alter under section 423 (b) may relate either to an offence with which the accused is apparently charged in the lower Court or to one of which he might be convicted under sections 237 and 238 without a distinct charge. In cases not falling under sections 237 and 238, he cannot be convicted of an offence with which he was not charged in the lower court. Where however he has been charged and the lower court has recorded a finding on such charge, the Appellate Court can alter the finding.

Golla Hanumappa v. Emperor ... (1912) I.L.R., 35 Mad., 243

2. —, sec. 429—*Cutting off the ears of horse is ‘maiming’ within section:*

The cutting off of the ears of a horse is ‘maiming’ within the meaning of section 429 of the Indian Penal Code.

Marigowda v. Srinivasa Rangachar ... (1912) I.L.R., 35 Mad., 594

3. —, sec. 457—*‘Intent to annoy,’ what amounts to:*

A, with a view to support a fraudulent claim of title to a house, broke into it during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house and took forcible possession of it:—*Held*, that A was rightly convicted of the offence of house-breaking under section 457, Indian Penal Code. *Per* BENSON, J.—That an intent to annoy under section 457 is established if annoyance in the ordinary course of events is known by the person committing the act to be the natural consequence of such act. A man must in law be held to intend the natural and ordinary consequences of his acts, irrespective of what his object was at the time of doing such acts if at such time he knows what the ordinary and natural consequences will be. If he does an act which is illegal, it does not make it legal that he did it with some other object unless

the object was such as would under the circumstances render the particular act lawful. *Per* SANKARAN NAIR, J.—That although the act complained of necessarily involved annoyance yet unless the intention of the accused was to annoy, it may be that the act cannot be said to have been committed with intent to annoy. *Emperor v. Baid*, [(1905) I.L.R., 27 All., 298], referred to. *Queen-Emprses v. Rayapadayashi*, [(1896) I.L.R., 19 Mad., 240], referred to. A, however, in doing the act complained of intended to use criminal force to the servant in possession and therefore intended to commit an offence.

Sellamuthu Sevaigaran v. Pallamuthu Karuppan ... (1912) I.L.R., 35 Mad., 186

LANDLORD AND TENANT—*Encroachment by tenant on adjoining land of landlord—Such encroachments enure for the benefit of the tenant during his tenancy and afterwards for the benefit of the landlord—Adverse possession:*

Possession by a person will be presumed to be held in his own right and adversely to the true owner. This presumption will not apply when a special relationship exists between the parties, as tenants in common or members of an undivided family. The presumption in such cases will be that possession is held on behalf of all the co-owners or members of the family and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose right he seeks to affect by such possession. Where a tenant taking advantage of his position as such, takes possession of lands belonging to his landlord not included in his holding the presumption is that such lands are added to the tenure and form part thereof for the benefit of the tenant so long as the holding continues and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. *Gooroo Dass Roy v. Issur Chunder Bose*, [(1874) 22 W.R., 246], approved. It is not necessary that the tenant trespasser should prove that his trespass was known to his landlord to justify such presumption.

Muthurakkoo Thevan v. Orr ... (1912) I.L.R., 35 Mad., 618

LETTERS PATENT, CL. 15—*Judgment—Order of single Judge refusing to frame an issue not appealable as a judgment:*

An order of a single Judge on the Original Side, refusing to frame an issue asked for by one of the parties is not a judgment within clause 15 of the Letters Patent and is not appealable. *Per* CHIEF JUSTICE.—An adjudication is a judgment within the meaning of the clause if its effect, whatever its form may be and whatever may be the nature of the application in which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if not complied with, is to put an end to the suit or proceeding. It is not necessary that the decision must affect the merits by determining some right or liability. An adjudication based on a refusal to exercise discretion, is appealable if the effect of the adjudication is to dispose of the suit so far as the Court making the adjudication is concerned. *Per* V. KRISHNASWAMI AYYAR, J.—The word ‘judgment’ in clause 15 must be so construed as to include the various kinds of judgments dealt with in other clauses of the Letters Patent. It must be understood as including preliminary or interlocutory judgments but not preliminary or interlocutory orders. *Ebrahim v. Fakhruddin Begum*, [(1879) I.L.R., 4 Cal., 531], approved. *DeSouza v. Coles*, [(1868) 3 M.H.O.R., 384], commented upon. *Veerabhadran Chetty v. Nataraja Dasikar*, [(1905) I.L.R., 28 Mad., 28], not approved. *Maruthamuthu Pillai v. Krishnamachariar*, [(1907) I.L.R., 30 Mad., 143], not approved. *Appasamy Pillai v. Somasundara Mudaliyar*, [(1903) I.L.R., 26 Mad., 437], dissented from. *Chinnamasami Mudali v. Arumuga Goundan*, [(1904) I.L.R., 27 Mad., 432], dissented from.

Tuljaram Row v. Alagappa Chettiar ... (1912) I.L.R., 35 Mad., 1

(ACT XIV OF 1908), cls. 25 and 26:—*See* “INDIAN EVIDENCE ACT.”

LIMITATION—Suit for sale on mortgage—Period of limitation changed with provision for pending suits at passing of Act—Limitation Act (XV of 1877), schedule II, articles 132, 147, Limitation Act (IX of 1908), sec. 31, sub-section 1—Order of His Majesty in Council holding applicable—Shorter period of limitation than provided by Act subsequently passed :

The Limitation Act (IX of 1908) which came into force on 7th August of that year after providing by section 31, sub-section 1 "for a suit for sale by a mortgagee," a period of "sixty years from the date when the money secured by the mortgage became due," enacts "that no suit instituted within the said period of sixty years and pending at the date of the passing of the Act . . . shall be dismissed on the ground that a twelve years rule of limitation is applicable." In a suit for sale on a mortgage, dated 22nd September 1883, instituted on 23rd September 1899, the defence was limitation which the plaintiff avoided by alleging payments of interest and settlement of accounts. The first Court found that part of the claim was barred by the twelve years' period of limitation provided by article 132, schedule II of the Limitation Act, 1877. The High Court on appeal held that the suit was governed by article 147 which allowed a period of sixty years, and that no part of it was barred. On appeal to His Majesty in Council the decision of the High Court was reversed, and by an order in Council it was declared that "article 132 is the article which provided the period of limitation applicable," and the case was "remitted to the High Court to be disposed of in accordance with such declaration." So remitted the case came before the High Court on 16th August 1908 after the passing of the Limitation Act, IX of 1908, and that Court holding that section 31 of that Act applied, disposed of the suit as they had previously done in favour of the plaintiff. Held by the Judicial Committee (affirming that decision) that the suit was "pending" at the time of the passing of Act IX of 1908. The judgment remitting the case did not end the suit, nor finally determine it. It was remitted for further procedure and enquiry on allegations of fact : and at the passing of Act IX of 1908 that procedure was not concluded and the enquiry not entered upon. The suit in fact was neither adjudged upon nor ready for judgment.

Vasudeva Mudaliar v. Sadagopa Mudaliar ... (1912) I.L.R., 35 Mad., 191

MAHOMEDAN LAW—Gift under, validity of—Transfer of possession when unnecessary—Possession of donor necessary to validate gift :

To make a valid gift under Mahomedan law the donee should be put in possession. But where the donee is a minor at the time of the gift and the donor remains in possession of the property as guardian of the donee on his behalf, the gift would be valid under Mahomedan law. Unless the subject matter of a gift is in the possession of a trustee or agent of the donor whose custody is regarded in law as the custody of the donor, the owner of a property, if not in possession, cannot make a valid gift of it or rather a gift made by him, will not pass the ownership of the property to the donee until the donee takes possession by the donor's consent.

Fakir Nynar Muhamed Rowther v. Kandasawmy Kulathu Vandan (1912) I.L.R.,

35 Mad., 120

MAIMING :—See "INDIAN PENAL CODE, SEC. 429."

MAINTENANCE :—See "HINDU LAW"

... (1912) I.L.R., 35 Mad., 147

MALABAR (COMPENSATION FOR) TENANTS' IMPROVEMENT ACT (I OF 1900) :—See "MARUMAKATTAYAM LAW"

MANAGERS, POSITION OF :—See "HINDU LAW" ... (1912) I.L.R., 35 Mad., 177

MARUMAKATTAYAM LAW—Gift to a woman and her children enures for their benefit with the incidents of tarwad property—Members subsequently born acquire an interest by birth—Karnawan, power of, to alienate—Right of one member of tarwad to erect buildings in tarwad property—Compensation, claim to, for demolition of building—Malabar Tenants' Improvement Act (I of 1900), sec. 5 :

A gift to a woman governed by the Marumakattayam law and her children enures in favour of the donee and her children with the incidents

of tarwad property. As members of a tarwad acquire an interest in the tarwad property by birth, children born subsequent to the gift will acquire an interest in such property. A *karnawan* cannot make an alienation for such a long period as sixty years in the absence of special necessity or special benefit. Such an alienation cannot be held good for a portion of the term, i.e., the usual period of twelve years, as it will have the effect of creating a new contract between the parties. Although in the case of ordinary co-parceneries the Courts will not order the demolition of buildings erected by one co-parcener in joint property, unless some substantial injury is shown, the case will be different in the case of tarwad property. The members of the tarwad have not, like the members of an ordinary co-parcenary, the right of compulsory partition and it would not be fair or equitable to compel the *karnawan* to purchase the building erected by a junior member or to deprive the *karaawan* of possession of part of the property for ever. The junior member cannot therefore on general principles resist recovery or demolition of the building. A lessee, whose lease is disputed and who is put on inquiry as to the real title of the lessor, before constructing buildings on the land leased cannot after constructing buildings on a wrong view of the lessor's title, claim on eviction compensation for the buildings as a *bona fide* tenant under section 5 of the Malabar Tenants' Improvement, Act.

Kalliani Amma v. Govinda Menon ... (1912) I.L.R., 35 Mad., 648

MISCONDUCT OF VAKIL IN MANAGEMENT OF APPEAL :—See "PLEADER."

MITAKSHARA LAW :—See "HINDU LAW" ... (1912) I.L.R., 35 Mad., 152

MORTGAGE, DISCHARGE OF—Whether security kept alive for benefit of person making payment :

The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. If it is to the advantage of the person paying that the security should be kept alive, the law will presume that he intended to keep it alive. *Bhawani Koer v. Mathura Prasad*, [(1908) 7 O.L.J., 1, at p. 31], referred to.

Mahalakshammammal v. Sriman Madhwa Siddhanta Oonmahini Nidhi, Limited. (1912) I.L.R., 35 Mad., 642

2. _____ Right of assignee of mortgagor to redeem first mortgage after a decree for redemption obtained by a puisne mortgagee had become inoperative :

A mortgaged certain properties to B and afterwards mortgaged the same with other properties to C. C obtained a decree for redemption against B but the decree was allowed to become inoperative by not being executed. D obtained an assignment of the right of A in the mortgaged properties and also the rights of C therein. A sued to redeem the mortgage in favour of B. Held, that although the suit by D as the assignee of C was not maintainable still it was competent to him as assignee of A to bring the suit after the decree obtained by C had become inoperative.

Raman Namboodri v. Achutha Pishurodi ... (1912) I.L.R., 35 Mad., 42

3. _____ Right of person paying off prior to—Cannot claim rights of prior mortgagee unless prior debt is completely satisfied :

Where there are two mortgages on a single property and a person advances money for the payment of the first mortgage, the claim of such person to priority over the second mortgage cannot be sustained unless the first mortgage is entirely discharged.

Hanumanthaiyan v. Meenatchi Naidu ... (1912) I.L.R., 35 Mad., 183

4. _____ Validity of, when only part of the consideration paid—Mortgages in possession cannot prescribe for higher interest by asserting a larger amount as due—Limitation Act, sch. II, arts. 144, 148 :

Where only a part of the consideration for a mortgage has been paid, the mortgage is a good security for the amount that has validly passed.

The mortgagee by remaining in possession for more than 12 years under such a mortgage, cannot by merely claiming to hold for the full amount, acquire by prescription a right to hold as mortgagee for such full amount. Notwithstanding the assertion by the mortgagee of a larger interest than was validly passed to him by the mortgage, article 148 of the Limitation Act will apply to a suit for redemption by the mortgagor. Article 144 will not apply as article 148 specially provides for the case.

Rajai Tirumal Raju v. Pandla Muthial Naidu ... (1912) I.L.R., 35 Mad., 114

5. ———— *Usufructuary—Equity of redemption, clog or fetter on—Lease—Right to retain possession as lessee after satisfaction of mortgage:*

A provision in a mortgage deed whereby the mortgagee is to remain in possession after payment of the mortgage debt is unenforceable as it acts as a fetter upon the right to redeem. When a mortgage deed is accompanied by a lease the effect of which is to keep the mortgagor out of possession notwithstanding the discharge by him of the mortgage debt there is a fetter on the equity of redemption which the court ought not to enforce.

Ankinedu v. Subbiah ... (1912) I.L.R., 35 Mad., 744

OPIUM ACT (I OF 1878), secs. 4, 5 and 9—Contract by which person without license is enabled to sell opium void:

A and B were farmers of opium revenue under Government. They obtained a license from the Collector for the sale of opium, subject to the condition, among others, that they should not sell, transfer or sub-rent their privileges without the permission of the Collector. A and B, without the sanction of the Collector, entered into an agreement with C, by which they admitted him as a partner in the opium business. C brought a suit for dissolution and winding up of the business. Held, that the agreement was void and the suit was not maintainable. The effect of the agreement between A and B on the one hand and C on the other, was to enable C to sell opium without a license, an act directly forbidden by section 4 of the Opium Act and made penal by section 9. The contract being intended to enable C to do what was forbidden by law was unlawful and void. The provisions of the Abkari and Opium Acts are not intended merely to protect public revenue but the prohibitions contained in them are based on public policy. The agreement was also illegal as it amounted to a transfer by A and B of their privilege to C, in violation of the condition against transfer subject to which the license was granted. The combined effect of sections 4, 5 and 9 of the Opium Act is to make the transfer in violation of the conditions in the license, illegal.

Nalain Padmanabhan v. Sait Badrinadh Sarda ... (1912) I.L.R., 35 Mad., 582

PLEADER—Suspension of vakil from practising—Functions of Pleader and duty to the Court and to client—Rule 95 of Appellate Side rules of Madras High Court—Non-payment by vakil of printing-charges for appeal though paid to him by client—Misconduct of vakil in management of appeal—Letters Patent of High Court, sec. 10—Legal Practitioners' Act (XVIII of 1879), sec. 13:

Under section 95 of the Appellate Side rules of the Madras High Court, pleaders "are responsible to the Registrar for all translations and printing-charges incurred by him on their behalf." To that extent, therefore, the vakil must co-operate in the conduct of the suit with the Registrar, and with the Court under those regulations; and vakils have also the general function, applicable not only to the bar in general but also to solicitors at large, that they must in the conduct of all suits entrusted to them co-operate with the Court in the orderly and pure administration of justice. In a proceeding in the High Court to restore an appeal which had been struck off for non-payment of the printing-charges, it appeared that the vakil for the appellant, though the money for that specific purpose had been received in his office from his client, had omitted to pay it to the Registrar, had not made any true and proper explanation to his client of the cause of the appeal being struck off, but had allowed letters written

by his clerks to go from his office to the client, and had even written one himself, which would lead him to believe that the appeal had been heard and dismissed in due course, and had also not given the Court, on the earliest possible opportunity any reason for his absence when the appeal was called on, except that other professional engagements had prevented him from being present, nor had he ever offered to the Court any explanation or apology concerning his conduct of the case nor expressed to the Court any regret for its effect. The vakil, after being called on to show cause why he should not be punished under the Letters Patent of the High Court, or the Legal Practitioners' Act (XVIII of 1879) for professional misconduct, was, whilst personally acquitted of any fraudulent or criminal act, suspended from practising for six months. Held, on an appeal to the Judicial Committee, that the vakil had in his acts, and omissions to explain, regret, or apologise for them, utterly failed to perform what his honour and duty to his client and to the Court made it incumbent upon him to do; and their Lordships while not interfering with his acquittance of direct and personal fraud, did not see their way to acquit him of conduct in the management of the appeal, and of his client's affairs, which caused the procedure of the Court to be the very opposite of what it should be, namely, responsible, orderly, and pure; and they were of opinion that there was "reasonable cause" under section 10 of the Letters Patent, for the sentence pronounced by the High Court, which was justified both in its pronouncement, and the extent of the suspension.

In the matter of Krishnasami Aiyar ... (1912) I.L.R., 35 Mad., 543 (P.C.)

POLICY OF LIFE INSURANCE. MONEY PAYABLE UNDER—Such money forms part of estate of assured and is recoverable by his representatives:

Where the assured does not, in his lifetime, create any trust in respect of the money payable under a policy of Life Insurance for the benefit of his wife and children, such money, in cases where the provisions of the Married Woman's Property Act do not apply, forms part of his estate and is recoverable by his legal representatives. The contract between the Company and the assured gives no right of action to the beneficiaries named. Where the company refuses payment on the death of the assured, the legal representatives and not the beneficiary will be entitled to enforce the contract. The Company will be bound to pay the amount to a person who has obtained a succession certificate under section 16 of the Succession Certificate Act. *Cleaver v. Mutual Reserve Fund Life Association*, [(1892) 1 Q.B., 147], referred to.

Oriental Government Security Life Assurance, Limited v. Vanteldu Ammiraju (1912) I.L.R., 35 Mad., 162

PRESIDENCY MAGISTRATES' COURTS—Jurisdiction of, inter se—Transfer, High Court has power of, from Court of Chief Presidency Magistrate to Court of another Presidency Magistrate—Criminal Procedure Code (Act V of 1898), sec. 21, cl. (2); 526, cl. (ii), Charter Act: (1865), sec. 15:

The Court of the Chief Presidency Magistrate and those of the other Presidency Magistrates are "Courts of equal jurisdiction" within the meaning of section 526, clause (ii), Criminal Procedure Code (Act V of 1898). The High Court has power to transfer a case from the file of the Chief Presidency Magistrate to that of another Presidency Magistrate.

In re Venkateswara Sastri ... (1912) I.L.R., 35 Mad., 739

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887):—See "TRESPASS."

REGISTRATION ACT, III OF 1877, secs. 3, 17, 40—Contract to sell—Agreement to lease—Evidence Act, s. 91:

An agreement to execute a sub-lease and to get it registered at a future date is a lease within section 3 of the Indian Registration Act III of 1877 and is compulsorily registrable under clause (d) of section 17. Such an agreement to grant a lease which requires registration affects immovable property and cannot be received in evidence in a suit for specific performance of such agreement. It is immaterial whether possession has

passed or not in accordance with the agreement. Section 49 of the Registration Act indicates that a document should not be received in evidence even where the transaction sought to be proved does not amount to a transfer of interest in immovable property but has only created an obligation to transfer the property.

Narayanan Chetty v. Muthiah Servai ... (1912) I.L.R., 35 Mad., 68

REGULATION (VI OF 1831):—See "SERVICE INAM."

RELIGIOUS FOUNDATION—Endowed property—Limitation Act (XV of 1877), sec. 28, sch. II, arts. 124, 144—Temple trusteeship and properties, bar of suit for former involves bar of suits for latter:

The dismissal of a suit to recover the office of trustee for a temple whereby the right to the trusteeship is lost involves the loss of the right to recover a portion of the endowment.

Govindanami Pillai v. Dakshinamurti Poosuri ... (1912) I.L.R., 35 Mad., 92

RENT RECOVERY ACT (MADRAS), VIII OF 1885, ss. 3, 11—Right of landlord to enhance rent on dry land cultivated with garden crop by wells dug at tenant's cost—No such right in the absence of a contract supported by consideration:

Dry lands liable to pay a fixed rent were cultivated with garden crops by the tenant by means of wells excavated at his cost with the consent of the landlord. The landlord claimed, and the tenant for some years paid, an enhanced rate of rent for the crop so raised. In a suit by the tenant to compel the landlord to grant pattas at the usual dry rate, it was contended for the landlord that a contract to pay the enhanced rate must be implied from the payment for a number of years of such rate and that such contract was supported by consideration, as the landlord had consented to the digging of wells and as he had forborne from claiming the *varam* rate, which he had a right to do under section 11, clause 3, of the Rent Recovery Act. There was no evidence that rent was chargeable according to the nature of the crop raised. Held, (1) that the word 'contract' in section 11 cannot be construed as a mere agreement but as an enforceable contract supported by consideration; (2) that the consent of the landlord not being necessary to entitle the tenant to sink the well, such consent was no legal consideration for an agreement to pay the enhanced rate; (3) that payment of a fixed rate of rent prior to the sinking of the wells was evidence of an implied contract to pay rent at that rate; and in the absence of evidence to show that the rate was fixed not on the holding but on the nature of the crop and was liable to be altered with a variation in the crop raised; that the existence of such a contract debarred the landlord's claim to *varam* rates under section 11, clause 3, of the Rent Recovery Act. The promise not to press such an unenforceable claim was no legal consideration.

Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa (1912) I.L.R., 35 Mad., 134

2. sec. 7.—Distraint for larger amount than is legally due not good even for the amount due:

Where, after tender by landlord and refusal by the tenant of a patta providing for a larger rent than is really due, the landlord distrains property of the tenant for such larger amount, such distraint will not hold good even for the amount properly claimable.

Sree Raja Venkata Narasimha v. Ravi Subbayya ... (1912) I.L.R., 35 Mad., 139

RES JUDICATA—Compromise decree—Recision of—Civil Procedure Code, sec. 257-A—Agreement contravening, rule in, not opposed to public policy—Judgment-debtor may waive rule:—

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise is whether the parties decided for themselves the particular matter in dispute by the compromise and the matter was expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in,

or was it the basis of, what was embodied in the decree. The basis of a compromise decree is a contract between the parties to the litigation and the principles applicable to contracts would often have to be considered in determining the rules of estoppel applicable to such decrees; at the same time such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The parties to the decree cannot therefore put an end to it at their pleasure in the manner that they could rescind a mere contract. Nor can it be impeached on some grounds on which a mere contract could be impeached such as absence of consideration or mistake. *Jenkins v. Robertson* [(1867) 1 H.L., 80. and Div., 117], distinguished. The reason is that the Court being bound to adopt the agreement between the parties as its own adjudication the interpretation to be placed upon such adjudication ought to be the same as that to be placed on the agreement itself. A compromise decree may in some respects have a greater validity than one passed after contest between the parties as such a decree has all the force of a compromise or a species of contract which is highly favoured by the Courts. Judgments passed on mutual agreements of parties are distinguishable from judgments by default and decrees passed upon a confession of judgment or an admission by the defendant that the plaintiff is entitled to a particular relief. An agreement in contravention of section 257-A of the Civil Procedure Code is not opposed to public policy. The prohibition in the section is not based on any rule of public policy rendering such agreement illegal. It is merely unenforceable in execution proceedings or by a fresh suit as the case may be. A judgment-debtor is entitled to waive the benefit of the rule.

Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty (1912) I.L.R., 35 Mad., 75

2. How far decree for rent in previous suit res judicata on the question of title in subsequent suit:

A, a landlord tendered patta to B, his tenant, who objected to the patta on the ground that the extent of his holding was overstated, some of the lands included in the patta not belonging to A, but to B himself. The issue was raised whether the patta tendered was proper; the Court found that it did not contain any objectionable matter and was therefore a proper patta. Decree was accordingly given for rent in favour of A.—A tendered a similar patta to B for a subsequent year and B again raised a similar objection to the extent of the holding. In a suit brought by A for the rent, B objected to the extent of the holding and it was contended first that the matter was *res judicata* by reason of the decision in the previous suit:—*Per MUNRO, J.*—The finding in the previous suit that the relationship of landlord and patta was proper, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the patta and the defendants cannot be allowed to put plaintiff again to proof of his title:—*Per SANKARAN NAIK, J.*—A decree for rent does not necessarily require a decision as to the terms of the patta or the extent of the land for which rent has to be paid. There being no express finding in the previous suit on the question of the ownership of the land, it cannot be implied from the mere passing of the decree for rent that the question was decided for the purpose of the subsequent suit. Where a question need not be deemed to have been decided on the ground that the decree in the previous suit requires such assumption to make it a decree rightly passed, a party is not, in the absence of a clear and express finding, precluded from raising the question in a subsequent suit. The question whether A or B was owner of the land included in the patta, was not *res judicata* by reason of the previous decision.

Bayya Naidu v. Paradesi Naidu ... (1912) I.L.R., 35 Mad., 218

REVENUE RECOVERY ACT (MADRAS) II OF 1864, secs. 3, 4, 5, and 26—Defaulter, who is—Registered proprietor is "defaulter" in respect of arrears accrued before registry:

The Madras Revenue Recovery Act lays the obligation to pay the revenue including all the arrears on every landholder irrespective of the

time when he becomes the holder and if he does not do so, he becomes a defaulter. A person, on being registered as the holder, becomes a defaulter in respect of arrears accrued before the registry, as if he were the registered owner when the arrears fell due.

Kota Subbayya Gupta Garu v. The Secretary of State for India.

(1912) I.L.R., 35 Mad., 555

SERVICE INAM, RESUMPTION OF—*Resumption not a fresh grant and does not put an end to prior encumbrances—Regulation VI of 1831, sec. 2—Emoluments granted for gadaba service not within regulation:*

Resumption consists in putting an end to the grant, remitting the services and requiring the grantee to pay the full assessment. It has not the effect of putting an end to prior encumbrances. Gadaba or bearer service is of a personal nature and an inam for such service does not fall within Regulation VI of 1831, where the grantee of an inam for gadaba service mortgages the inam and the inam is afterwards resumed by Government, such resumption does not extinguish the mortgages.

Sesuvadhru Yerranna v. Donkira Kannamma ... (1912) I.L.R., 35 Mad., 704

SPECIFIC RELIEF ACT (I OF 1877), sec. 42—*Fabrication of authority to adopt by widow does not justify suit by reversioner for declaring the authority not genuine:*

The mere fabrication of an authority to adopt by the widow will not entitle the reversioner to claim a declaration under section 42 of the Specific Relief Act that the authority is not genuine.

Sreepada Venkataramanna v. Sreepada Ramalakshamma.

(1912) I.L.R., 35 Mad., 592

STAMP ACT (II OF 1899), sec. 2 (15), sch. I, art. 45—*Final decrees effecting partition, what is:*

To make an order chargeable with stamp duty under section 2 (15) of the Stamp Act of 1899, it must effect an actual division of the property. An order declaring the rights of the parties and directing further proceedings for the ascertainment of the specific shares is not such an order. Courts ought not to pass interim orders and direct proceedings in execution for the ascertainment of the specific shares. The final order should be passed after the specific shares have been ascertained. A decree reciting a *rashnamah* made by consent of parties, allotting specific properties to the several parties and directing other parties to deliver possession is chargeable with stamp duty under article 45 of schedule I as a final order effecting partition within section 2 (15). Being made by consent of parties, it is also an instrument whereby co-owners have agreed to divide property in severalty and falls within the first part of section 2 (15).

Thiruvengadathamiah v. Mungiah ... (1912) I.L.R., 35 Mad., 26

SUCCESSION:—See "HINDU LAW" ... 152

TRANSFER OF PROPERTY ACT (IV OF 1882), sec. 38:—See "HINDU LAW," 108

2. *absolute title to interest in all cases irrespective of equities—Right of vendor in possession to interest:*

Section 55, clause (4) of the Transfer of Property Act, does not give the vendor an absolute title to interest in all cases irrespective of equities. It only provides that the vendor shall have a lien for interest when it is payable. Interest on the purchase money cannot be claimed so long as the vendor remains in possession of the property sold.

Muthia Chetty v. Sinna Velliam Chetty ... (1912) I.L.R., 35 Mad., 825

3. *Presence of witnesses at actual execution—Acknowledgment of his signature by executant—Civil Procedure Code (Act XIV of 1882), sec. 149—Issue raised by Court at late stage of case—Power of Court as to issues:*

Held (affirming the decision of the Madras High Court) that attestation of a mortgage deed within the meaning of section 59 of the Transfer of Property Act (IV of 1882) must be made by the witnesses signing their

names after seeing the actual execution of the deed. Mere acknowledgment of his signature by the executant is not sufficient. *Girindya Nath Mukerjee v. Bejoy Gopal Mukerjee* [(1899) I.L.R., 26 Cal., 246], *Abdul Karim v. Salimun* [(1900) I.L.R., 27 Cal., 190], *Ranu v. Lawmanrao* [(1909) I.L.R., 33 Bom., 44], and *Shamu Patter v. Abdul Kadir Ravuthan*, [(1908) I.L.R., 31 Mad., 215], approved of. *Ramji v. Bai Parvati* [(1908) I.L.R., 27 Bom., 91], and *Ganga Dei v. Shiam Sundar*, [(1903) I.L.R., 26 All., 69], dissented from. Cases in England on the meaning of "attest," reviewed and discussed. The first portion of section 149 of the Civil Procedure Code (Act XIV of 1882) leaves it in the discretion of the Court to frame such additional issues as it thinks fit; whilst the latter part makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was therefore fully empowered to frame the issue on which he decided the case.

Shamu Patter v. Abdul Kadir Ravuthan ... (1912) I.L.R., 35 Mad., 607 (P.C.)

4. *sec. 83—Tender under sec. 83 in one Court subsequent to suit by mortgagee, in another Court to enforce his mortgage invalid—Where mortgages entitled to possession mortgagee must be put in possession before deposit under sec. 83—Costs, right of mortgagee to:*

Where after the institution of a suit by the mortgagee to enforce his mortgage in one Court, the mortgagor deposits the amount in another Court under section 83 of the Transfer of Property Act, the deposit is not a valid one and cannot have the effect of stopping the running of interest on the amount deposited. Where the mortgagor proposes to take action under section 83 of the Act, he must have a valid right to redeem under his contract with the mortgagee. No deposit can be made if the mortgagee being entitled to possession is not put in possession. *Ram Sonji v. Krishnaji*, [(1902) I.L.R., 26 Bom., 312], followed. A mortgagee is entitled to his cost, unless there are special reasons disentitling him to them.

Bayya Rao v. Narasinga Mahapatro ... (1912) I.L.R., 35 Mad., 209

5. *secs. 83, 84—Deposit under sec. 83 and withdrawal by mortgagor, effect of—Interest on mortgage amount does not cease to run—Costs of mortgagee in redemption suit:*

Where the mortgage amount deposited by the mortgagor under section 83 of the Transfer of Property Act has been withdrawn by the mortgagor on the mortgagee's refusal to accept it, interest in such amount does not cease to run under section 84. The continuance of the deposit is necessary to justify the claim to the cessation of interest. The mortgagee is entitled to his costs in a redemption suit. It will be forfeited by some improper defence or misconduct but not by merely claiming a larger amount than is due.

Krishnasami Chettiar v. Ramasami Chettiar ... (1912) I.L.R., 35 Mad., 44

6. *sec. 107—Signature of lessor, necessity of, to registered instrument:*

The registered instrument which, under section 107 of the Transfer of Property Act, is necessary to create a lease within the section need not necessarily be an instrument signed by the lessor. Such a lease may be created by a registered instrument signed by the lessee and accepted by the lessor. *Tuf Sahib v. Esuf Sahib*, [(1907) I.L.R., 30 Mad., 322], overruled. *Per THE CHIEF JUSTICE and AYLING, J.*—If a registered instrument signed by the lessee and accepted by the lessor is not a lease the mere fact that the instrument is signed by the lessee does not preclude him from denying his liability thereunder. *Per KRISHNASWAMI AYYAR, J.*—If a registered instrument signed by the lessee and accepted by the vendor is not a lease, the lessee will not be liable except on the footing of use and occupation.

Syed Ajam Sahib v. Ananthanarayana Aiyar ... (1912) I.L.R., 35 Mad., 95

TRESPASS, SUIT FOR, DAMAGES FOR—*Provincial Small Cause Courts Act (IX of 1887), art. 31, sch. II—Jurisdiction under :*

Where the plaint alleged that the defendants had trespassed upon plaintiff's land and removed his crop and assessed damages at the profit thus wrongfully obtained by defendants. *Held*, that the suit was one for damages for a single act of trespass and not exempted from the jurisdiction of the Provincial Small Cause Courts Act by article 31, schedule II of the Provincial Small Cause Courts Act (IX of 1887). *Annamalai v. Subramanyan*, [(1892) I.L.R., 15 Mad., 298], followed; and *Venkoba Rao v. Muthu Aiyar*, [(1908) 18 M.L.J., 88], dissented from.

Ramaiyar v. Saminatha Aiyar ... (1912) I.L.R., 35 Mad., 726

TRUSTEE—BANKER AND CUSTOMER—*Trustee mixing trust money with his own—Indian Insolvency Act, 1848, 11 and 12 Vict., Cap. XXI, sec. 24—Voluntary payment.*

By a resolution, dated 31st July 1906, the Directors of the Madras Equitable Insurance Company resolved that a sum of Rs. 75,000 standing to the credit of the company with Messrs. Arbuthnot & Co., its Secretaries and Treasurers, should be invested in Government promissory-notes. Messrs. Arbuthnot & Co. purchased for the Insurance Company Rs. 25,000 worth of Government promissory-notes on 7th August 1906, Rs. 25,000 on 9th October 1906, and Rs. 10,000 on 20th October 1906, the securities being credited to the Insurance Company. On 22nd October 1906, Messrs. Arbuthnot & Co. failed. *Held*, that Messrs. Arbuthnot & Co. held the securities as trustees for the Insurance Company which was entitled to rank as a secured creditor. *Held* also, that the fact that Messrs. Arbuthnot & Co. before purchasing the Government promissory-notes mixed up the Insurance Company's money with their own and used it in their banking business, did not amount to misappropriation of the money, the trust having a lien on the aggregate amount in the hands of the trustee and any sum which may have been drawn for the trustee's own use being deemed to have been taken out of his own money. *Held* further, that even if Arbuthnot & Co. could be held to have misappropriated the trust money a subsequent payment in reparation by them would not amount to a "voluntary" payment within the meaning of section 24 of the Indian Insolvency Act, 11 and 12 Vict. of 1848, Cap. XXI.

Ramsay & Co. v. The Official Assignee of Madras ... (1912) I.L.R., 35 Mad., 712

TRUSTEES OF TEMPLE, POWERS OF, TO SUSPEND HEREDITARY ARCHAKAS—*Suspension otherwise justifiable, not bad for want of previous notice—Archaka, a servant, subject to the disciplinary power of trustees—Power of interim suspension incidental to trustee's power to inquire and dismiss for misconduct.*

The position of the hereditary Archaka of a temple is that of a servant subject to the disciplinary power of the trustee. The trustee of a temple has power to inquire into the conduct of such servants and dismiss them for misconduct. The right of interim suspension pending such inquiry is incidental to such power and no notice is required for an *ad interim* suspension pending enquiry. Even if such notice is deemed necessary, the order of suspension will not be set aside, if misconduct is proved at the enquiry. A hereditary Archaka can be dismissed by the trustee but only for good reasons which are liable to examination by a Court of Justice.

Seshadri Aiyangar v. Ranga Bhattar ... (1912) I.L.R., 35 Mad., 681

UNDIVIDED FAMILY:—*See "HINDU LAW" ... 177*

WAKE—*Nature of, according to Sunni schools—Injunction between co-owners—Muhammadan burial-grounds, joint interests in :*

The court will refuse to a co-owner an injunction to prevent the carrying out of a necessary work by another co-owner upon property held in common. According to the accepted view of the Sunni schools which

comprise the followers both of Imam Abu Hanifa and Imam Shafei, it is in the very conception of Wakf, which is the name for a grant by which mosques and similar institutions are dedicated, that all proprietary rights of men should be extinguished in the property so dedicated.

Kuttayan v. Mammanna Ravuthan ... (1912) I.L.R., 35 Mad., 681

WATER-CESS ACT (MADRAS) VII OF 1865—*Levy of cess, what is—Effect of levy not retrospective—"Arrears" in sec. 2 of the Act means payments which become due and remain unpaid after levy :—*

Under Madras Act VII of 1865, Government have the right to levy at pleasure a separate cess for water. The liability to pay water-cess is not incurred in each fasli by the mere fact of taking Government water but only when Government indicates its intention to charge the cess. The cess must be imposed during the fasli. "Arrears" in section 2 of the Act means payments which have become due and remain unpaid after the levy was made. An "arrear" under the Act presupposes an engagement to pay and the mere use of water implies no such engagement. The Government cannot by the mere act of levying water-cess in a subsequent fasli indicate an intention to claim rent for previous fasli.

Raja Ramachandra Appa Row v. Secretary of State for India. (1912) I.L.R., 35 Mad., 197

WIDOW AND REVERSIONER:—*See "HINDU LAW" ... (1912) I.L.R., 35 Mad., 560*

THE
INDIAN LAW REPORTS.
MADRAS Series.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Krishnaswami
Ayyar and Mr. Justice Ayling.*

T. V. TULJARAM ROW (DEFENDANT IN ORIGINAL SUIT
No. 117 of 1909), APPELLANT,

1910.
May 3.
August 8, 9.
September
29.

v.

M. K. R. V. ALAGAPPA CHETTIAR (PLAINTIFF IN ORIGINAL
SUIT No 117 of 1909), RESPONDENT.*

*Letters Patent, cl. 15—Judgment—Order of single Judge refusing to frame an
issue not appealable as a judgment.*

An order of a single Judge on the Original Side, refusing to frame an issue asked for by one of the parties is not a judgment within clause 15 of the Letters Patent and is not appealable.

Per CHIEF JUSTICE.—An adjudication is a judgment within the meaning of the clause if its effect, whatever its form may be and whatever may be the nature of the application in which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if not complied with, is to put an end to the suit or proceeding. It is not necessary that the decision must affect the merits by determining some right or liability. An adjudication based on a refusal to exercise discretion, is appealable if the effect of the adjudication is to dispose of the suit so far as the Court making the adjudication is concerned.

Per V. KRISHNASWAMI AYYAR, J.—The word 'judgment' in clause 15 must be so construed as to include the various kinds of judgments dealt with in other clauses of the Letters Patent. It must be understood as including preliminary or interlocutory judgments but not preliminary or interlocutory orders.

Ebrahim v. Fukrunissa Begum, [(1879) I.L.R., 4 Cal., 531], approved.

DeSouza v. Coles, [(1868) 3 M.H.C.R., 384], commented upon.

* Original Side Appeal No. 43 of 1909.

- WHITE, C.J.,
KRISHNASWAMI
AYYAR AND
AYLING, JJ.
- Veerabhadran Chetty v. Nataraja Desikar*, [(1903) I.L.R., 28 Mad., 28], not approved.
- Maruthamuthu Pillai v. Krishnamachariar*, [(1907) I.L.R., 30 Mad., 143], not approved.
- TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.
- Appasamy Pillai v. Somasundara Mudaliar*, [(1903) I.L.R., 26 Mad., 437], dissented from.
- Chinnasamy Mudali v. Arumuga Gounden*, [(1904) I.L.R., 27 Mad., 432], dissented from.

APPEAL against the order of WALLIS, J., dated 14th day of September 1909, in Civil Suit No. 117 of 1909.

This case first came on for hearing before (Sir ARNOLD WHITE, Chief Justice, and ABDUR RAHIM, J.) who made the following

ORDER OF REFERENCE TO A FULL BENCH.—In this case an objection has been taken that no appeal lies against the order of a Judge on the Original Side declining to frame additional issues for which one of the parties asked. We are disposed to uphold this objection on the ground that such an order is not a judgment within the meaning of section 15 of the Letters Patent.

Ebrahim v. Fuckerunnissa Begum(1) is an authority which supports this view. As regards this High Court however, the authorities would seem to preclude us from so holding. The grounds of the decision in *Maruthamuthu Pillai v. Krishnamachariar*(2) is applicable to the present case. We may also refer to *R. v. R.*(3), *Subhpathi Chetti v. Narayanasami Chetti*(4), *Commercial Bank of India, Limited v. Sabju Sahab*(5), *Vyasacharry v. Keshavacharya*(6), *Seshagiri Row v. Nawab Askur Jung Aftab Dowla*(7).

We refer to a Full Bench the question whether an appeal lies to this Court from an order of a Judge on the Original Side declining to frame an issue which is asked for by one of the parties to the suit.

The appeal again came on for hearing in due course before the Full Bench constituted as above.

Hon. Mr. T. V. Seshagiri Ayyar and V. Masilamony Pillai for appellant.

Hon. Mr. T. V. Seshagiri Ayyar.—As to whether an order of a Judge on the Original Side refusing to frame an issue is appealable, sections 15, 39 and 40 of the Letters Patent must be care-

(1) (1879) I.L.R., 4 Calo., 531.

(3) (1891) I.L.R., 14 Mad., 88.

(5) (1901) I.L.R., 24 Mad., 252.

(7) (1903) I.L.R., 26 Mad., 502.

(2) (1907) I.L.R., 30 Mad., 143.

(4) (1902) I.L.R., 25 Mad., 555.

(6) (1902) I.L.R., 25 Mad., 654.

fully examined. In section 15 the word 'judgment' includes the words 'sentence' and 'order.' This is clear from the fact that the section goes on to exclude such "when they are in criminal trial."

[V. KRISHNASWAMI AYYAR, J.—I do not think that follows. All that the words "sentence and order" mean are that such in a criminal trial are excluded. They cannot be taken to define the word 'judgment.']

The word 'judgment' includes orders when those orders affect rights or interests and are not passed merely in the exercise of discretion such as orders for stay of execution or for costs. If any order does affect a right or interest it would be a judgment and would be appealable. *DeSouza v. Coles*(1).

[THE CHIEF JUSTICE.—Where is the hardship in an issue being refused? The party can take the point in appeal.]

The party runs the risk of being put to two trials.

[THE CHIEF JUSTICE.—But on the other hand the party has only to set up a bogus issue to gain time.]

Section 15 of the Letters Patent must be read with sections 39 and 40. Section 40 includes decrees and orders but the word sentence is there used in a civil sense. By the word 'right' I mean the interest the party has to ask the Court to do something with reference to the case. In the Judicature Act, 1873, section 100, 'order' includes every rule and 'judgment' includes decree. The words 'judgment', 'order', and 'decree' are used indiscriminately in the Letters Patent. *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(2), *Howard v. Wilson*(3) referred to. In *Ebrahim v. Fuckerunnissa Begum*(4), there was a refusal to frame issues by a Judge who had held that a certain document was inadmissible. This is the judgment of a single Judge and is wrong. It has not been followed. The question is purely whether or not there has been adjudication upon a right. In *Kishen Pershad Panday v. Tiluckdhari Lall*(5), an order refusing to extend time for furnishing security for costs of an appeal to the Privy Council was held not to be a judgment. *Seshagiri Row v. Nawab Askur Jung Aftab Dowla*(6) was a case for security for costs and it was followed in *Soonabia v. Tribhovan Das*(7).

(1) (1868) 3 M.H.C.B., 384.

(3) (1879) I.L.R., 4 Calo., 231.

(5) (1891) I.L.R., 18 Calo., 182.

(7) (1903) 10 Bom. L.R., 337.

(2) (1872) 8 Beng. L.R., 433 at p. 451.

(4) (1879) I.L.R., 4 Calo., 531.

(6) (1903) I.L.R., 26 Mad., 502.

WHITE, C.J.,
KRISHNASWAMI
AYYAR AND
AYLING, JJ.

TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

[THE CHIEF JUSTICE.—When security for costs is not given the result may be an adjudication. This cannot be so where it is an issue refused which is not final.] *Vaghoji v. Camaji*(1), *Toolseemoney Dassee v. Sudevi Dassee*(2), *Mussamut Brij Coomaree v. Ramrick Dass*(3), *Gopinath Pati v. Moheswar Pradhan*(4), *Sonbai, Widow of Fazul Habibhai v. Ahmedbhai Habiahai*(5), *Baluram Ramkissen v. Bai Pannabai*(6) referred to.

[KRISHNASWAMI AYYAR, J.—In practically all the cases referred to to support your contention there has been an adjudication.]

Atlas Assurance Company (Ltd.) v. Ahmedbhoy Habibhoy(7), *DeSouza v. Coles*(8), *R. v. R.*(9), *Chappan v. Moidin Kutti*(10), *Ramchandra v. Narasimha Charya*(11), *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(12), *Vyasacharry v. Keshavacharya*(13) are all cases in which the order which was held to be unappealable was purely discretionary. *Appasamy Pillai v. Somasundara Mudaliar*(14) clearly states that an order passed in the exercise of discretion is unappealable. In *Sabhapathi Chetty v. Narayanasami Chetti*(15) it was held that an appeal lay from a refusal to extend time to give security, the time having expired. In *Maruthamuthu Pillai v. Krishnamachariar*(16) an order refusing to issue a commission to examine a witness was held to be appealable.

[KRISHNASWAMI AYYAR, J.—Does not that destroy your rule about discretion?]

A right to produce evidence is held to give a right of appeal. Daniel's 'Chancery Practice,' 7th ed., p. 625, referred to.

P. R. Sundara Ayyar for respondent.—The word 'judgment' in section 15 of the Letters Patent means final pronouncement. It would be oppressive to have a suit and perhaps one or more appeals going on at the same time. In section 39 the word 'final' occurs; section 40 deals with matters not final. Section 37 of the Letters Patent of 1862 must be compared with section 37 of

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| (1) (1905) I.L.R., 29 Bom., 249 at p. 253. | (2) (1899) I.L.R., 26 Cal., 361. |
| (3) (1901) 5 C.W.N., 751. | (4) (1908) I.L.R., 35 Cal., 1096. |
| (5) (1872) 9 B.H.C.R., 398 at p. 406. | (6) (1911) I.L.R., 35 Bom., 216. |
| (7) (1910) I.L.R., 34 Bom., 1. | (8) (1868) 3 M.H.C.R., 384 at p. 387. |
| (9) (1891) I.L.R., 14 Mad., 88. | (10) (1899) I.L.R., 22 Mad., 68. |
| (11) (1900) I.L.R., 24 Bom., 252. | |
| (12) (1901) I.L.R., 24 Mad., 311 at p. 358. | |
| (13) (1902) I.L.R., 25 Mad., 654 at p. 700. | (14) (1903) I.L.R., 26 Mad., 437. |
| (15) (1902) I.L.R., 25 Mad., 555. | (16) (1907) I.L.R., 30 Mad., 143. |

the present Letters Patent. Courts must be guided by Act VIII of 1859 as to what orders are appealable. It could never have been intended for all orders to be appealable; orders giving incidental reliefs—injunctions, attachments, dismissals for default, rejections of plaints are all final pronouncements on the matters with which they deal and will therefore be judgments and so appealable.

[KRISHNASWAMI AYYAR, J.—Would a dismissal with leave to bring a fresh suit be a judgment?]

The incidental reliefs I refer to are those which are independent of the action but incidental steps required to be taken to obtain the fruits of the action. Orders giving or refusing leave to file a suit are on the same footing. Both are judgments in an original proceeding, not in a suit. Looking at the matter from this point of view only *Veerubahdran Chetty v. Nataraja Desikar*(1) and *Maruthamuthu Pillai v. Krishnamachariar*(2) are against me. In *DeSouza v. Coles*(3) leave to sue was refused. In *Kirani Ahmedula v. Subabhat*(4), it is held that the fact that there is a discretion does not interfere with the right of appeal. In *Padmanabha Chettiar v. Williams*(5) an assignee *pendenti lite* applied to be brought on the record and the application was rejected. This was held to be appealable. In this case the assignee's rights were not disposed of. In Black on 'Judgments,' 2nd ed., vol. 1, section 1, 'judgment' is defined as "the determination or sentence of the law, pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court, affirming that, upon the matter submitted for its decision, a legal duty or liability does or does not exist." In section 12, judgments are classified and in section 38 it is laid down that interlocutory and intermediate orders may be considered as judgments but if they are not final they are not appealable judgments. American 'Cyclopedia of Law and Procedure,' 1906, vol. 23, article 'Judgments,' pp. 669 and 672 referred to.

Maharajah of Jeypore v. Papayamma(6), *Commercial Bank of India v. Sabju Saheb*(7), *Srimantu Raja Yarlagadda Durga*

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| (1) (1905) I.L.R., 28 Mad., 28. | (2) (1907) I.L.R., 30 Mad., 143. |
| (3) (1868) 3 M.H.C.R., 384. | (4) (1884) I.L.R., 8 Bom., 28 at p. 30. |
| (5) (1900) I.L.R., 23 Mad., 252. | (6) (1900) I.L.R., 23 Mad., 329. |
| (7) (1901) I.L.R., 24 Mad., 252. | |

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

Prnsada Nayudu v. Srimantu Raja Yorlagadda Mallikarjuna Prasada Nayudu(1), *Mahabir Prosad Singh v. Adhikari Kunwar*(2), *Kuppusami Chetti v. Rathnavelu Chetti*(3), *Appasami Pillai v. Somasundara Mudaliar*(4), *Seshagiri Row v. Nawab Askur Jung Aftah Dowla*(5), *In the matter of the petition of Kally Soondery Dabia*(6), *Veerabhadran Chetty v. Nataraja Desikar*(7), *Maruthamuthu Pillai v. Krishnamachariar*(8), *Vanangamudi v. Ramasami*(9) referred to.

Hon. Mr. T. V. Seshagiri Ayyar in reply.—In Black on 'Judgments,' section 32, it is stated that the matter is a question of practice. Orders granting or dissolving an injunction or overruling a motion to that effect, are frequently found in the enumerated classes of appealable orders; or they may be considered as orders "affecting a substantial right" and hence subject to the revisory power of the upper Courts.

The Court expressed the following:—

THE CHIEF JUSTICE.—The question we have to determine in this case turns on the meaning of the word 'judgment' in clause 15 of the Letters Patent. I find it impossible to reconcile the decisions on the point.

I do not think the word 'judgment' is used in contradistinction to the words 'sentence' or 'order' which immediately follow it. The words "not being a sentence or order passed or made in any criminal trial," as it seems to me, were introduced in order to exclude all criminal proceedings from the operation of the section and that it is not to be inferred from the introduction of these words that the legislature intended that the word 'judgment' should include all orders in civil proceedings.

Further, I am not prepared to infer, from the fact that in sections 39 and 40 of the Letters Patent a distinction is drawn between final judgments, decrees or orders, and interlocutory judgments, decrees or orders, that the word 'judgment' in section 15 is to be deemed to include any order in any interlocutory proceeding.

(1) (1901) I.L.R., 24 Mad., 358.

(3) (1901) I.L.R., 24 Mad., 511.

(5) (1903) I.L.R., 26 Mad., 502.

(7) (1905) I.L.R., 28 Mad., 28.

(9) (1891) I.L.R., 14 Mad., 406.

(2) (1894) I.L.R., 21 Cal., 478.

(4) (1903) I.L.R., 26 Mad., 437.

(6) (1881) I.L.R., 6 Calc., 594.

(8) (1907) I.L.R., 30 Mad., 143.

The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained)—e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause.

Speaking generally I think the word 'judgment' means any "final order, decree or judgment" within the meaning of those words as used in section 12 of the English Judicature Act 1875. An order made on an application which is interlocutory in point of form may be a judgment within the meaning of section 15 of the Letters Patent. On the other hand I am not prepared to say as was held in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(1) and in *Sonbai v. Ahamedbhai Habibhai*(2), it must be a decision which affects the merits by determining some right or liability. I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding.

As regards the authorities I will deal with the Madras cases first. With all respect I think the definition of judgment given by BITTLESTON, J., in *DeSouza v. Coles*(3) as "any decision or determination affecting the rights or the interest of any suitor or applicant" is too wide, and I cannot accede to the proposition that it is "impossible to prescribe any limits to the right of appeal

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

(1) (1872) 8 Beng. L.R., 433.

(2) (1872) 9 B.H.C.R., 398.

(3) (1888) 3 M. H.C.R., 384.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

founded upon the nature of the order or decree appealed from." I agree, however, with the actual decision in the case which seems to me to satisfy the test which I have ventured to lay down.

The order in *Somasundaram Chetti v. Administrator-General*(1) was an order under the Administrator-General's Act giving the Administrator-General commission at a certain rate. I think the order may be regarded as an order which put an end to a proceeding in which the Administrator-General claimed commission at a certain rate, and was therefore appealable.

I am unable to agree with the decision in *R. v. R.*(2) that an order fixing a date for the hearing of a suit is appealable. This case does not appear to have been cited with approval in this Court, and was expressly disapproved in *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(3) and in *Mussamut Brij Coomaree v. Ramrick Dass*(4).

The decisions in *Commercial Bank of India, Limited v. Sahju Saheb*(5) (an order dismissing an application by the assignee of a plaintiff to be brought on the record held appealable) and in *Vyasacharry v. Keshavacharya*(6) (an order dismissing a petition to receive a sum of money as security for costs of an appeal held appealable) in my opinion satisfy the test I have suggested. I should be prepared to hold that an appeal lay from an order refusing a stay of execution (the application for a stay being an ancillary proceeding) though a contrary view was taken in *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(3).

With all respect I find myself unable to agree with the decisions in *Veerabadrin Chetty v. Nataraja Desikar*(7) and in *Maruthamuthu Pillai v. Krishnamachariar*(8), that an order for evidence to be taken on commission or an order refusing a commission is an appealable order. As regards the latter case I entirely agree with the observation of the learned Judges that the fact that the making of the order was a matter of discretion does not affect the appealability of the order. This fact may be a good reason for refusing to exercise the appellate jurisdiction, but,

- (1) (1876) I.L.R., 1 Mad., 148.
(3) (1901) I.L.R., 24 Mad., 358.
(5) (1901) I.L.R., 24 Mad., 252.
(7) (1905) I.L.R., 28 Mad., 28.

- (2) (1891) I.L.R., 14 Mad., 88.
(4) (1901) 5 Cal., W.N., 781.
(6) (1902) I.L.R., 25 Mad., 654.
(8) (1907) I.L.R., 30 Mad., 143.

as it seems to me, it is no reason for holding that the appellate jurisdiction does not exist.

I am unable to agree with what I understand to be the principle of the decision in *Appasami Pillai v. Somasundara Mudaliar*(1) and I think that the adjudication based on a refusal to exercise discretion, if the effect of the adjudication is to dispose of the suit so far as the Court making the adjudication is concerned, is appealable. This being my view I must hold though I do so with considerable reluctance that the decision in *Chinnasami Mudali v. Arumuga Goundan*(2), is not, in my opinion, good law.

As regards the Calcutta cases I have already referred to *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(3), in connection with the grounds of the decision in that case. As regards the actual decision I should feel some difficulty in following it and I should be disposed to hold such an order was appealable. In *Hurriah Chunder Chowdhry v. Kali Sunderi Debi*(4), the Privy Council held, on the facts of that case, that an order refusing to transmit for execution an order of the Privy Council was appealable. Their Lordships do not discuss the general question of the meaning of the word 'Judgment.'

I am of opinion that an appeal lies from a refusal to confirm an award (*Howard v. Wilson*(5)) or a refusal to set aside an award (*Toolsee Money Dasse v. Sudevi Dasse*(6)).

I think an appeal would lie from an order refusing to extend the time for giving security for costs, as the effect of the order would be to put an end to the appeal. (In *Kishen Pershad Panday v. Tiluckdhari Lall*(7), the Calcutta High Court took a different view.) In *Gopinath Pati v. Moheshwar Pradhan*(8), an order was made setting aside a judgment and a decree and ordering a remand, and this order was held to be appealable. I agree. The learned Judges observe, "we think, it is a 'judgment' because it disposes of the suit."

As regards the Bombay authorities I may refer to *Vaghogi v. Camaji*(9) where it was held "that an appeal lay from an order

- (1) (1903) I.L.R., 26 Mad., 437.
(3) (1872) 8 Beng., L.R., 433.
(5) (1879) I.L.R., 4 Cal., 231.
(7) (1891) I.L.R., 18 Cal., 182.
(9) (1905) I.L.R., 29 Bom., 249.

- (2) (1904) I.L.R., 27 Mad., 432.
(4) (1883) I.L.R., 9 Cal., 432.
(6) (1899) I.L.R., 26 Cal., 361.
(8) (1908) I.L.R., 35 Cal., 1096.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA.
CHETTIAR.

dismissing a Judge's summons to show cause why leave granted under clause 12 of the Letters Patent should not be rescinded and the plaint taken off the file." Here the adjudication asked for, if made, would have disposed of the suit. So also would an order made on an application to revoke a submission to arbitration. I think such an order is appealable. See *Atlas Assurance Company, Limited v. Ahmedbhoy Habibhoy*(1).

I agree with the view expressed by GARTH, C.J., in *Ebrahim v. Fuchhunnissa Begum*(2), on the point which has been referred to us and I think our answer to the question referred should be in the negative.

KRISHNASWAMI AYYAR, J.—In this case the defendant in Original Suit No. 117 of 1909 on the file of the High Court (Original Side) moved upon Judge's Summons for certain additional issues before Mr. Justice WALLIS. The learned Judge dismissed the summons and the defendant appeals under clause 15 of the Letters Patent of 1865. The question has been referred to the Full Bench whether the order in this case is a judgment within the meaning of that clause. The meaning of the word 'Judgment' has often come up for consideration in this Court and the cases show a considerable diversity of opinion. Apart from the question of the true signification of that word in clause 15 there has also been considerable difficulty in the application of the definition to the facts of individual cases. It is perhaps to be regretted that the question was not set at rest earlier so far as this Court was concerned by the authoritative pronouncement of a Full Bench. Having regard to the contrariety of opinion it is inevitable, whatever view we may take of the meaning of the term 'Judgment,' that some decisions of this Court at all events will be found to be at variance with it.

What then does the word 'Judgment' mean in clause 15 of the Letters Patent? In Daniel's 'Chancery Practice,' Volume I, page 625 the following definition occurs. "A judgment is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final." These judicial pronouncements are known as 'judgments' at Common Law and as 'Decrees' in Chancery.

See page 321, introduction to Seton on 'Decrees.' A more accurate definition is to be found in Black on 'Judgments' at page 2 where the author says:—We may define a 'Judgment' as the determination or sentence of the law pronounced by a competent judge or court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist." Again at page 3 "the term which, in equity practice, corresponds to 'judgment' at common law is 'decree.' A 'decree' is a determination or sentence of equity pronounced by a competent Court upon the controversies submitted for decision." At page 32 the author proceeds to define an interlocutory judgment. "A 'judgment' which is not final is called 'interlocutory,' i.e., an 'interlocutory judgment' is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause but does not adjudicate the ultimate rights of the parties or finally put the case out of Court. Thus a judgment or order passed upon any provisional or accessory claim or contention is in general merely 'interlocutory' though it may finally dispose of that particular matter." Distinguishing between judgments and orders the learned author says at page 5 "an 'order' is the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits but adjudicating a preliminary point or directing some steps in the proceedings." It is unnecessary to refer to other definitions some of which are collected in *Chinnasami Mudali v. Arumuga Goundan*(1). But these citations are hardly sufficient for defining the meaning of the term 'Judgment' in the Letters Patent though they render us substantial assistance in arriving at the exact signification intended by the framers of the Letters Patent. We find the terms judgment, sentence, order, decree and preliminary or interlocutory judgment employed in the Letters Patent. It is necessary to understand the use of the term 'judgment' in clause 15 in such a manner as to give effect to the several words above noted that are employed in the Letters Patent. When the terms final, preliminary, and interlocutory judgment occur in other parts of the Letters Patent it is only reasonable to assign

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

(1) (1910) I.L.R., 34 Bom., 1.

(2) (1879) I.L.R., 4 Cal., 531.

(1) (1904) I.L.R., 27 Mad., 432.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

to the word 'judgment' standing by itself in clause 15 an interpretation which will cover the various kinds of judgments specifically dealt with in other clauses of the Letters Patent. Clauses 39 to 42 of the Letters Patent of 1865 as well as the corresponding clauses of the Letters Patent of 1862 deal with appeals to the Privy Council. They contemplate an appeal from a final judgment, decree or order as a matter of course, provided certain requirements as to value or certificate of fitness are satisfied. An appeal to the same tribunal is allowed from any preliminary or interlocutory decree, judgment, order, or sentence with the leave of the Court. If an interlocutory judgment is appealable to the Privy Council with the leave of the Court, it can only be when it is a decision of the High Court on appeal or in its original jurisdiction if the Bench passing the interlocutory judgment is composed of the majority of the Judges of the Court. It would be a strange result to hold that from an interlocutory judgment from the original side leave may be given to appeal to the Privy Council under section 40 even though it is a pronouncement of a single Judge, there being no appeal to the High Court itself under clause 15. The proper view therefore to take of the meaning of the word 'judgment' in section 15 is to understand it as covering an 'interlocutory or preliminary judgment.' But a preliminary or interlocutory judgment is not the same thing as an interlocutory order. And whatever width of interpretation the term 'judgment' may be capable of it ought not to be so understood as to cover 'interlocutory orders.' It was contended by Mr. Seshagiri Ayyar that as clause 15 speaks of a 'judgment' not being a 'sentence' or 'order' passed and made in a criminal trial that all orders other than those that are made in a criminal trial should be held to be comprised within the term 'judgment.' This argument appears to me to be inadmissible. An order in a criminal trial does not correspond to the interlocutory order in a Civil Cause but ordinarily to an order of discharge or acquittal which terminates in a criminal proceeding in favour of a prisoner as a sentence does the other way. The phrase "not being a sentence or order passed or made in any Criminal trial" was not in clause 14 of the Letters Patent of 1862 which corresponded to Clause 15 of the later letters. It appears to have been inserted in clause 15 of the Letters Patent of 1865 mainly to indicate the exception dealt with in clause 25 later, though it is not confined

to a sentence or order in the exercise of Original Criminal Jurisdiction as clause 25 is.

It was suggested in the course of the argument that Act VIII of 1859 which was in force at the time of the issue of the Letters Patent would be a valuable guide to the meaning of the word 'judgment' though the provisions of the Act were not binding as to what should be held to be appealable judgments. Having regard to the language of clause 37 of the original Letters Patent and of the later letters the view appears to have been entertained that the class of appealable judgments must be confined to those that were appealable under the Code of Civil Procedure. Both in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(1) and in *Sonbai, widow of Fazul Habibhai v. Ahamed Bhai Habibhai*(2) the opinion was expressed that as section 363 of Act VIII of 1859 prohibited appeals from interlocutory orders in the course of the suit and the only appeals from orders were under sections 36, 76, 85, 95 and 119, the word 'judgment' in section 15 of the Letters Patent should receive a restricted interpretation so as not to allow an appeal in cases where no appeal lay under the Code. This view was obviously open to exception. The rules to be made under clause 37 for regulating proceedings in civil cases though the court was to be guided as far as possible by the provisions of the Code of Civil Procedure could hardly include a provision regulating the right of appeal already determined by section 15 and as pointed out by the Full Bench of this Court in *Chuppan v. Moidin Kutti*(3), the provision as to appeals in the Code applies to cases in which appeals lie from one court to another and not from one member of a court to other members of the same court. Having arrived then at the conclusion that the word 'judgment' covers a 'preliminary or interlocutory' judgment as well as a 'final' judgment that it does not include an 'interlocutory' order and the interpretation is uncontrolled by any provision of the Code of Civil Procedure though having regard to the reference to the Code in section 37 radical divergence from it is hardly to be expected, we may proceed to further delimit the exact boundaries of the field covered by the term as used in clause 15.

The definitions with which we started will hardly suffice to mark the boundary accurately. There is no doubt that the

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

(1) (1872) 8 Beng. L.R., 433.

(2) (1872) 9 B. H.C.R., 398.

(3) (1899) I.L.R., 22 Mad., 68.

WHITE, C.J.,
KRISHNA-
SWAMI
ATTAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

adjudication of a right or liability which determines a suit or appeal is a Judgment. Even a refusal to adjudicate which puts an end to a particular suit or appeal must equally amount to a 'judgment.' This has not always been borne in mind as we shall find later on in dealing with the case of *Chinnasami Mudali v. Arumuga Goundan*(1). A decision on the merits of the controversy between the parties is not essential to the termination of a suit or appeal. Even though the proceeding is not a suit or appeal as technically understood, but is only what may be called an original petition like an application for a succession certificate or the appointment of a guardian, the pronouncement which terminates the proceeding has the characteristics of a judgment, though there is a formal difference in the designation of the proceeding (see Rule 4 Moffussil Rules of Practice). But the right or liability with reference to which the court adjudicates or declines to do so must be the substantive claim or liability and not as Mr. Seshagiri Ayyar tried to maintain a right to a particular judicial procedure or a detriment suffered in being denied the benefit of a rule of procedure. But I do not think we shall be justified in confining the term 'judgment' to final disposal of suits, appeals or original petitions or proceedings in execution. Preliminary or interlocutory judgments which ascertain rights and direct further inquiries which determine liabilities though further directions are given for ascertaining the measure of those liabilities must be deemed to fall within clause 15. See however *Rahimbhoy Hibbhoy v. Turner*(2) and *Syed Muszar Husein v. Bodha Bibi*(3), as to final judgments under section 595 of the Civil Procedure Code of 1882.

The Common Law Procedure Act, 15 and 16 Victoria, Chapter 76, recognised the distinction between interlocutory and final judgments. See sections 27 and 140. But they were both 'judgments' as distinguished from 'interlocutory orders' under sections 52, 54 and 222. I am unable to agree with Mr. Sundara Ayyar that interlocutory judgments which decide the merits are not judgments under section 15. The question still remains whether orders in incidental proceedings for attachment or arrest before judgment, for a temporary injunction or for the appointment of a receiver are judgments within the meaning of the term

(1) (1904) I.L.R., 27 Mad., 432.

(2) (1890) 18 I.A., p. 6.

(3) (1894) 22 I.A., p. 1.

as used in clause 15. Such proceedings are not natural steps in the determination of the cause. But they are remedies, though provisional in their character, and the judicial determination of those proceedings may well be deemed to be analogous to the disposal of original petitions which determines the rights of parties. An appeal was specially provided from such orders even in the code of 1859 and the decisions in such cases may well be treated as interlocutory judgments. Cases of stay of execution, or security for costs, whether the order is in favour of one party or another, must stand on the same footing as temporarily affecting the rights of parties.

We have now to examine the decisions to see how far these principles are in accord with the rules that are deducible from the cases. So far as I have been able to discover, there are only four or five decisions in which an endeavour has been made to arrive at a definition of the term 'judgment' as used in clause 15 of the Letters Patent. The decision in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(1) stands at the head of them all. A mandamus was issued by Mr. Justice PHEAR sitting on the Original Side to the Justices of the Peace of Calcutta to compel them to refer to arbitration a question of compensation. "The mandamus was to do certain things or to show cause to the contrary so that the order of the Original Judge did not determine any question whatever between the parties. It only initiated the proceedings by which the liability of the Justices to make compensation would be ascertained and determined." COUCH, C.J., says "We think judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." I would only stop here to remark that a decision which determines the cause or proceeding so far as the particular court is concerned, though it refuses to adjudge the merits, must also be deemed to be a judgment: for otherwise the rejection of a plaint for defect of form or insufficiency of court fee or a return of it for want of jurisdiction would be outside the

WHITE, C.J.,
KRISHNA-
SWAMI
ATTAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

(1) (1872) 8 Beng. L.R., 433.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.

TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

definition of the learned Chief Justice which could hardly have been his meaning. I may also observe that the "part" which is determined may be a part of the claim separable from the rest or a determination of liability generally though the actual measure of liability may be a matter of account. The decision in *Sonbai, widow of Fazul Habibhai v. Ahmed Bhai Habibhai*(1) is in substantial accord with the judgment of the High Court of Bengal though Chief Justice SARGENT seemed to consider that clause 15 was governed by Act VIII of 1859. That this latter view is erroneous appears to be clear from the decision of the Privy Council in *Hurriah Chunder Chowdhry v. Kalisunderi Debi*(2) where an order of a single Judge refusing to transmit an order of the Privy Council to a Subordinate Court for execution was held to be appealable as a 'judgment' under clause 15 although such an order was not included as appealable under section 588 of the Code of 1882. The decision in *DeSouza v. Coles*(3) was the first attempt in Madras to ascertain the meaning of the word 'judgment' in the Letters Patent. Leave to institute a suit having been refused by the Judge sitting on the Original Side on the ground that the cause of action having in great part arisen outside Madras, an appeal was preferred under clause 15. The two very learned Judges who decided that case held that the term meant any decision or determination affecting the rights or the interest of any suitor or applicant. If they had stopped there it might be doubted whether this language was not in substantial accord with that of Sir R. Couch in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(4). But Sir Adam Bittleston proceeds to say at page 388 "when the language giving the appeal is so general in its terms as that contained in the fifteenth clause of the chapter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." It seems to me that this is manifestly too wide a definition. And the opinion has been expressed in later cases in Madras and elsewhere that this is so. I need not stop to notice the passing remark in *R. v. R.*(5) that every order of a single Judge is a judgment. For this has been disapproved of in two later cases, *Srimantu Rajah*

(1) (1872) 9 B. H.C.R., 398. (2) (1883) I.L.R., 9 Cal., 482 at p. 493.
(3) (1885) 3 M.H.C.R., 384. (4) (1872) 8 Beng. L.R., 433.
(5) (1891) I.L.R., 14 Mad., 88.

Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu(1) and *Kuppusami Chetti v. Rathna-elu Chetti*(2) in which one of the learned Judges who was a party to the judgment in *R. v. R.*(3) joined in the disapproval. In *Chinnasami Mudali v. Arumuga Goundan*(4) which was an appeal from a decision of a single Judge declining to interfere under section 25 of the Small Cause Courts Act, Sir S. SUBRAMANIA AYYAR, officiating C.J., and RUSSELL, J., defined 'judgment' in section 15 of the Letters Patent by confining it to an adjudication of the right or liability. But they regarded a refusal to interfere as no judgment. It was said that the Court had a discretion to interfere and a refusal to exercise a discretion was no judgment. This raises a question as to whether the refusal to exercise a discretion does not involve the application of the judicial mind as much as a decision in the exercise of discretion. Observations similar to those that have been made in this case are to be found in *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*(1) and in *Appasami Pillai v. Somasundara Mudaliar*(5) in which latter case BENSON and BODDAM, JJ., refused to entertain an appeal from an order refusing leave to appeal *in forma pauperis* because it was within the discretion of the Court to grant or refuse such leave. I am unable to agree in the principle enunciated in these decisions as regards discretionary orders and orders refusing to exercise a discretion not being appealable. This view was expressly disapproved of by SUBRAMANIA AYYAR and MILLER, JJ., in *Marutha Muthu Pillai v. Krishnamachariar*(6). In the Privy Council case of *Hurriah Chunder Chowdhry v. Kali Sunderi Debi*(7) it was held that the Appellate Court had rightly entertained the appeal under section 15 from the order of the single Judge who refused to transmit the order of the Privy Council for execution. The Appellate Court which entertained the appeal in Calcutta had expressly stated in *In the matter of the petition of Kally Sogndery Dabia*(8) that the wrong exercise of discretion by the Judge below was the ground on which the appeal was entertained. In *DeSouza v.*

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

(1) (1901) I.L.R., 24 Mad., 358. (2) (1901) I.L.R., 24 Mad., 511.
(3) (1891) I.L.R., 14 Mad., 88. (4) (1904) I.L.R., 27 Mad., 432.
(5) (1901) I.L.R., 26 Mad., 437. (6) (1907) I.L.R., 30 Mad., 143.
(7) (1883) I.L.R., 9 Cal., 482 at p. 493.
(8) (1881) I.L.R., 6 Cal., 594 at p. 599.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

Coles(1) the point was well put by Sir Adam Bittleston at page 388. The question of the right of appeal, he pointed out, was different from how a matter of discretion should be dealt with by an appellate Court. He said "it is obvious that the duty of the appellate Court in disposing of the appeal may vary considerably according to the nature of the order or decree complained of. And we think it may be stated as a general rule that when the determination complained of is merely the result of the exercise of discretion on the part of the Judge, in a matter which was a proper subject for the exercise of that discretion, the appellate Court would rightly decline to interfere." The fact of a matter being within the discretion of the original Judge is not a ground for refusing to entertain the appeal but a sufficient reason for declining to interfere with that discretion. I cannot therefore accept Mr. Seshagiri Ayyar's apparent concession that if the order of the single Judge is one which he has made in the exercise of discretion, a party has no right to the exercise of that discretion in a particular way and is therefore not entitled to appeal when he is aggrieved by an erroneous exercise of that discretion.

It is unnecessary to examine all the cases in detail. It is sufficient to say that I have gone through every one of them. In some of them the true principle does not appear to have been recognized or kept in view. In some others the application of the principle to the particular facts of the case appears to be open to exception. All the Calcutta cases cited at the bar *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(2), *Howard v. Wilson*(3), *Ebrahim v. Fackhrunnissa Begum*(4), *Hurrish Chunder Chowdhry v. Kali Sundari Debi*(5), *Toolesemony Dassee v. Sudevi Dassee*(6), *Mussamut Brij Coomaree v. Ramrickdass*(7), *Gopinath Pati v. Moheswar Pradhan*(8) with the exception perhaps of the decisions in *Mussamut Amirrunnessa v. Baboo Behary Lall*(9), *Mowla Buksh v. Kishen Pertab Sahi*(10), *Manly v. Patterson*(11), *Lutf Ali Khan v. Asgur Reza*(12) and *Kishen Pershad Panday v. Tiluckdhari Lall*(13) which are cases of leave to appeal

- (1) (1868) 3 M.H.C.R., 384.
- (3) (1879) I.L.R., 4 Cal., 231.
- (5) (1883) I.L.R., 9 Cal., 482.
- (7) (1901) 5 C.W.N., 781.
- (9) (1901) 25 W.R., 529.
- (11) (1881) I.L.R., 7 Cal., 339.
- (13) (1891) I.L.R., 18 Cal., 182.

- (2) (1872) 8 Beng. L.R., 433.
- (4) (1879) I.L.R., 4 Cal., 531.
- (6) (1899) I.L.R., 26 Cal., 361.
- (8) (1908) I.L.R., 35 Cal., 1096.
- (10) (1876) I.L.R., 1 Cal., 102.
- (12) (1890) I.L.R., 17 Cal., 455.

to the Privy Council dealt with on special grounds, appear to be in accord with the principles I have endeavoured to formulate. So are also all the Bombay cases cited; *Sonbai, widow of Fazul Habibhai v. Ahmed Bhai Habibhai*(1), *Hirji Jini v. Narran Mulji*(2), *Vaghoji v. Camaji*(3), *Jehangir Cowasji v. The Hope Mills, Limited*(4), *Atlas Assurance Company, Limited, v. Ahamedbhoy Habibhoy*(5), and *Soonabai v. Tribhovan Das*(6). As regards the Madras cases it is impossible to express oneself as in agreement with them all. The decision in *De Souza v. Coles*(7) is certainly right, whatever may be said with reference to the definition given of "judgment." In *Somasundaram Chetty v. Administrator-General*(8) an appeal was rightly held to lie against an order determining the rate of commission payable to the Administrator-General. In *R. v. R.*(9) the order of adjournment was certainly not appealable. But an appeal lay as regards the application to vary the rate of alimony and though the definition of judgment there was certainly open to exception the order of adjournment itself was not varied in appeal. In *Vanangamudi v. Ramasami*(10) where a single Judge had set aside a decree for rent in part and called for a report as to the remainder there was at least an interlocutory judgment from which an appeal was rightly held to lie. In *Commercial Bank of India, Limited v. Sabju Saheb*(11) the application of a transferee from the plaintiff to be added as a party was refused. As the refusal was a determination of the proceeding so far as he was concerned, it seems to me he was rightly held entitled to appeal. The decision in *Srimantu Raja Yarlagadda Durga Prasada Nayudu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayudu*(12) where an order refusing to stay execution was held not to be a judgment, proceeded on the authority of *Ramair v. Dorasami Aiyar*(13) and *Mohabir Prasad Singh v. Adhikari Kunwar*(14) and upon the view that the order of the single Judge was one made by him in the exercise of his discretion. Staying execution is a temporary interference with a right adjudged, and the refusal to stay is a refusal of a provisional

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

- (1) (1872) 9 B.H.C.R., 398.
- (3) (1905) I.L.R., 29 Bom., 249.
- (5) (1910) I.L.R., 34 Bom., 1.
- (7) (1868) 3 M.H.C.R., 384.
- (9) (1891) I.L.R., 14 Mad., 88.
- (11) (1901) I.L.R., 24 Mad., 252.
- (13) L.P.A. No. 5 of 1900 (unreported).
- (2) (1875) 12 Bom., H.C.R., 129.
- (4) (1909) I.L.R., 33 Bom., 216.
- (6) (1908) 10 Bom. L.R., 337.
- (8) (1876) I.L.R., 18 Mad., 148.
- (10) (1891) I.L.R., 14 Mad., 406.
- (12) (1901) I.L.R., 24 Mad., 358.
- (14) (1894) I.L.R., 21 Cal., 473.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

remedy, as would be the refusal of an injunction or an attachment before judgment. It appears to me that the sounder view is that of the Calcutta High Court in *Mussamut Brijcoomaree v. Ramrick Dass*(1). The Calcutta case *Mohabir Prosad Singh v. Adhikari Kunwar*(2) which this Court purported to follow, is explained away in the later decision in *Mussamut Brij Coomaree v. Ramrick Dass*(1). I have already dealt with the argument derived from the discretionary character of the order. If pushed to its full length it would cover all cases of specific relief which are within the discretion of the Court and the grant or refusal of such relief would cease to be the subject of appeal under clause 15 of the Letters Patent, a result which shows its weakness. It is difficult to distinguish in principle between an order staying execution or refusing to stay it and an order directing security for the costs of an appeal during its pendency. Though the failure to furnish the security may eventually lead to the dismissal of the appeal where security was ordered, the refusal to direct security is not attended with any such consequences. All these orders affect the right of the parties though temporarily and must be deemed to fall within the definition of judgment. It is worthy of note that in *Kuppusami Chetti v. Rathnavelu Chetti*(3) an order for stay of execution and an order for security for costs referred to by way of illustration were treated on the same footing though in favour of the opposite view that no appeal lay. It was rightly held, if I may presume to say so, in *Sabhpathi Chetti v. Narayanasami Chetti*(4) and *Seshagiri Row v. Nawab Askur Jung Aftab Dowla*(5) that an appeal lay from an order refusing to extend time for the giving of security for the costs of an appeal and from an order directing security to be given. Two further cases remain to be noticed. *Veerabadran Chetti v. Nataraja Desikar*(6) and *Marutha Muthu Pillai v. Krishnamachariar*(7). It is difficult to support the latter. An order refusing to issue a commission, however serious the ultimate results to the party, is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits. As regards the former it is possible to contend that so far as the judgment of the single Judge of this Court was

(1) (1901) 5 C.W.N., 781.
(3) (1901) I.L.R., 24 Mad., 511.
(5) (1903) I.L.R., 26 Mad., 502.
(7) (1907) I.L.R., 30 Mad., 143.

(2) (1894) I.L.R., 21 Cal., 473.
(4) (1902) I.L.R., 25 Mad., 555.
(6) (1905) I.L.R., 28 Mad., 28.

concerned it was passed in revision and not in the course of an interlocutory proceeding. The Subordinate Judge had refused to issue a commission for the examination of a witness. That was a mere interlocutory order. Mr. Justice BODDAM set that aside in revision. Could his order be treated as other than interlocutory so far as the execution proceeding was concerned in which the witness was to be examined on commission? It is unnecessary to express an opinion on the question whether Mr. Justice BODDAM's order was a judgment. A full examination of the cases cited on both sides leads me to the conclusion that no appeal lies from the order of Mr. Justice WALLIS in the present case. I would answer the reference accordingly.

AYLING, J.—I agree that the answer to the question referred for disposal should be in the negative.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
TULJARAM
ROW
v.
ALAGAPPA
CHETTIAR.

ORIGINAL CIVIL.

Before Sir Arnold White, Chief Justice.

MALLIKARJUNA DUGGET (PLAINTIFF),

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT).*

1911.
January 27.

Evidence Act I of 1872, s. 35—Admissibility of report by Tahsildar to Collector.

A Tahsildar, in response to the requisition of the Collector, sent the following report:—"I beg to state that the village munsif of Inavaram reports that the charities referred to have not yet been commenced."

Held, that the report was not admissible under the first part of section 35 of the Evidence Act to prove that the charities referred to were not performed on the date of the report.

Although in certain cases an isolated document may be considered a book or register within the meaning of the first part of section 35, it does not follow that every report regarding a fact from a public servant to his official superior in pursuance of directions from the latter, is admissible evidence to prove such fact.

* Original Suit No. 315 of 1909.

WHITE, C.J.
MALLIKAR-
JUNA
DUGGET
v.
SECRETARY
OF STATE
FOR INDIA.

C. P. Ramaswami Ayyar and Nanabhoy Devay for plaintiff.
The Hon. The Advocate-General for defendant.
THE CHIEF JUSTICE.—In this case the Advocate-General on behalf of the defendant has tendered in evidence a document dated the 10th August 1900. The document is a report from the Tahsildar to the Collector of Chingleput district. It is in these terms:—Adverting to (a certain reference): “I beg to state that the village munsif of Inavaram reports that the charities referred to have not yet been commenced.” The Advocate-General tenders this under section 35 of the Evidence Act as a “statement of fact in issue or relevant fact,” “the fact in issue or relevant fact” being that the charities in question “have not been commenced,” in other words, he tenders it in evidence of the fact that the charities had not been commenced on the day when the report was made. Mr. Ramaswami Ayyar on behalf of the plaintiff has objected to this document and has contended it is not evidence under section 35. The Advocate-General has also tendered in evidence certain other documents which he says are admissible under section 9 as explaining the circumstances in which this report contained in the letter of the 10th of August was made by the Tahsildar. I do not think I need set out the purport of these other documents because the Advocate-General does not contend that they are admissible in evidence except as explaining the circumstances in which the letter of the 10th of August, was written and has conceded that if I am against him as regards his contention with reference to the letter of the 10th of August, these other documents would not be admissible under section 9 of the Act. After careful consideration I have come to the conclusion that the letter or report of the 10th of August is not admissible under section 35 for the purpose for which the Advocate-General says it is. I say nothing as to whether it would be admissible for other purposes or as to whether the other documents on which the Advocate-General relies as showing the circumstances in which the letter of the 10th of August was written would not be admissible for other purposes. Section 35 of the Evidence Act contains two branches. The first branch of the section so far as the question I have to decide is concerned runs: “An entry in any public or other official book, register or record, stating a fact in issue or relevant fact”—“and made by a public servant in the discharge of his official duty”—is itself a relevant

fact. The second branch runs: “or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record, is kept” is itself a relevant fact. The Advocate-General did not argue that this was an entry by some person in the performance of his duties “specially enjoined by the laws of the country.” But he says it was an entry which fell within the meaning of the first branch of the section. It has been held by this Court in a judgment to which I was a party that a single document may be a public record within the meaning of this section; that is the case of *Raman v. The Secretary of State for India in Council*(1). In that case we relied upon the decisions under which records of judgments though single documents were held to be admissible in evidence under section 35. There is not much authority as to how far an isolated document can be said to be an “entry in any public or other official book, register or record” but we have held that it may be for the purposes of the section and I do not wish to suggest for one moment that that decision was not good law.

Now the Advocate-General relied on a decision of the Privy Council in the case of *Raja Muthu Ramalinga Sethupati v. Peria Nayagam Pillai*(2) the passage of the judgment on which he relied being at p. 238. I need not read the whole of it. The judgment runs: “Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under suitable authority they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded upon them.” In that case their Lordships really rest their decision, as I understand it, upon the fact that it was the duty of the Collector who made the report in that case to do certain things under the provisions of Regulation VII of 1817, and it seems to me with all respect to the Advocate-General’s argument, although this may be a decision which one would have to consider carefully with regard to the second branch of the section, one really gets

WHITE, C.J.
MALLIKAR-
JUNA
DUGGET
v.
SECRETARY
OF STATE
FOR INDIA.

(1) (1901) 11 M.L.J., 315.

(2) (1874) 1 I.A., p. 209.

WHITE, C.J. very little help from it with reference to the first part of the section, because it is not suggested here that when the Tahsildar made the report he did so in performance of a duty specially enjoined by the law of the country. I need not now pause to consider how far a report purporting to be made by an officer in pursuance of the provisions of Regulation VII of 1817 would be admissible in evidence under section 35.

The Advocate-General also relied upon the case of *Raman v. The Secretary of State for India in Council*(1). The report in question there which was held admissible under section 35 was a report on Government forests made by a Forest officer with reference to some question as to the reservation of forests, and it seems reasonably clear the report was made under the provisions of the Forest Act. The report in that case is a report which would be admissible under the second branch of the section. I think the same observation applies to the case of *Madhav Rao v. Deonak*(2). This again is a case which really does not afford me much assistance with regard to the construction of the first branch of the section. The Advocate-General invited me to go to this length—he invited me to hold that any statement made by any public servant in pursuance of directions given him by a superior officer was a statement which would be evidence of the fact to which the statement relates. The Advocate-General has not been able to call my attention to any authority which goes so far as this. I know of no authority. The Advocate-General suggests it is a question of drawing the line. I agree; but in the absence of some authority I am certainly not prepared to carry the law further, as it seems to me, than it has ever yet been carried. In a sense no doubt the statement is made in the discharge of official duties, because, I take it, it is made in connection with a matter which came within the sphere of his duties and in pursuance of orders given by a superior officer. But, as I say, I am not prepared on that ground alone to hold that the statement is admissible in evidence within section 35. As regards this particular statement it is really nothing more than a statement as to what the Munsif had reported to the Tahsildar. I do not say that the statement to be evidence within the section must be a statement within the personal knowledge of the party making it. All

(1) (1901) 11 M.L.J., 315.

(2) (1897) I.L.R., 21 Bom., 695.

I say is—and I desire to confine my observations to this particular statement—I am not prepared to hold that it is admissible under section 35.

Mr. Ramasawmy Ayyar has called my attention to certain authorities but I don't propose to discuss them at any length. In the case *Jigoyamba Bai Sahiba v. Venkalakshmi Ammal*(1) in the course of the judgment I observed "Our attention has been called to no case in which it has been held that correspondence, official it may be, comes within the terms of that section. As I construe that section, it does not apply to ordinary correspondence though that might be conducted by officials." After having had the full benefit of the arguments in this case I see no reason to depart from the view which I then expressed.

There is one other case to which perhaps I ought to refer, seeing it is a judgment of the Privy Council. It is the case *Parbati Kunwar v. Chandar Pal Kunwar*(2). The judgment runs (page 475):—"Various technical objections to declarations, such as those of the Kannugas, to entries made in the village records by the officer charged by Government with that duty and to answers given to official enquiries made under Government directions as to the rules of succession prevailing in particular families were urged by the plaintiff. Speaking broadly these objections seem to their Lordships to have been material rather to the weight than to the admissibility of the particular evidence, which was *prima facie* admissible as purporting to be made by the proper officer in performance of a special duty and presumably with due regard to the rules laid down for his guidance." These are very general observations and made with reference to the documents in question in that case. And the conclusion I have come to is that for the purposes for which the Advocate-General now seeks to put this document in evidence it is not admissible under section 35.

I am told that the Munsif and the Tahsildar are still alive. The proper way to prove the fact to which the statement in the report relates is by calling them.

W. O. David, Attorney for defendant.

(1) 7 M.L.J., 117.

(2) (1909) I.L.R., 31 All., 457.

WHITE, C. J.
MALLIKAR-
JUNA
DUGGET
v.
SECRETARY
OF STATE
FOR INDIA.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

THIRUVENGADATHAMIAH (PLAINTIFF),

v.

MUNGIAH AND ANOTHER (DEFENDANTS).*

Stamp Act, II of 1899, s. 2 (15), sch. I, art. 45—Final decree effecting partition, what is.

To make an order chargeable with stamp duty under section 2 (15) of the Stamp Act of 1899, it must effect an actual division of the property. An order declaring the rights of the parties and directing further proceedings for the ascertainment of the specific shares is not such an order.

Courts ought not to pass interim orders and direct proceedings in execution for the ascertainment of the specific shares. The final order should be passed after the specific shares have been ascertained.

A decree reciting a razinamah made by consent of parties, allotting specific properties to the several parties and directing other parties to deliver possession is chargeable with stamp duty under article 45 of schedule I as a final order effecting partition within section 2 (15). Being made by consent of parties, it is also an instrument whereby co-owners have agreed to divide property in severalty and falls within the first part of section 2 (15).

THE FACTS are stated in the judgment.

The draft partition decree in this case having come on for orders on the 28th September 1911 in the presence of Mr. V. V. Srinivasa Ayyangar, vakil for the plaintiff for determination as to whether the said decree is chargeable with stamp duty under section 2 (15) and article 45 of schedule I of the Stamp Act, 1899, and having stood over for consideration till this day, the Court made the following.

V. V. Srinivasa Ayyangar for plaintiff.

P. Doraiswami Ayyangar for first defendant.

ORDER.—It has been the practice in the Registrar's office to require the parties to pay the stamp duty leviable upon a partition under the Stamp Act, 1899, schedule I, article 45, before the issue of the final decree in a partition suit, on the ground that the decree is a final order for effecting a partition passed by a Civil Court within the meaning of section 2 (15) of the Act, which defines an "instrument of partition."

The learned vakil for the plaintiff has argued that the duty is not chargeable upon the decree in this case, since it is not a final order within this definition, and that final order means an order

made in execution delivering to the parties the shares which have been determined by the decree of the Court.

To make an order chargeable under the section it must effect an actual division of the property and therefore an order declaring the rights of the parties and directing further proceedings for the ascertainment of the specific portion to be taken by each party, or for the demarcation of a share of immoveable property by metes and bounds, will not fall within the section. The Courts have sometimes passed such interim orders and directed further proceedings to be in execution, but this procedure is irregular, and the Court should, after the specific share of each co-sharer has been determined, pass the final order or decree allotting a particular and ascertained property to each co-sharer and vesting it in him. (See *Jotindra Mohan Tagore v. Bejoy Chand Mahatap* (1).) Further proceedings on such a final order will be for delivery of possession merely and in execution, and will not be for effecting a partition. A final order of this kind will be analagous to a final order of the Collector, under section 265 of the Code of Civil Procedure, 1882, effecting a partition of an undivided estate paying revenue to Government.

The decree in the present case recites a razinamah executed by the parties and is made by consent of parties; and the decretal portion allots specific properties to the several parties and directs other parties to deliver up possession, and also provides for the execution of a sale deed and lease of certain immoveable property.

In my opinion the decree affects an actual partition of the property among the parties, i.e., it vests specific portions of the estate in particular parties, and is therefore the final order in the suit effecting a partition, and is accordingly chargeable with duty as an instrument of partition (see *Balaram v. Chiloji* (2)).

Any proceedings subsequent to this decree can only be for the purpose of obtaining actual possession of, or the execution of documents relating to, specific properties.

I have been referred to a judgment of WALLIS, J., in Original Suit No. 70 of 1906 in which he expresses the opinion that "final order" in section 2 (15) applies to some order of the Civil Court made in execution; but the above case which is a decision of a full bench does not appear to have been brought to the notice of the learned Judge

BAKEWELL, J.
THIRUVENGADATHAMIAH
v.
MUNGIAH.

1911.
October 4.

* Civil Suit No. 374 of 1910.

(1) (1905) 32 Cal., 483.

(2) (1905) I.L.R., 29 Bom., 366.

BAKEWELL, J. I am also of opinion that the decree in the present case, being
 THIRUVENGA- a consent decree, is an instrument whereby the co-owners have
 DATHAMIAH agreed to divide property in severalty, since it is the formal
 v. record of an agreement entered into by the parties, and that it
 MUNGIAH. falls within the first part of section 2 (15).

The stamp paper is directed to be brought in within seven days.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1910.
 July 22, 25.
 September 5.

VIBUDAPRIYA THIRTHASWAMY AND ANOTHER

(PLAINTIFFS), APPELLANTS,

v.

ESOOF SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

Highway, right to carry processions in—Where user of highway proved, presumption will be that the right is unrestricted—Trustees, dedication by.

Where user as a highway, sufficient to raise a presumption of dedication has been proved, the dedication will, in the absence of evidence to the contrary, be presumed, if possible, to be unrestricted.

Marching in procession on a highway is not an excessive user of the highway; and a right of unrestricted user will include the right of marching in procession on the highway.

Shadagopachariar v. Krishnamurthy Rao, [(1907) 1 L.R., 30 Mad., 185], referred to.

A presumption of dedication by trustees will not be made when such dedication will contravene the purposes of the trust. The illegality of such a dedication by the trustees must be clearly proved.

APPEAL against the decree of P. Itteyerah, Subordinate Judge of South Canara, in Original Suit No. 44 of 1904.

The case for the plaintiffs and the defendants is thus set out in the judgment of the lower Court.

Plaint recites that the plaintiffs are Moktessors and managers of Shri Anantheswara temple in Udipi Kasba; that defendants Nos. 1 to 3 are the trustees of the Jammath Mosque and Asarkhana in Udipi Kasba, and the fourth defendant is the Moilar or Khazi of the said mosque, and as such the officiating priest of the Muhammadans of Udipi; that Shri Anantheswara temple is a Hindu religious institution of great sanctity and antiquity, and adjoining it there is another such temple called Chandramowleshwara; that around the site of these temples marked I in

* Appeal No 81 of 1906.

the plan, there is an open space called Car Street, marked WALLIS AND II and III, which is surrounded on all sides by various KRISHNA-SWAMI mutts and buildings, besides the famous shrine of Shri Krishna; AYYAR, J.J. that the whole of the site covered by the said temples, the VIBUDAPRIYA THIRTHASWAMY Car Street and the mutts, etc., belong to the deity of Shri ANANTHESWARA temple and form part of warg No. 95; that the ESOOF SAHIB. said Car Street is the outer courtyard of the said Anantheswara temple, being intended and used for the celebration of numerous processions and religious ceremonies and festivals connected with the said temples; that though it was held by the High Court in Second Appeal No. 1848 of 1895 that the public had acquired a right of thoroughfare over the Car Street, it was only for the purpose of passing and repassing over it and not for the purpose of assembling and passing in a procession engaged in the performance of their religious worship or ceremonies (whether attended with music, bands, tom-toms or not) by reciting prayers and hymns which are abhorrent and repugnant to the Hindu religion and worship in those temples; that for the first time and in April 1900 on the occasion of the annual Muhammadan Bakrid festival, the Muhammadans of Udipi headed by the defendants and certain others, under color of the said decision and with a view to insult and annoy the feelings of plaintiffs and other religionists and to cause disturbance to the performance of religious worship and various ceremonies in those temples, formed themselves into a religious procession in Badaga Pettah, and led by the fourth defendant and preceded by bands, music, etc., marched through the said Car street on their way to the Kabirasthan in spite of the resistance offered by the Hindus; that subsequently in December 1903, and on 27th and 28th March 1904, the Muhammadans repeated the said unlawful action and trespass which caused loss to the said temple by reason of the plaintiffs having been obliged to perform purificatory ceremonies at a considerable cost on each of those occasions.

Defendants Nos. 1 and 5 to 7 contend that first defendant is not the Moktessor of the Jammath Mosque; that the suit without impleading all the trustees of the mosque is bad for non-joinder of parties; that the plaint road is not the private property of the plaint temple; that the processions in question attended with music, etc., were passing through the said road from time immemorial as of right and without any obstruction on the part of the temple authorities; that the plaint road is a public thoroughfare;

WALLIS AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
VIBUDAPRIYA
THIRTHA-
SWAMY
v.
ESOOF SAHIB.

that the suit for injunctions is barred by limitation; that none of their acts were unlawful; that they never committed any trespass; that plaintiffs have not been put to any loss or damages; that the amount claimed is exorbitant; and that the claim for damages is also barred by limitation.

The Subordinate Judge decreed as follows:—

In respect of III-B I give a decree as prayed for in prayers (1) to (3). As regards III-A, it is decreed that the Muhammadan inhabitants of Udipi represented by the defendants be restrained by means of a perpetual injunction from playing music and repeating prayers when taking their processions through III-A while religious worship is going on in the Anantheswara temple and that the remainder of the first prayer be rejected; that the second and third prayers be also rejected save as directed in respect of the first prayer, and that the claim for damages be dismissed.

The plaintiffs appealed and the defendants presented memorandum of objections.

P. R. Sundara Ayyar, K. N. Aiya and B. Silarama Rao for appellants.

K. Naraina Rau and K. P. Madava Rau, first, third, fifth to seventh, ninth to thirteenth and seventeenth to twentieth respondents.

KRISHNASWAMI AYYAR, J.—The plaintiffs are trustees of a Hindu temple. They have instituted the action to restrain the defendants who represent the Muhammadan inhabitants of Udipi by means of a permanent injunction from marching in procession through the portions marked IIIa and IIIb in the plan (exhibit WWW). The Subordinate Judge has given them a decree as prayed for as regards IIIb. The defendants made no claim to go in procession along IIIb, and as the respondents in the appeal before us no attempt was made by them to object to that portion of the decree. As regards IIIa the Subordinate Judge has restrained the defendants from going in procession with music and reciting prayers while religious worship is going on in the plaintiff's temple. Mr. Sundara Ayyar who argued the case for the plaintiffs who are the appellants before us did not contest the right of the defendants to go in procession along IIIa. But he argued against their right to go in procession with music or repeating prayers at any time along IIIa whether

worship was or was not carried on in the Hindu temple. Mr. Naraina Rao for the respondents objected to the Subordinate Judge's decree restricting their right to go with music and reciting their prayers to hours when there was no worship going on in the Hindu temple. The right to go in procession with music was the principal bone of contention before us. No serious effort was made to impugn the finding of the Subordinate Judge that IIIa belongs to the temple. We are not prepared to dissent from that finding. In addition to the evidence detailed by the Subordinate Judge, we may advert to the fact disclosed by the plan and the evidence of the plaintiff's witnesses Nos. 2 and 4 that there are traces of an old temple wall outside the limits of the street in question and on three sides of it.

Starting then from the position that the subsoil of IIIa vests in the temple, the next question is what rights the public have over the surface. IIIa is a part of the big trunk road leading from Mangalore to Kalyanpur. It was the only road between those places till the coast road was opened less than forty years ago according to the plaintiff's second witness. It is not in evidence when IIIa was laid out. Its origin is lost in antiquity. The public has used it as a thoroughfare from time immemorial. Dedication must be presumed from the user as a highway, whoever was the owner of the soil at the time of the dedication. *Regina v. East Mart Tything*(1), *Regina v. East Mart*(2) and *Turner v. Walsh*(3) decide that the crown is no exception. There is no evidence in this case of dedication by the trustees of the temple. The general *prima facie* presumption of law in England is that the freehold of the road *ad medium filum* is in the proprietors of the land on either side; (see *Haigh v. West*(4) and *London and North-Western Railway v. Westminster Corporation*(5)) and that when the road was originally formed the proprietors on either side each contributed a portion of his land for the purpose. *Holmes v. Bellingham*(6) and *In re Whites' Charities, Charity Commissioners v. Mayor of London*(7). This rule is carried so far in England as to raise the presumption that the waste land on each side of the road is the property of the adjoining

WALLIS AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
VIBUDAPRIYA
THIRTHA-
SWAMY
v.
ESOOF SAHIB.

(1) (1848) 17 L.J.Q.B., 177.

(3) (1881) 6 A.C., 636.

(5) (1902) 1 Ch., 269.

(7) (1898) 1 Ch., 659 at p. 660.

(2) (1848) 75 R.R., 653.

(4) (1893) 2 Q.B., 19 at p. 29.

(6) (1859) 29 L.J.C.P., 132 at p. 134.

WALLIS AND KRISHNA-SWAMI AYYAR, JJ. VIBUDAPRIYA THIRTHA-SWAMY v. EROOF SAHIB.

OWNERS. *Steel v. Prickett*(1) and *Doe dem Pring and Another v. Pearsey*(2). These presumptions are based upon the fact that property in land vests in private owners. Dedication therefore of a highway under the Common Law arises by the act of the private owner of the soil. It may be open to question how far these principles have any application to India where it is not the accepted theory that the property in land for which patta is issued is in the grantee of the patta from Government more than in the Government itself. (See however *Moharuck Shah v. Toofany*(3) and *Balbir Singh v. The Secretary of State for India in Council*(4)). In the case of waste lands at all events not included in a patta in ryotwari tracts the property has unquestionably been treated as vesting in the Government. There is no reason to suppose that the dedication of IIIa was originally made by the trustees of the temple rather than that a common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public. The argument of Mr. Sundara Ayyar assumed that the trustees of the temple must have dedicated the highway. He then proceeded to contend that it was upon the defendants to show that the dedication was unrestricted, i.e., without any reservation, that an unrestricted dedication ought not to be presumed as that would be contrary to the powers of trustees of a Hindu temple who could not make a grant injurious to the interests of the temple and that if there was a dedication without reservation, it would be invalid as contravening the purposes of a Hindu religious foundation like the temple in question. Although the nature of the user is the only basis for determining the extent of the dedication, a general user in the case of a public highway would throw the burden of proving the reservation upon the person contending for it. The law would not restrict the public to the exact mode of user of which there was evidence requiring the party pleading an unrestricted right to establish it. In *Ballard v. Dyson*(5), Chief Justice MANSFIELD distinguishing between a public highway and a private way, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for

cattle as well as carriages. In the case of a private way however he was of opinion that when there was no grant, usage alone indicated the extent. Although it seems to be the better opinion at the present day that there may be a partial dedication of a highway, limited as to time or as to the extent of the user though not to a part of the public (see Glen on 'Highways,' pp. 38 and 39; *Poole v. Huskinson*(1) and the *Marquis of Stafford v. Coyney*(2)), there is no instance in which the public being entitled to use the highway at all times and men and cattle and carriages being entitled to pass and repass, any restriction was imposed on the manner of passing along the highway. It is true a highway is for passing and repassing and it may amount to a trespass to use it for other purposes. See *Regina v. Pratt*(3), *Harrison v. Duke of Rutland*(4), *Hickman v. Maisey*(5). Mr. Sundara Aiyar has not attempted to argue that marching in procession is an excessive use of a highway. That question notwithstanding the observations of Mr. Justice BHASHYAM AYYANGAR and Mr. Justice SUBRAHMANIA AYYAR in *Vijiaraghava Chariar v. Emperor*(6) must now be deemed to have been set at rest by the decision of the Privy Council in *Sadagopa Chariar v. Krishnamoorthy Rao*(7), approving entirely of the judgment of this Court in *Sadagopa Chariar v. Rama Rao*(8). And the two cases of *Kandasami Mudali v. Subroya Mudali*(9) and *Mannada Mudali v. Nallaya Gounden*(10) are explicit upon the point. The presumption of the complete dedication was affirmed in *Mannada Mudali v. Nallaya Gounden*(10) by BENSON and SANKARAN-NAIR, JJ., when they said "there is no evidence as to the origin of the user nor is there any evidence that the dedication was subject to any conditions." Dedication would be assumed if dedication was possible. *Farquhar v. Newbury Rural Council*(11). Where there has been a general user by the public a dedication without reservation would be presumed if that was possible. Mr. Sundara Aiyar's contention that a dedication without reservation cannot be presumed to have been made by the trustees of the Hindu temple has not been supported by references to the ceremonial or ritualistic practice of

WALLIS AND KRISHNA-SWAMI AYYAR, JJ. VIBUDAPRIYA THIRTHA-SWAMY v. EROOF SAHIB.

(1) (1819) 20 R.R., 717.

(2) (1827) 7 B. & C., 304.

(3) (1879) I.L.R., 4 Calc., 208.

(4) (1900) I.L.R., 22 All., 96.

(5) (1808) 9 R.R., 770.

(1) (1843) 63 R.R., 782.

(2) (1827) 7 B. & C., 257.

(3) (1855) 99 R.R., 792.

(4) (1893) 1 Q.B., 142 at p. 149.

(5) (1900) 1 Q.B., 752 at p. 755.

(6) (1903) I.L.R., 26 Mad., 554.

(7) (1907) I.L.R., 30 Mad., 185.

(8) (1903) I.L.R., 26 Mad., 376.

(9) (1903) I.L.R., 32 Mad., 478.

(10) (1909) I.L.R., 32 Mad., 527 at p. 529.

(11) (1908) 2 Ch., 586.

WALLIS AND
KRISHNA-
SWAMI
AIYAR, JJ.
—
VIBUDAPRIYA
THIRTHA-
SWAMY
v.
ESOOF SAHIB.

Hindu temples. If a rival sect marching in procession with music on the highway would be contrary to the religious usages of the adjoining temple, there is no authority for presuming a dedication restricted in respect of processions with music. It has undoubtedly been held that property vested in trustees cannot be presumed to have been dedicated as a highway where such dedication would be contrary to the purposes of the trust. See *Rex v. The Inhabitants of Leake*(1) and *Neaverson v. Peterborough Rural Council*(2) and Pratt on 'Highways,' p. 23. But that is not sufficient to justify a conclusion of no dedication when the user as a highway, for all purposes is established and objection is taken only to processions with music as opposed to the religious usages of the temple. It is enough however to say that as no evidence has been adduced in this case that the procession with music of the Muhammadan inhabitants would contravene the purposes of the trusts of the Hindu temple there is no impediment to the presumption of a dedication by the trustees of the highway unrestricted as to the mode in which the procession might be carried. But as pointed out already we are not obliged by any evidence in the case to suppose that the highway was dedicated by the trustees of the temples. If it was not, no question of the legality of an unreserved dedication can possibly arise. It follows that the Subordinate Judge was wrong in granting the injunction as regards III-A. We must therefore dismiss the appeal with costs and allow the memorandum of objections in part by dismissing the suit as regards the injunction granted in respect of III-A. But as the respondents have partially failed with reference to the memorandum of objections we make no order as to costs in regard to it.

WALLIS, J.—I agree and will only add that, if it were proved that an unrestricted dedication by the trustees would be illegal—which has not been proved here—then a presumption in favour of a restricted dedication might arise as in *Grand Junction Canal Company v. Petty*(3), but before such a presumption could be raised, I think an illegality of the kind suggested would have to be very clearly proved.

(1) (1888) 39 R.R., 521 at p. 529.

(2) (1902) 1 Ch., 557 at p. 573.

(3) (1888) 21 Q.B., 278.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Ayling.

RAMU AIYAR (TWENTY-FIFTH DEFENDANT), APPELLANT,

1910.
August 31.

v.

A. L. PALANIAPPA CHETTY AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 11, 13 TO 26 AND LEGAL REPRESENTATIVE OF THE DECKASED TWELFTH DEFENDANT), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss. 278, 280, 281, 282, 283—Bar under s. 283 applies to parties to proceedings though subsequent to the order they become representatives of judgment-debtor—Orders under ss. 280, 281, 282 may deal with questions of title.

Parties to proceedings under section 278 of the Civil Procedure Code of 1882 and persons claiming through them who would be estopped by orders passed under sections 280—282 do not cease to be parties to such proceedings and to be so estopped because subsequent to such order they acquire rights which enable them to stand in the shoes of the judgment-debtor.

Orders under sections 280, 281 and 282 may determine questions of title. The power of the Courts in passing such orders is not confined to determining which of the parties is in possession.

APPEAL against the decree of A. C. Tate, District Judge of Chingleput, in Original Suit No. 2 of 1903.

The facts are fully stated in the judgment.

C. V. Anantakrishna Ayyar for appellant.

T. R. Ramachandra Ayyar and M. Narayanaswami Ayyar for first respondent.

THE CHIEF JUSTICE.—The question which we have to decide in this appeal is whether it is open to the appellant to impeach the validity of the mortgage on which the suit is brought. The question arises in this way. The suit is by the mortgagee. The first defendant is the mortgagor. Defendants Nos. 23 and 24 held a money decree against the mortgagor and they attached the mortgaged property. The mortgagee put in a claim under section 278 of the Civil Procedure Code. The mortgagor was not a party to these proceedings. On the hearing of that claim the mortgage was attacked by defendants Nos. 23 and 24 on two

WHITE, C.J., grounds. It was attacked on the ground that it was invalid because AND
AYLING, J. the provisions of section 257-A of the Code had not been complied with and on the ground that it was a sham. Notwithstanding
RAMU AIYAR v. that the mortgage was impeached on the grounds I have stated, the claim of the mortgagee was upheld. Defendants Nos. 23 and
PALANIAPPA CHETTY. 24 became the purchasers at the Court sale held under the order made in the proceedings under section 278; they afterwards assigned their rights to the twenty-fifth defendant who is the appellant before us. Now the present suit is a suit by the mortgagee and he seeks to recover the money due to him from the mortgagor by sale of the mortgaged property. The twenty-fifth defendant seeks to impeach the validity of the mortgage. One of the issues raised in the suit was whether the mortgage was bad because the provisions of section 257-A of the Code had not been complied with. The Court of First Instance held it was. The matter came before this Court on appeal and with regard to the question this Court took a different view from that of the Court of First Instance and held that section 283 barred the right of defendants Nos. 23, 24 and 25 to raise the question of the validity of the mortgage with reference to the provisions of 257-A, because they failed to bring a suit within one year from the order made in the claim proceedings. They held against the twenty-third and twenty-fourth defendants on the contention which they raised that they were entitled on the ground of minority to escape the operation of this provision of the law of limitation.

Now it is conceded by Mr. Anantakrishna Ayyar who argued this appeal on behalf of the appellant that the grounds of the decision of this Court, to which I have just referred, are equally applicable to the question which we have to consider here, that is to say, the question whether the appellant is entitled to impeach the mortgage with reference to the provisions of section 257-A, and on the ground that it is a sham. The parties against whom the order referred to in section 283 of the Code of Civil Procedure was made were the judgment-creditors of the mortgagor (defendants Nos. 23 and 24) and the twenty-fifth defendant derived his title by assignment from them. The contention on behalf of the appellant was that although the order was made against the parties from whom the twenty-fifth defendant derived his title inasmuch as these parties were the purchasers at Court auction, the appellant had become relieved of the disability

imposed by the provisions of section 283 of the Civil Procedure Code and clothed himself with all the rights of the judgment-debtor. One of these rights was the right to say "As I was not a party to the claim proceedings I am not bound thereby."

Now that is the argument which is advanced by the appellant and it seems to me it cannot be supported on principle or by authority. The policy of the section is clear. It is stated in the case to which Mr. Ramachandra Ayyar referred, i.e., *Sardhari Lal v. Ambika Pershad*(1), that the object to be secured was speedy settlement of questions of title raised in execution. As regards the policy of the section I fail to see that the circumstances of this case give the appellant any special claim for consideration. It may be that the auction purchaser is the representative of the judgment-debtor and not the decree-holder but that is a proposition which can only be accepted subject to certain limitations. I need only refer to the decisions in *Sandhu Taraganar v. Hussain Sahib*(2) and *Krishna Satapati v. Sarasvatula Sambasiva Row*(3). The proposition, as it seems to me even if we accept it, can have no application to a case where the parties against whom the order was made under the claim proceedings are the identical parties who claim to have the benefit of standing in the shoes of the judgment-debtor. They are none the less the parties against whom the order was made because they have the right to say (assuming they have the right) we stand in the shoes of the judgment-debtor.

Coming to the decision of the Full Bench in *Krishnasami Naidu v. Somasundaram Ohettiar*(4), what was held there (so far as is material to the question we have to consider) was that a judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment-debtor. That does not help the appellant.

We were also referred to the decision in *Vadapalli Narasimham v. Dronam Raju Setharama Murthy*(5). There, following the principle of the decision of the Full Bench, it was held that a claim under section 281 was not conclusive against, or in favour of, the judgment-debtor under section 283 of the Code unless he

WHITE, C.J.,
AND
AYLING, J.
—
RAMU AIYAR
v.
PALANIAPPA
CHETTY.

(1) (1888) I.L.R., 15 Calc., 521.

(2) (1905) I.L.R., 28 Mad., 87.

(3) (1908) I.L.R., 31 Mad., 177.

(4) (1907) I.L.R., 30 Mad., 335.

(5) (1908) I.L.R., 31 Mad., 163.

WHITE, C.J., was a party to the proceedings in which the order was passed.
 AND
 AYLING, J. The other case *Gurwa v. Subbarayudu*(1), certainly does not help
 the appellant because, as it seems to me, it does not carry him so
 far as the decision of the Full Bench. Then with regard to the
 other two cases *Mahomed Mira Ravuther v. Savvasi Vijaya Raghu-*
nadha Gopalar(2) and *Mahabir Pershad Singh v. Macnaghten*(3),
 I think neither of these authorities supports the proposition which
 Mr. Anantakrishna Ayyar has asked us to accept. So much for
 the first point.

The second point is this: it is said that, assuming that the
 appellant is estopped because the defendants Nos. 23 and 24 are
 estopped, the order on the claim petition is not an adjudication
 as regards the question of the validity of the mortgage. It is
 argued, that the order in the claim proceedings merely deter-
 mines the question of physical possession and does not determine,
 and was never intended by the legislature to determine, any
 question of title. Now if we turn to section 283 of the Civil
 Procedure Code we find the words "The party against whom an
 order under section 280, 281 or 282 of the Civil Procedure Code
 is passed may institute a suit to establish the right which he
 claims to the property in dispute, but, subject to the result of
 such suit, if any, the order shall be conclusive." Surely that
 means the order with reference to the right to claim the property
 in dispute and not the order with reference to the fact as to
 whether A or B was in physical possession at the time the order
 was made. If we turn to the order made by the learned Judge in
 the claim proceedings it becomes clear that on one side the title
 under the mortgage was asserted and on the other side the title
 under the mortgage was denied on the ground that the mortgage
 was fraudulent. And the learned Judge holds, I quote his
 language, "I must hold, therefore, that exhibit C has been
 executed for consideration notwithstanding that the date of
 exhibit C compared with the dates referred to by counter-peti-
 tioners' vakil in connection with their suit against Chockalinga
 Pillai seems to show that exhibit C was executed in that connec-
 tion. In holding that exhibit C is a genuine document I also
 consider the evidence relating to possession which I am going to

(1) (1890) I.L.R., 13 Mad., 386.

(2) (1900) I.L.R., 23 Mad., 227.

(3) (1889) I.L.R., 16 Cal., 682.

refer to." The learned Judge adjudicates upon this very question
 in his order, although it is true that the actual words of his final
 order are "That however does not interfere with the finding to
 which I now come, that Palaniappa Chetti is in possession of the
 property mortgaged to him by exhibit C." I think that must be
 taken as an adjudication upon the question as to whether he was
 in possession as the party entitled to possession, that is to say,
 in possession by reason of the mortgage which he set up as the
 basis of his claim. I think, therefore, the points which have been
 taken by the appellant fail.

As regards the merits Mr. Anantakrishna Ayyar did not think
 it necessary to contest the findings of the lower Court.

The result would be that the appeal is dismissed with costs.

AYLING, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abdur Rahim.

KOVVURI BASIVI REDDI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

TALLAPRAGADA NAGAMMA *alias* BHUSHAMMA AND
 OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code, Act XIV of 1882, s. 28—Test for misjoinder—No misjoinder
 where claims against several defendants in respect of same matter—Limitation
 Act, sch. II, art. 62—Suit to recover purchase money where sale ab initio void
 governed by art. 62.*

A suit to recover the consideration paid for a sale, which is *ab initio*
 void is governed by article 62 of schedule II of the Limitation Act and must be
 brought within 3 years from the date when the purchase-money was paid.

Hanuman Kamat v. Hanuman Mandur, [(1892) I.L.R., 19 Cal., 123], followed.

Krishnan Nambiar v. Kannan, [(1898) I.L.R., 21 Mad., 8], not followed.

A purchased some land from B and paid the purchase-money. On proceeding
 to take possession, he was obstructed by C and he got a sale-deed from C paying
 consideration for the sale. When the second sale was concluded, D undertook
 to get back the purchase-money from B, which was not done.

A who had paid the purchase-money twice brought a suit against B, C, and D
 to recover from B the amount paid to him, if he should be found not to be the
 owner or in the alternative, if B should be the true owner, to recover from C
 and D the amount paid for the second sale:

* Second Appeal No. 1503 of 1909.

WHITE, C.J.,
 AND
 AYLING, J.
 —
 RAMU AIYAR
 v.
 PALANIAPPA
 CHETTY.

1910.
 October 21.

BENSON AND
ABDUR
RAHIM, JJ.
—
KOVVURI
BASIVI
REDDI
v.
TALLAPRA-
GADA
NAGAMMA.

Held, that the suit was not bad for misjoinder.
Section 28 of the Civil Procedure Code authorises the joinder in one suit of several defendants where the relief claimed is sought in the same matter, although the causes of action against them may be different.

Aiyathurai Rowthen v. Santam Meera Rowthen, [(1908) I.L.R., 31 Mad., 252], followed.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, Subordinate Judge, Kistna at Ellore, in Appeal Suit No. 167 of 1908, presented against the decree of S. Nilakantam Pantulu, District Munsif of Tanuku, in Original Suit No. 9 of 1908.

Suit to recover Rs. 507-8-0 being the amount of sale of one acre of land bearing D No. 3 and situated in the village of Nidadavole with interest thereon paid by first plaintiff to defendants Nos. 2 to 5 under a sale-deed, dated 10th June 1902, executed by the defendants Nos. 2 to 4 in favour of second plaintiff, the fifth defendant having failed as promised to take the necessary steps at his own costs on first plaintiff's behalf to recover back the amount paid by him (first plaintiff) to first defendant in respect of the same land under another prior registered sale-deed, dated 6th December 1901, executed by the latter in favour of the former; or in the alternative in case the defendants Nos. 2 to 5 establish their right to the said land to recover the amount from the first defendant.

The first defendant and defendants Nos. 2 and 3 are sisters. The land in question admittedly belonged to their father. The first plaintiff first obtained a sale-deed in respect of it from the first defendant. He is the owner of a rice mill at Nidadavole and he stood in need of the suit land to erect a factory thereon and he, therefore, purchased the same from the first defendant under the registered sale-deed, dated 6th December 1901. He got possession of the land and when constructing a factory thereon the defendants Nos. 2 and 3 began to raise objections. He then obtained a fresh sale-deed from them in respect of the same property.

Both the lower Courts held that the suit against first defendant was barred as the sale by first defendant was on 6th December 1901 and the plaint was presented only on 13th June 1905.

The suit was also held by both the lower Courts to be bad on the ground of misjoinder of parties and causes of action and was dismissed.

Plaintiffs appealed.

P. Narayanamurti for appellants.

T. Prakasam for second to fifth for respondents.

A. Ramachandra Ayyar for first respondent.

JUDGMENT.—We agree with the Subordinate Judge that the plaintiff's claim as against the first defendant is barred. The Privy Council case of *Hanuman Kamat v. Hanuman Mandur*(1) makes it clear that the article of the Limitation Act applicable is article 62 of the second schedule and the period of limitation is three years from the date when the first defendant received the purchase money. The present suit was not brought within three years from that date. The appellant's pleader relies on the case of *Krishnan Nambiar v. Kannan*(2) but in that case no reference was made to(1). It appears to have been assumed that either article 115 or 116 applied, and the only question discussed was as to which of these two articles was applicable. Article 62 was not referred to at all.

The Second Appeal therefore must be dismissed with costs so far as the first defendant is concerned.

But we think that there is no ground for holding, as the Courts below have held, that the suit is bad as against all the defendants on account of misjoinder of defendants and causes of action. Section 28, Civil Procedure Code, allows all persons to be joined together as defendants against whom the right to any relief is alleged to exist whether jointly, severally, or in the alternative, in respect of the same matter. In the present suit there is but one relief claimed against all the defendants, viz., the repayment of the purchase money paid twice over, and it is claimed in respect of the same matter, viz., the transaction or series of transactions by which the plaintiff has, wrongfully, as he alleges, been obliged to pay twice over for the same land. The Courts below have not at all referred to that section. For the respondents Nos. 2 to 5 it is argued that section 28 does not apply because the cause of action against defendants Nos. 2 to 4 is not the same as the cause of action against the fifth defendant. The test as to whether section 28 of the Civil Procedure Code applies is not whether the causes of action against the several defendants

BENSON AND
ABDUR
RAHIM, JJ.
—
KOVVURI
BASIVI
REDDI
v.
TALLAPRA-
GADA
NAGAMMA.

(1) (1892) I.L.R., 19 Cal., 123.

(2) (1898) I.L.R., 21 Mad., 8.

(3) I.L.R., 19 Cal., 123.

BENSON AND ABDUR RAHIM, JJ. are the same, but whether the relief is sought in the same matter (*Aiyathurai Ravuthan v. Santhu Meera Ravuthan*(1)).

KOVVURI BASIVI REDDI v. TALLAPRA-GADA NAGAMMA. Applying this test, we are of opinion that section 28 authorises the present suit.

We therefore set aside the decrees of the Courts below as regards defendants Nos. 2 to 5, and remand the suit as against them to the District Munsif for disposal according to law. Costs hitherto incurred will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1904.
April 15.

KUTTISSERI ILLATH RAMAN NAMBOODRI (PLAINTIFF),
APPELLANT,

v.

ACHUTHA PISHURODI AND OTHERS (DEFENDANTS NOS. 1 to 4,
6 AND 7) RESPONDENTS.*

Mortgage—Right of assignee of mortgagor to redeem first mortgage after a decree for redemption obtained by a puisne mortgagee had become inoperative.

A mortgaged certain properties to B and afterwards mortgaged the same with other properties to C. C. obtained a decree for redemption against B but the decree was allowed to become inoperative by not being executed. D obtained an assignment of the right of A in the mortgaged properties and also the rights of C therein.

A sued to redeem the mortgage in favour of B.

Held that although the suit by D as the assignee of C was not maintainable still it was competent to him as assignee of A to bring the suit after the decree obtained by C had become inoperative.

SECOND APPEAL against the decree of N. S. Brodie, District Judge of South Malabar, in Appeal Suit No. 726 of 1901, presented against the decree of V. Kelu Eradi, District Munsif, of Kutnad, in Original Suit No. 69 of 1910.

(1) (1908) I.L.R., 31 Mad., 252.

* Second Appeal No. 1219 of 1902 (directed to be reported by Munro and Abdur Rahim, JJ., on 10th March 1911).

The facts are stated in the judgment of the lower Appellate Court as follows :—

The plaintiff appeals. He brought a suit to redeem certain lands granted to first and second defendants' Karnavan Govinda Pisharodi on a kanam by the sixth defendant's Karnavan, Parangotasha Menon. This sixth defendant's tarwad granted mortgage to the fifth defendant's karnavan on the strength of which the fifth defendant's karnavan sued to recover the plaintiff lands from the possession of the first and second defendant's tarwad in Original Suit No. 199 of 1882 on the file of the lower Court. The sixth defendant was impleaded as the first defendant in that suit and he did not appear. It may be presumed, therefore, that he admitted the fifth defendant's title. The fifth defendant's karnavan as plaintiff pleaded that the lands belonged to the sixth defendant in jenm and the present first and second defendant's tarwad pleaded as in the present suit that they did not belong to him. The fifth defendant's karnavan succeeded in appeal—*vide* exhibit G, but he failed to redeem the mortgage within the time given him. Subsequently, the plaintiff purchased the fifth defendant's title under exhibit C (?) and also that of the sixth defendant under exhibit A. He now sues as the representative of the sixth defendant and on the strength of the sixth defendant's title to redeem the same lands.

The Court of First Instance dismissed the suit and the decree was confirmed on appeal.

Plaintiff appealed.

P. R. Sundara Ayyar for appellant.

The respondent was not represented.

JUDGMENT.—No doubt the plaintiff's claim in so far as it was based on the assignment to him by the melkanomdar who had obtained the previous decree for redemption was concerned would have been unsustainable. But as the assignee of the jenm right he is clearly entitled to redeem. Though so long as the right to redeem under the previous decree obtained by the melkanomdar was in force and executable the right to redemption as between the melkanomdar and the jenmi would have been preferentially in the former yet that decree having become incapable of execution there is nothing to prevent the plaintiff

SUBRAH-
MANIA
AYYAR AND
BODDAM, JJ.

RAMAN
NAMBOODRI
v.
ACHUTHA
PISHURODI.

SUBBAH-
MANIA
AYYAR AND
BODDAM, JJ.

RAMAN
NAMBOODRI
v.
ACHUTHA
PISHURODI.

as the assignee of the jenm right exercising his right of redemption under the earlier mortgage to the defendants.

The decrees of the lower Courts are therefore set aside and there will be a decree for the plaintiff for possession and for Rs. 10-4, arrears of rent till date of suit and future profits at 5 paras of paddy and 4 annas 7 pies from Malabar year 1076 till possession or 3 years from this date whichever is earlier. The defendants Nos. 1 and 2 will pay the plaintiff's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

1910.
October 27.
November 4.

KRISHNASAMI CHETTIAR (PLAINTIFF), APPELLANT,

v.

THIPPA RAMASAMI CHETTIAR AND OTHERS (DEFENDENTS),
RESPONDENTS.*

Transfer of Property Act, V of 1892, ss. 83, 84—Deposit under s. 83 and withdrawal by mortgagor, effect of—Interest on mortgage amount does not cease to run—Costs of mortgage in redemption suit.

Where the mortgage amount deposited by the mortgagor under section 83 of the Transfer of Property Act has been withdrawn by the mortgagor on the mortgagee's refusal to accept it, interest in such amount does not cease to run under section 84. The continuance of the deposit is necessary to justify the claim to the cessation of interest.

The mortgagee is entitled to his costs in a redemption suit. It will be forfeited by some improper defence or misconduct but not by merely claiming a larger amount than is due.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit Nos. 617 and 664 of 1908, presented against the decree of N. Sundara Ayyar, District Munsif of Tiruvadi, in Original Suit No. 239 of 1907.

The facts of this case are fully set out in the judgment.

G. S. Ramachandra Ayyar for appellant in Second Appeal No. 1314 of 1909, and for first respondent in Second Appeal No. 1363 of 1909.

* Second Appeal No. 1314 of 1909.

P. R. Srinivasa Ayyangar for first respondent in Second Appeal No. 1314 of 1909 and for the appellant in Second Appeal No. 1363 of 1909.

S. Rajagopala Ayyangar for third respondent in Second Appeal No. 1314 of 1909.

BENSON AND
KRISHNA-
SWAMI
AYYAR, JJ.

KRISHNA-
SAMI
CHETTIAR
v.
RAMASAMI
CHETTIAR.

JUDGMENT.—The only question argued in this case relates to mesne profits and costs. The suit is one for redemption of a mortgage. Before the suit the plaintiff paid the mortgage money into Court under section 83 of the Transfer of Property Act. Notice was issued to the mortgagee and he refused to take the money. Upon the pleadings we must assume, with the District Judge, that the plaintiff thereupon withdrew the deposit. The question is whether interest ceases from the date of deposit. We must answer the question in the negative. Under section 84 of the Act interest ceases when the mortgagor "has done all that has to be done by him to enable the mortgagee to take such amount out of Court." Neither section 83 nor section 84 states expressly what are all the things that the mortgagor has to do. Is it enough if he pays the proper amount into Court and causes a notice to issue to be served upon the mortgagee? There is nothing more that he has got to do under section 83. Can he then withdraw the money even before the mortgagee appears to claim it? Most certainly not, if he wants interest not to run. Why should he be at liberty to do so because the mortgagee appears and refuses to take it? There may be nothing to prevent it if he makes no claim for the cessation of interest. Suppose the mortgagee changes his mind and applies to the Court for payment. We can see nothing in section 83 to preclude his doing so. If the money does not remain in deposit but has been in the interval withdrawn, he cannot of course be paid. But why should the mortgagor who has taken back the money and possibly made use of it or derived some other benefit from it, be entitled to the cessation of interest from the date of the original deposit? Section 84 appears to us to presuppose the continuance of the deposit to justify the claim to the cessation of interest. In the case of tender, continued readiness to pay has been held necessary for the cessation of interest. See *Geyles v. Halk*(1),

(1) (1745) 2 P.W., 377.

BENSON AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
KRISHNA-
SAMI
CHETTIAR
v.
RAMASAMI
CHETTIAR.

Kinnaird v. Trollope(1), *Bank of New South Wales v. O'Connor*(2); also Fisher on Mortgages, section 1851, and Jones on Mortgages, Vol. 1, section 899. It is true *Velayuda Naicker v. Hyder Hussan Khan Sahib*(3) raises the question as to how far this rule has been departed from in India, but it is there observed "it is not alleged in this case that there was a subsequent demand by the mortgagee for the amount and that the mortgagor failed to pay." However this may be, the matter appears to stand upon a clearer footing as regards deposit. We cannot understand the words "has deposited in Court" to include "has deposited in Court and subsequently withdrawn." It is quite conceivable that tender may be complete even though after it is once rejected there is no subsequent readiness to pay, but we cannot speak of a person having deposited in Court, if he has withdrawn his deposit. As regards costs also the Judge is right. There is no reason to depart from the rule laid down by Lord Selborne in *Cotterell v. Stratton*(4). "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established." In *Kinnaird v. Trollope*(1) STIRLING, J., after quoting Lord Selborne adds at page 619 "it is well settled that the mere fact of a mortgagee claiming more than he is entitled to is not sufficient to deprive him of his costs." The second appeal, therefore, fails and is dismissed with the costs of the first respondent. The appellant will also pay the third respondent's costs on the value of the property claimed by him.

(1) (1889) 42 Ch.D., 610 at p. 618.

(3) (1910) I.L.R., 33 Mad., 100.

(2) (1889) 14 A.C., 273 at p. 284.

(4) (1872) 8 Ch., 295.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson,
Mr. Justice Munro, Mr. Justice Sankaran-Nair and
Mr. Justice Krishnaswami Ayyar.

CHINNU PILLAI, MINOR BY GUARDIAN RAMA-
CHANDRAM PILLAI (THIRD DEFENDANT), APPELLANT,

v.

KALIMUTHU CHETTI (PLAINTIFF), RESPONDENT.*

Hindu Law—Suit by alienee of a co-parcener in family property—Time when the share is ascertained.

In Hindu Law the alienee of the interest of a co-parcener is entitled to enforce his claim against the share to which the vendor was entitled to at the time of the alienation.

The mortgagee of a Hindu father is therefore entitled to proceed against the share of a son subsequently born in family property mortgaged by the father.

Rangasami v. Krishnayyan, [(1891) I.L.R., 14 Mad., 408], dissented from.

Ayyagari Venkataramayya v. Ayyagari Ramayya, [(1902) I.L.R., 25 Mad., 690], followed.

Hardi Narain Sahu v. Ruder Perakash Misser, [(1884) I.L.R., 10 Cal., 626], followed.

SECOND APPEAL against the decree of R. D. Broadfoot, District Judge of Coimbatore, in Appeal Suit No. 113 of 1906, presented against the decree of D. K. Virasawmy Ayyar, District Munsif of Udumalpet, in Original Suit No. 671 of 1905.

This Second Appeal first came on for hearing before (BENSON and KRISHNASWAMI AYYAR, JJ.) who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The suit is on a mortgage executed by the first defendant. It is found that at the date of the mortgage he was entitled to a fifth share in the family properties. Subsequent to the mortgage the first defendant had a son, the third defendant. There appears to have been a partition under which the third defendant got half of one-fifth or a tenth share in the family properties. He objects to a decree being passed against his half share in the one-fifth of the properties which belonged to his father. The District Judge having decided against this contention, the appellant relies on *Rangasami v.*

* Second Appeal No. 736 of 1908.

1910.
March 30,
1911.
January
6, 27.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

Krishnayyan(1). There the vendor was entitled to a third at the date of the sale. Two brothers and a son were subsequently born. The Full Bench held that the purchaser did not take the share as it stood at the date of sale but the diminished share to which the vendor was entitled at the date of the partition in the purchaser's suit. The vendor's share would be reduced to a fifth by the birth of two brothers, and to a tenth by the further birth of a son to himself. The Division Bench was of opinion that the result of the decision of the Full Bench was that the purchaser could only take a tenth.

It is argued by the learned Advocate-General that the Full Bench had overlooked the decisions of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh*(2), *Suraj Bansi Koer v. Sheo Persad Singh*(3), and *Hardi Narain Sahu v. Ruder Perakash Misser*(4). Those decisions appear to proceed on the view that the share taken by the vendee or mortgagee from one member of the undivided family is what the vendor or mortgagor was entitled to at the date of the sale or mortgage. It was pointed out by Sir V. BHASHYAM AYYANGAR, J., in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(5), that the decision of this Court in *Rangasami v. Krishnayyan*(1), was inconsistent with the decisions of the Privy Council above referred to though the other learned Judges, the CHIEF JUSTICE and MOORE, J., refrained from expressing any opinion on the question. It seems difficult to contend in the case of a son born subsequent to a mortgage by the father that he takes more than the equity of redemption in a moiety. See *Bholanath Khettry v. Kartick Kissen Das Khettry*(6) and *Ajodhya Roy v. Hardwar Roy*(7). We might have rested our decision on this narrower ground and supported the decree of the District Judge by holding that as against the son subsequently born the mortgagee could sell the whole of the father's interest at the date of the mortgage but for the fact that in *Rangasami v. Krishnayyan*(1), the Division Bench held that the son's interest did not pass by the sale of the father's interest before the son was born. It is not easy either to see how, if the father's interest could be reduced by the birth of brothers, it should remain unaffected by the

(1) (1891) I.L.R., 14 Mad., 408.

(3) (1880) I.L.R., 5 Cal., 148.

(5) (1902) I.L.R., 25 Mad., 690.

(7) (1909) 9 C.L.J., 485.

(2) (1878) I.L.R., 3 Cal., 198.

(4) (1884) I.L.R., 10 Cal., 626.

(6) (1907) I.L.R., 34 Cal., 372.

birth of a son. The interests of the subsequently born brothers were carved out of their father's interest as much as the interest of the son was carved out of his own father's share. We feel therefore constrained to think that the birth of brothers as well as the birth of a son must lead to the same consequences as regards the effect of a prior sale or mortgage. As we think the doubts entertained by BHASHYAM AYYANGAR, J., are well founded about the correctness of the decision in *Rangasami v. Krishnayyan*(1), we must refer to the Full Bench the following question :—

Whether the mortgagee of a Hindu is entitled to proceed against the share of a son subsequently born, in family property mortgaged by him.

The case again came on for hearing in due course, before the Full Bench constituted as above.

Etharajulu Mudaliar for appellant.

The plaintiff has been allowed to proceed against the one-fifth share of the father. I say he cannot touch the share of the son, *Rangasami v. Krishnayyan*(1). If a member of a joint Hindu family sell only his interest the interest of the remaining parties will not pass. Where one of two had sold his interest and the vendor had a son it was held that the date of such sale was the correct date to go from and he got a one-tenth share.

[KRISHNASWAMI AYYAR, J.—If a partition took place at the date of the sale he would get a definite amount. This amount would not be subject to fluctuations.]

He would not get a larger share though he would be in a better position.

[KRISHNASWAMI AYYAR, J.—Suppose the vendor himself died. Would not your argument leave the purchaser nothing at all?]

That would no doubt be so. All that is transferred is the right of the vendor to claim partition at any time.

[KRISHNASWAMI AYYAR, J.—Why should not the analogy of English Law apply whereby if a joint tenant alienates his interest the joint-tenancy comes to an end?]

[CHIEF JUSTICE.—Why should the proposition not be applicable to the case of an increase of members of a family as well as the death of a vendor? If an interest vests when the vendor

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

(1) (1891) I.L.R., 14 Mad., 408.

WHITE, C.J., dies why should his interest not vest when the family is increased? BENSON, MUNRO, SANKARAN- NAIR AND KRISHNASWAMI AYYAR, JJ. CHINNU PILLAI v. KALIMUTHU CHETTI.

The one case is no less indefinite than the other.]

What is transferred is the property itself. Here the son was divided from his father.

[KRISHNASWAMI AYYAR, J.—At the date of the birth the father's interest is reduced from one-fifth to one-tenth and the son gets one-tenth.

That would not be so where there were others in the family. But here the mortgage is for an antecedent debt. In *Ayyagiri Venkataramayya v. Ayyagiri Ramayya*(1), the share was the same at the date of the alienation and the death. In *Hardi Narain Sahu v. Ruder Perakash Misser*(2), it is said that the share is not purchased but the right to a certain amount at the date of partition.

[KRISHNASWAMI AYYAR, J.—There the birth of the son made no difference.]

The sale was treated as if it operated as a partition. *Hardi Narain Sahu v. Ruder Perakash Misser*(2), does not lay down the proposition that there is a definite share at the date of the alienation. *Gurlingapa v. Nandapa*(3), follows *Rangasami v. Krishnayyan*(4). When the indefinite share in one property is alienated not touching other property the whole share is not touched. Otherwise the effect would be to make a partition of family property.

The Hon. the Advocate-General for respondent.

There is another case, *Virayya v. Hanumanta*(5) which gives a decreased share. This can be reconciled with *Rangasami v. Krishnayyan*(4). The correct view is in *Ayyagiri Venkataramayya v. Ayyagiri Ramayya*(1), where the Privy Council cases are referred to.

[KRISHNASWAMI AYYAR, J.—The Privy Council did not work out this problem in Decndyal's case(6).]

Baboo Hurdey Narain Sahu v. Pundit Baboo Rooder Perakash Misser(7) gives Mr. Doyné's argument better than in *Hardi Narain Sahu v. Rudder Perakash Misser*(2).

The principles of partnership really apply. It is much more equitable that a purchaser should get what he actually bought

(1) (1902) I.L.R., 25 Mad., 690 at p. 704. (2) (1884) I.L.R., 10 Cal., 626 at p. 636.
(3) (1897) I.L.R., 21 Ben., 797. (4) (1891) I.L.R., 14 Mad., 408.
(5) (1891) I.L.R., 14 Mad. 459. (6) (1878) I.L.R., 3 Cal., 198.
(7) (1883) 11 I.A., 26 at p. 27.

rather than gain or lose by defining what he buys at a later date. *Balgobid Das v. Narain Lal*(1) referred to.

Etharaja Mudaliar in reply.—*Parbati v. Nannihal Singh*(2) affirms Lord Westbury's dictum that as regards co-parceners no one can predicate at any particular time what his share really is.

The case having stood over for consideration and the case having been posted for judgment and on the Advocate-General raising a question as to the validity of the judgment in consequence of the Hon'ble Mr. KRISHNASWAMI AYYAR's resignation of office before delivering the judgment, the Hon'ble the Chief Justice made the following

ORDER.—I directed the question raised in this order of reference to be argued before a Bench of five Judges. The question was argued before a Bench of five Judges of whom the Hon'ble Mr. KRISHNASWAMI AYYAR was one. The Hon'ble Mr. KRISHNASWAMI AYYAR has now resigned his office. After the hearing of the arguments, he wrote what he intended to deliver as a judgment. The Advocate-General has suggested that the judgment or opinion of the Hon'ble Mr. KRISHNASWAMI AYYAR cannot be treated as a legal judgment since he resigned office before it could be delivered. The Advocate-General has also suggested that a question might be raised as to the validity of the judgment of a Bench consisting of four Judges, since the tribunal would not be constituted as directed by my order.

To prevent the possibility of any difficulty arising I now direct that the question raised in the order of reference be heard before a Full Bench consisting of the four Judges who with the Hon'ble Mr. KRISHNASWAMI AYYAR constituted the Full Bench on the previous occasion. The Advocate-General and Mr. Ethiraja Mudaliar argued the question on the previous occasion. They are now present, but they do not desire to add anything to their arguments.

The judgment of the Full Bench will accordingly be delivered.

THE CHIEF JUSTICE.—I would answer the question which has been referred to us in the affirmative.

As pointed out by the Privy Council in *Suraj Bansi Koer v. Sheo Persad singh*(3) an alienation by a co-parcener of his joint interest in family property is inconsistent with the strict theory

(1) (1898) I.L.R., 15 All., 339 at p. 248. (2) (1909) I.L.R., 31 All., 412 at p. 421.
(3) (1880) I.L.R., 5 Cal., 148.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAB, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

of a joint and undivided Hindu family. But the doctrine recognizing this right is well established in this Presidency, and it seems to me to be only the logical development of this doctrine that, for the purpose of ascertaining the quantum of interest alienated, the test to apply should be the state of the family, as regards the number of co-parceners, at the time the alienation is made, and not the state of the family when the owner of the interest seeks to reduce his interest into possession. Seeing that the right of alienation is really inconsistent with the theory of the undivided family, it is perhaps not unnatural that the Courts have shrunk from recognising the development of the doctrine to what seems to me to be its logical conclusion. The question came before a Full Bench of this Court in *Rangasami v. Krishnayyan*(1). In the order of reference in the case the learned Judges observe: "He (that is the member of the family who alienates his joint interest) cannot put his alienee in a better position than himself, and thereby prejudice his co-parceners, and the alienee, therefore, must be liable, until he obtains partition, to the same fluctuations in the amount and value of the share caused by changes in the number and circumstances of the family, as his alienor would have been liable to, had the alienation not taken place. It was pressed upon us in argument that if this be so, the purchaser might in some cases take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased diminished by changes in the family he must also have the benefit if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity. He who purchases the interest of a member of an undivided family in the family property purchases that which is from its nature uncertain, and the purchase must always partake of the nature of a speculative transaction; but he knows perfectly well what he is buying, and is not to be pitied if he gets less than he hoped for, any more than he is to be blamed if he gets more."

This seems to me a perfectly logical and intelligible position, but it is a position which the Full Bench declined to accept. In the Full Bench case the doctrine is stated thus: "The purchaser

(1) (1891) I.L.R., 14 Mad., 408.

who can only take what can be lawfully sold, must be taken to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property." But the learned Judges were not prepared to apply this doctrine to a case where the interest alienated increased by reason of a diminution in the number of co-parceners. On principle, it is very difficult to see why it should not be so applied. If the interest is liable to fluctuate one way, why should it not fluctuate the other? In dealing with the contention that, if the vendor dies before the purchaser effects a partition, the purchaser will take nothing, their Lordships observe: "If it is necessary to notice it as an objection to the rule of decision indicated above, the answer is that the interests carved out by the sale vest in the purchaser at once and that the vendor being competent to sell, his subsequent death is an event which cannot divest the interest which has once vested; and for the purpose of giving effect to his contract of sale the purchase must be dealt with as if the seller were alive when the purchaser demands partition." With the greatest respect, it seems to me that if this proposition is effective as an answer to the contention as to the right of survivorship on the death of the alienor, it is just as effective as an answer to the contention that after an alienation the quantum of the interest alienated is liable to be affected by a change, whether by way of increase or decrease in the number of co-parceners.

In *Ayyagari Venkata Ramayya v. Ayyagari Ramayya*(1) a Full Bench, of which I was a member, held that the death of the co-parcener who had made the alienation did not divest the interest of the alienee. The question whether the decision in *Rangasami v. Krishnayyan*(2) was right was raised in this case; but as we were able to answer the question referred to us without expressing an opinion on this question, MOORE, J., and I did not think it necessary to discuss it. But it seems to me that when once it has been held that the death of the alienor does not create any right of survivorship in the other co-parceners, it follows, almost as a necessary corollary, that the quantum of the interest which vests in the alienee is not affected by subsequent changes in the number of co-parceners.

(1) (1902) I.L.R., 25 Mad., 890.

(2) (1891) I.L.R., 14 Mad., 408.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAB, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
ATTYAR, JJ.

The general question is discussed by Sir Bashyam Ayyangar in his judgment in *Ayyagari Venkataramayya v. Ayyagari Ramayya*(1) and I am prepared to accept the conclusions at which he arrives as containing the true exposition of the law of this Presidency upon the subject.

As I have said, I would answer the question in the affirmative.

BENSON, J.—I am of the same opinion. The question is really concluded by the decision of the Privy Council in the case of *Hardi Narain Sahu v. Ruder Perakash Misser*(2). As pointed out by Sir Bashyam Ayyangar, "In that case a creditor obtained a decree for money against the father only and in execution attached, caused to be put up for sale, and himself bought, the right, title and interest of the judgment-debtor in a certain property which belonged to him and to his minor son jointly, and obtained possession. Shortly afterwards, the judgment-debtor made a gift of his interest in the family property in favour of his minor son. A suit was thereupon brought on behalf of the minor son to recover the whole of the property purchased by the decreeholder. During the pendency of the suit another son was born to the judgment-debtor and it was contended before the High Court that a share should be allotted to such son also. The High Court, however, following the decision of the Privy Council in *Suraj Bansi Koer v. Sheo Persad*(3) overruled this contention and held that the property which passed to the defendant—the purchaser—was the share and interest of the father which would have been allotted to him if a partition of the family property had taken place just before the execution sale and that as the family at that time consisted only of the father, his wife and one son, the father was entitled to one-third share and that such one-third share ought to be allotted to the defendant—the purchaser—and the other two-thirds, to the minor plaintiff and his mother. The case was carried in appeal to the Privy Council by the defendant—the purchaser—principally on the ground that the sale should be upheld in its entirety as it was not shown that the decree debt was contracted by the father for any illegal or immoral purpose. The Judicial Committee affirmed the decision of the High Court, holding that the purchaser became entitled only to one-third which would have been the

(1) (1902) I.L.R., 25 Mad., 690.

(2) (1884) I.L.R., 10 Cal., 626.

(3) (1880) I.L.R., 5 Cal., 148 at p. 166.

share that would have been allotted to the father if a partition had taken place at the time of the sale. Pending the appeal to the Privy Council the mother died, but the decision of the Privy Council proceeds on the footing that neither the birth of the second son after the date of the execution sale, nor the subsequent death of the mother before a partition was effected, affected the share to which the purchaser became entitled at the date of the execution sale" (*Ayyagari Venkataramayya v. Ayyagari Ramayya*(1)). In the Full Bench case of *Rangasami v. Krishnayyan*(2) there was no reference to the decision of the Privy Council summarized above. In my opinion the latter cannot be reconciled with it. Their Lordships indicate clearly enough that the alienee takes the interest of the alienor as it exists at the time of the alienation, not at the time of partition. This conclusion also seems to be the logical and almost necessary consequence of the rule established in this Presidency by a long course of decisions that an alienation by sale, mortgage or otherwise, by an undivided member of his interest in the whole or any part of the joint family property in favour of a purchasee for value is valid as between the transferor and the transferee. Any other conclusion than that above stated would lead to great practical inconvenience and injustice. It is, however, unnecessary to dwell on this line of argument as the matter is concluded by the authority of the Privy Council. I would answer the reference in the affirmative.

MUNRO, J.—I agree that the question should be answered in the affirmative and have nothing to add.

SANKARAN-NAIR, J.—The question is whether the alienee of the interest of a co-parcener is entitled to enforce his claim against the co-parcener's share as it stood at the time of the alienation or the share that the vendor is entitled to at the time he brings his suit for partition.

If, as argued on behalf of the appellant, he is only entitled to recover the reduced share that the vendor may be entitled to at the time of the partition on the ground that, according to the theory of the Hindu Law, a co-parcener's interest is liable to fluctuation, to increase by death, decrease by birth of other co-parceners, to extinction by his own death, then it appears to me that, on the

(1) (1902) I.L.R., 25 Mad., 690 at p. 709.

(2) (1891) I.L.R., 14 Mad., 408.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
ATTYAR, JJ.

CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

death of the co-parcener, the alienee is not entitled to enforce the alienation in his favour at all, as the alienor's interest survived to the others on his death. On the other hand, it is only right that the purchaser must in that case have the benefit of an increase, if any, in the share of his vendor.

As pointed out by the Judicial Committee all alienations by a co-parcener, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family, and the law recognizing the validity of the alienation as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights to a partition—see *Suraji Bnusi Koes v. Sheo Persad Singh*(1). I do not think, as the alienation itself is inconsistent with the theory of Hindu law, we are likely to derive much help from a consideration of the Hindu law texts in the determination of this question. The creditor's equity which is the basis of the Madras and Bombay decisions subsists even after the death of the co-parcener; and I entirely agree therefore, if I may say so, with the Full Bench decision in *Ayyagari Venkataramayya v. Ayyagari Ramayya*(2), which follows prior decisions that the mortgagor or vendor is entitled to enforce his claim after the co-parcener's death. Further I do not see how it can be said that his equity does not subsist to the same extent as before.

Again it would be entirely against the principle of equity on which these decisions are based to give the alienee anything more than the value of the consideration advanced by him; or in other words, the principle of the decisions would not justify the courts in giving him the increased share to which the co-parcener may have become entitled. This shows that we have to reject the strict theory of the Hindu law in the ascertainment of the share; and if the purchaser is not to be entitled to an increased share, I do not see how we are to say he can get only the reduced share in the other contingency.

As the doctrine is based on equity, it is more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of alienation rather than that he gets a fluctuating share with the result that it will depre-

(1) (1880) I.L.R., 5 Cal., 148 at p. 166. (2) (1902) I.L.R., 25 Mad., 690.

ciate the value of property and impart to the alienation the nature of a gambling transaction. I have not referred to the cases decided by the Privy Council referred to in the argument, as I do not think there is any final decision by their Lordships or that the question was before them for decision. However the opinions incidentally expressed by their Lordships in some cases are of very great weight and, as they accord with the view I have expressed, I do not propose to refer to them in detail. I accordingly hold that the plaintiff, the alienee, is entitled to enforce his claim against the share to which the vendor was entitled to at the time of the alienation and in the case before us the mortgagee is therefore entitled to proceed against the share of the son subsequently born.

NOTE.—*Appended under orders of the Chief Justice.*—The following was written by the Hon. Mr. KRISHNASWAMI AYYAR, as a judgment to be delivered, before he resigned his office as a Judge of this Court.

The statement of facts made in the order of reference is somewhat inaccurate. The mortgagor would at the date of the mortgage be entitled to a fourth and not a fifth share in the family properties. A brother and a son were subsequently born. The plaintiff who is the mortgagee is content to have a decree on a fifth share in the mortgaged property. The lower Appellate Court has given that decree and he has not chosen to appeal against it. The son, who is the third defendant, contends that his one-tenth share should be exonerated from liability. If the son were alive at the date of the mortgage, his share in the property would be bound by it, as the mortgage was apparently for an antecedent debt and not tainted with illegality or immorality. His interest is *a fortiori* liable if he was not in existence at the date of the mortgage. He succeeds only to a moiety of the father's equity of redemption. See *Bholanath Khettry v. Kartick Kissen Das Khettry*(1) and *Ajodhya Roy v. Hardwar Roy*(2). This aspect of the matter appears to have been overlooked by the Full Bench in *Rangasami v. Krishnayyan*(3), and by the Division Bench that finally disposed of that case. The vakil for the appellant fairly admitted before us that he had no answer to this view of the case.

(1) (1907) I.L.R., 34 Cal., 372.

(2) (1909) 9 C.L.J., 485.

(3) (1891) I.L.R., 14 Mad., 408.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

The more important question raised by the order of reference is practically whether the decision of the Full Bench in *Rangasami v. Krishnayyan*(1), is right. It appears to me that we are bound to answer it in the negative. That case decided that the share to which the mortgagee or purchaser is entitled should be determined as at the date of the suit for partition. What the alienor would be entitled to, whether alive or not, at the date of the suit for partition, is, according to the Full Bench, what the alienee is entitled to, subject to this reservation that, if the alienor's share would then be more than at the date of the alienation, the alienee, if he had bargained for less, would not be entitled to the increased share. In other words, the alienee gets a fluctuating share actually ascertainable only at the date of the suit for partition, though such fluctuation can only be to reduce but not ordinarily to increase the share of the alienee.

It is in the first place not easy to understand why the date of the suit for partition and not the date of the decree for partition should settle the share of the alienee. In an ordinary suit for partition the sharers in existence at the date of the decree, and not at the date of suit, determine the share of each. The same rule must apply to the case of an alienee suing for partition, if the date of the alienation itself be not the determining factor as regards the quantum of the alienee's interest. What is the principle on which the date of the alienation is not to determine the share of the alienee? It is said "that the alienee cannot be in a better position than the alienor" and that "the purchaser must be taken to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property." I admit that the alienee should not be in a better position than the alienor, but when? I answer, at the date of the alienation and not at some subsequent date when the alienor's share might be reduced by the birth of other members into the co-parcenary if he had not made the alienation. What ground is there for supposing that the alienee purchases a fluctuating interest. The interest would no doubt fluctuate if there was no alienation. That is an incident of co-parcenary property. But the very fact of alienation by a co-parcener puts an end to the fluctuating character of the property alienated. Joint tenancy is destroyed

(1) (1891) I.L.R., 14 Mad., 408.

by severance and an alienation by a joint tenant effects a severance. The fluctuating character of a joint tenant's interest ceases in the hands of his alienee, Williams' Real property, 20th edition, page 138; *Jogeswar Narin Deo v. Ramchund Dutt*(1). The alienee becomes a tenant in common, *Kallapa Bin Girmallapa v. Venkatesh Vinayak*(2), *Udaram Sitaram v. Ranu Panduji* and *Venku Panduji*(3), *Mahabalaya Bin Parmaya v. Timaya Bin Appaya*(4), *Appovier v. Rama Subba Aiyar*(5), no doubt held "According to the true notion of an undivided family in Hindu law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property, that he—that particular member—has a certain definite share until partition." That is the law still. See *Parbati v. Nannihal Singh*(6). But it does not follow from this that if a co-parcener alienates his interest in family property the alienee has until actual partition no definite share in the property. Like the alienee from a joint tenant in England the alienee from a co-parcener in India has a fixed share in the common property with reference to the date of alienation. Where the alienor dies before the alienee institutes a suit for partition the alienee's share does not dwindle into nothing. The Full Bench in *Aiyyagiri Venkataramayya v. Aiyyagiri Rammayya*(7) has settled that. The learned Judge who delivered the judgment of the Full Bench in *Rangasami v. Krishnayyan*(8), took the same view and explained it by saying that "the interest carved out by the sale vests in the purchaser at once" and "the purchase must be dealt with as if the seller were alive when the purchaser demands partition." If this be so with reference to a seller dying before the purchaser sues for partition, why should it be different when the co-parcenary is enlarged by the birth of other members. It is difficult to see why the interest of the co-parcener who makes the alienation should not vest likewise in the purchaser to the extent of whatever share he would then have on a partition. With reference to the case of the co-parcenary being reduced in numbers subsequent to the alienation it is said that the alienee may not get an increased share if he bargained for less. The decision in

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

(1) (1896) 23 I.A., 37 at p. 44.

(3) (1874) 11 B.H.C.R., 78 at p. 81.

(5) (1886) 11 M.I.A., 75.

(7) (1902) I.L.R., 25 Mad., 690.

(2) (1878) I.L.R., 2 Bom., 676.

(4) (1875) 12 B.H.C.R., 138.

(6) (1909) I.L.R., 31 All., 412 at p. 421.

(8) (1891) I.L.R., 14 Mad., 408.

WHITE, C.J., *Virayya v. Hanumanta*(1), is not opposed to this view for it proceeded on the provision contained in section 43 of the Transfer of Property Act of "interest feeding the estoppel." If a fluctuating interest may dwindle, parity of reasoning would require that it should also expand. This, apparently the learned Judges in *Rangasami v. Krishnayyan*(2), were not prepared to accept, though the referring judges in that case were of that opinion. Mr. Justice SHEPARD one of the Judges who composed the Full Bench, is not apparently prepared to stand by *Rangasami v. Krishnayyan*(2), for he says in his commentaries on section 44 of the Transfer of Property Act, VI edition, page 144 "in the case of a sale by a co-parcener of his share of the family property the better opinion seems to be that the extent of the interest purchased must be determined with reference to the state of things at the date of the sale" and he relies on the observations of Sir BHASHYAM AYYANGAR, J., in *Aiyyagiri Venkataramayya v. Aiyyagiri Ramayya*(3). The whole question is fully threshed out in the exhaustive judgment in that case. It is difficult to add anything to the trenchant reasoning of the learned Judge. *Gurlingapa v. Nandapa*(4) has quoted *Rangasami v. Krishnayyan*(2) with approval, and in fact the proposition is in terms laid down "that the purchaser like the alienor is liable to have his share diminished upon partition by the birth of other co-parceners." But beyond following the decision of this Court on the point now under consideration that case adds nothing to the reasoning on which the decision rests.

There are numerous difficulties in accepting the view of the Full Bench as correct. In the case of a mortgage by a co-parcener of his interest, if the date of the mortgage does not determine the quantum of interest of the alienee, why should the date of the suit on the mortgage determine it? The suit does not separate the share nor does the decree in the suit. The interest of the mortgagor may be bought in court sale, but the purchase also does not separate the share. The purchaser may sue for partition, but the suit itself does not operate as a severance. The share of the alienor might be fluctuating backwards and forwards on these several stages from the mortgage to the decree for partition.

(1) I.L.R., 14 Mad., 459.

(3) (1902) I.L.R., 25 Mad., 690 at p. 718.

(2) (1891) I.L.R., 14 Mad., 408.

(4) (1897) I.L.R., 21 Bom., 797.

Again it is anomalous to hold that the alienor's share may go on dwindling but cannot vanish. The authority of the Privy Council is clear that the purchaser must have the alienor's share though he may be dead when the purchaser sues for partition *as if he were then alive*. Suppose the alienor is dead but further additions have been made to the co-parcenary; is the share of the alienee to be taken as at the date of the alienor's death or as at the date of the suit for partition when there are more co-parceners?

It appears to me that the only sound rule to adopt in the matter is to fix the share of the alienee as at the date of the alienation. The authority of the Privy Council may also be invoked in support of this view. It is no doubt true as contended by the learned vakil for the appellant that in none of the cases relied on *Deendyal v. Jugdeep Narain Singh*(1), *Suraj Bunsai Koer v. Sheo Persad Singh*(2), *Hardi Narain Sahu v. Ruder Perakash Misser*(3) and *Balgobind Das v. Narain Lal*(4) did the question arise for decision. But the language of the Privy Council does not leave any room for doubt as to their meaning. In *Deendyal v. Jugdeep Narain Singh*(1), they say at page 209 "the right of the purchaser at the execution sale (of the father's interest) may be limited to that of compelling the partition, which his debtor might have compelled had he been so minded, *before the alienation of his share took place*." This language may perhaps be explained by saying that the period anterior to the alienation is referred to, because the debtor could only then have sued for partition of the property. In *Suraj Bunsai Koer v. Sheo Persad Singh*(2), their Lordships of the Judicial Committee state at page 164 "An intermediate proposition between the extreme contentions on both sides is that the sale would be operative upon the right, title, and interest of the judgment-debtor in the property put up for sale, so as to pass the share to which, upon a partition effected during his life-time, he would have been entitled." At page 174 they proceed to say "The mortgage executed by Adit Sahai in his life-time, as a security for the debt, might operate after his death as a valid charge upon Mouza Bissumbhurpur to the extent of his own *then* share." This may mean the share to which she was entitled either at the date of the mortgage or during his life-time. It does not appear that the share

(1) (1878) I.L.R., 3 Calc., 198.

(3) (1884) I.L.R., 10 Calc., 626.

(2) (1880) I.L.R., 5 Calc., 148.

(4) (1898) I.L.R., 15 All., 339 at p. 353.

WHITE, C.J.
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
ATTAR, J.J.

CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

WHITE, C.J., varied afterwards. The Privy Council does not speak of the share of Adit Sahai as if he were alive at the date of the partition. Adit Sahai was dead at the date of the court sale. They made a declaration in favour of the purchaser that he was entitled to the third share of Adit Sahai which he possessed in his life-time and which he also mortgaged. *Hardi Narain Sahu v. Ruder Perakash Misser*(1) is a stronger case. The purchaser at the court sale of the father's interest was held entitled to his one-third (he had at that time a wife and one son) treating it as if the sale was to operate as a partition at that time. The appeal to the Privy Council was by the purchaser claiming the whole property. The Privy Council negatived that claim. He then asked for a moiety instead of the third which the High Court gave him on the footing of a partition as at the date of sale. Mr. Doyne who appeared for the appellant contended that the mother was no co-parcener and he was therefore entitled to a moiety. The Privy Council did not say that, the mother having died and another son having been born pending the appeal to their Lordships, he was only entitled to a third as a purchaser from one of three co-parceners, but that the purchaser only obtained the share which the father would take if a partition took place at the date of the sale. They added that the two sons were parties to the appeal in respect of the share which the mother was entitled to take at a partition. I am inclined to think that there is an express pronouncement in this case which is against the view taken by the Full Bench in *Rangasami v. Krishnayyan*(2). The observation in *Balgobind Das v. Narayan Lal*(3), is a mere repetition of the remark in *Deendyal v. Jugdeep Narain Singh*(4), to which reference has already been made and may be similarly explained.

The purchaser from a co-parcener of his share in all the family property or in one of several items belonging to the family may not succeed in a suit for partition in getting the share allotted to him that he purchased or the item. But that is because there may be liabilities which attach to the share of the co-parcener making the alienation. The equities between the co-parceners may reduce the share of the alienating co-parcener in the property alienated. But such equities or liabilities must only be deter-

with reference to the date of alienation. Future contingencies of births and deaths do not stand on the same footing as conditions and liabilities existing at the date of the alienation which are referred to in section 44 of the Transfer of Property Act. These latter incidents of a co-parcenary interest do not conflict with the principle that an alienee from one of several coparceners takes the interest which may be carved out at the date of alienation.

I would answer the question referred to the Full Bench in the affirmative.

WHITE, C.J.,
BENSON,
MUNRO,
SANKARAN-
NAIR AND
KRISHNA-
SWAMI
AYYAR, JJ.
CHINNU
PILLAI
v.
KALIMUTHU
CHETTI.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Krishnaswami Ayyar and Mr. Justice Ailing.

NARAYANAN CHETTY AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MUTHIAH SERVAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1910.
February 8.
March 31.
October 21.
November 3.

Registration Act III of 1877, ss. 3, 17, 40—Contract to sell—

Agreement to lease—Evidence Act, s. 91.

An agreement to execute a sub-lease and to get it registered at a future is a lease within section 3 of the Indian Registration Act III of 1877 and is compulsorily registrable under clause (d) of section 17.

Such an agreement to grant a lease which requires registration affects immoveable property and cannot be received in evidence in a suit for specific performance of such agreement.

It is immaterial whether possession has passed or not in accordance with the agreement.

Section 49 of the Registration Act indicates that a document should not be received in evidence even where the transaction sought to be proved does not amount to a transfer of interest in immoveable property but has only created an obligation to transfer the property.

SECOND APPEAL against the decree of Arthur F. Pinhey, District Judge of Madura, in Appeal Suit No. 458 of 1906, presented against the decree of S. Raghava Aiyangar, District Munsif of Sivaganga, in Original Suit No. 315 of 1905.

* Second Appeal No. 7 of 1908.

(1) (1884) I.L.R., 10 Cal., 626. (2) (1891) I.L.R., 14 Mad., 408.
(3) (1893) I.L.R., 15 All., 339 at p. 353. (4) (1878) I.L.R., 3 Cal., 198.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

The facts are as follows :—

The lessees of the Sivaganga zamindary are entitled to collect fuller's earth that is found in the waste land of certain villages. They granted a lease of the right to collect fuller's earth in three villages to first defendant. Plaintiffs allege that first defendant agreed to sub-lease the same to the plaintiffs by agreement, dated 4th January 1905. Plaintiffs sued for specific performance of the agreement and for damages. They asked that the first defendant should be compelled to execute a registered sub-lease. Defendants Nos. 2 to 5 obtained a sub-lease from the first defendant. The plaintiffs contended that that sub-lease was not binding. Exhibit A was put forward by the plaintiffs as the agreement to sub-lease. Its terms are as follows :—

"Under the lease taken for a period of six faslis from fasli 1314 current to fasli 1319, of the fuller's earth, and saline pottus in these three villages, viz., Ain Pilloor, Kalathoor and Narathakudi, from the lessees of Sivaganga zamin, and under the agreement entered into between myself and the said lessees and under the Court razinama in Original Suit No. 140 of 1904, on the file of the District Munsif of Sivaganga, my lease hold right to the earth was confirmed and the arid tracts in the said three villages remain in my possession and enjoyment. In order that you may boil the said fuller's earth and enjoy the same for the abovementioned six faslis according to my right, a sub-lease has been arranged and settled through this, and fixing the rent of the said sub-lease at the rate of Rs. 280 per fasli, Rs. 280 the rent due for the current fasli 1314 has been received by me in cash this day. In respect of this, and in respect of my having delivered the arid tracts to you to be enjoyed from fasli 1314 current, this itself shall be a receipt. After the lessees have executed a lease deed to me and got it registered according to razinama stated above, I shall at your cost execute a lease deed according to the terms of the said deed and get it registered. Until then this shall be in force. You shall keep this itself as a record."

This document being unregistered the second to fifth defendants pleaded that it was inadmissible in evidence. The District Munsif held that exhibit A should have been registered and as it had not been registered, it could not be admitted in evidence and further that secondary evidence of its contents could not be adduced (Indian Evidence Act, section 91).

The District Judge dismissed the appeal on the same grounds. The plaintiffs appealed to the High Court.

The case first came on for hearing before (BENSON and KRISHNASWAMI AYYAR, JJ.), who made the following order of Reference to the Full Bench.

BENSON, J.—I am not at present satisfied that the decision in the case of *Konduri Srinivasa Charyulu v. Gottumukkala Venkataraju*(1) is not in accordance with the principle underlying the decision of the Full Bench in *Raja of Venkatagiri v. Narayana Reddi*(2) and does not govern the present case. It is not, however, altogether easy to appreciate the grounds on which the Full Bench proceeded. The question before us, is one of great importance and of considerable difficulty. I am therefore of opinion that a reference to the Full Bench in the terms proposed by my learned brother is desirable.

KRISHNASWAMI AYYAR, J.—The suit is to compel specific performance of an agreement to give the plaintiff a sub-lease. Exhibit A, which is called a receipt, is in terms a promise to execute a sub-lease and to get it registered on a future date. The document comes within the definition of a lease in section 3 of the Registration Act and is compulsorily registrable under clause (d) of section 17. The Courts below have dismissed the suit holding that the document was inadmissible in evidence and that the suit therefore was not maintainable. The appellant's vakil relies upon the Full Bench decision in *Raja of Venkatagiri v. Narayana Reddi*(2), and on the unreported case *Konduri Srinivasa Charyulu v. Gottumukkala Venkataraju*(1), (WALLIS and BODDAM, JJ., not WALLIS and BENSON, JJ., as incorrectly stated in the report). If the latter case is correctly decided the appellant is entitled to succeed. In *Raja of Venkatagiri v. Narayana Reddi*(2), the question was as to the admissibility of a Kabuliat executed by the lessee in proof of a contract on the part of the lessor to execute a cowle and to get the Kabuliat registered. The action itself was for damages "for the breach of contract on the part of the defendant in refusing to register the Kabuliat and to give the plaintiff a cowle and also in disturbing his possession." The contract to grant a cowle was not in writing. A draft cowle prepared by the plaintiff had not been executed by the defendant.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR,
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

(1) (1907) 17 M.L.J., 218.

(2) (1894) I.L.R., 17 Mad., 456.

WHITE, C.J., KRISHNA-SWAMI AYYAR AND AYLING, JJ. NARAYANAN CHETTY v. MUTHIAH SERVAL.

The contract to grant a cowle and to register the Kabuliat could only be regarded as oral. No question could properly be raised with regard to the admissibility of the Kabuliat in evidence of such an oral contract. The Kabuliat which was in writing and came within the definition of lease required registration and was inadmissible under section 49 to prove a transaction affecting immoveable property. But it was apparently thought that there was nothing to prevent its admissibility to prove the perfectly valid oral agreement to grant a cowle and to register the Kabuliat. The decision of the Full Bench therefore in allowing the Kabuliat to be received in evidence of the contract to grant a cowle and to register the Kabuliat is not an authority for the position that an unregistered lease or agreement to grant a lease can be used in evidence for proving the lease or the agreement to grant it; see however the judgment of SUBRAMANIA AYYAR and MILLER, JJ., in *Subbarayudu v. Narasimha Row*(1). It was argued that in a suit for specific performance the written agreement to grant the lease is not used as evidence of a transaction affecting immoveable property. It was also contended that it is only a lease that creates an interest in the property and not a mere agreement to give a lease and in the absence of creation of any interest in the lessee we cannot speak of an agreement to grant a lease of immoveable property as affecting the immoveable property. It is difficult to accept this argument. Section 49 provides that a document required by section 17 to be registered shall not affect the immoveable property comprised therein and further that it shall not be received as evidence of any transaction affecting such property. Can it be said that an agreement to grant a lease of immoveable property is not a transaction affecting the property? Such an agreement creates an equitable interest in favour of the promisee (see Fry on "Specific Performance," 4th edition, page 589), and must therefore be regarded as a transaction affecting the property though it does not amount to the transfer of an interest under the Transfer of Property Act. Courts of Equity treat a tenant in possession under an instrument which would be specifically enforceable as in the same position as if a valid lease were in existence. See Redman's "Landlord and Tenant," page 130, and in the present case possession was given under

WHITE, C.J., KRISHNA-SWAMI AYYAR AND AYLING, JJ. NARAYANAN CHETTY v. MUTHIAH SERVAL.

exhibit A. Section 17 of the Act requiring the registration of the agreement to lease, it is difficult to suppose that section 49, which renders the unregistered document inadmissible, allows the admissibility of the document to prove the agreement on the ground that it does not affect the immoveable property comprised in it. Why should registration of an agreement to lease be compulsory if the transaction can be proved by an unregistered instrument? It may be said that the provision for compulsory registration of an agreement to lease has sufficient scope for its operation in the fact that non-registration subjects the instrument to the risk of priority of a later instrument registered. But this is not a sufficient reason for including agreements to lease in section 17 and not in section 18. For the rule as to priority applies to optionally registrable instruments as well. It seems also proper to bear in mind that having specified in clause (b) of section 17 instruments creating a right in immoveable property of one hundred rupees and upwards the legislature has taken care to except from this clause "a document not itself creating such an interest but merely creating a right to obtain another document which will when executed create such an interest." The enactment of the exception is some evidence to show that but for it, a document, which is only an agreement to execute another, may be deemed to affect the property comprised in it. As an agreement to grant a lease, however, falls within clause (d) and not within clauses (b) and (c) in respect of which the exception referred to has been enacted, it may well be considered that by the inclusion of the agreement to give a lease in the very definition of a lease and the separate specification of leases of immoveable property in clause (d) of section 17 as requiring registration that the legislature has indicated that agreements to lease immoveable property do create an interest in such property or at all events affect such property so as to render the unregistered agreement to lease inadmissible in evidence of the transaction.

It is worthy of remark that the Full Bench in *Raja of Venkatagiri v. Narayana Reddy*(1) did not dissent from the decision in *Hurjiwan Virji v. Jamsetji Nowroji*(2), where

(1) Second Appeal No. 973 of 1904 (unreported).

(1) (1894) I.L.R., 17 Mad., 456.

(2) (1885) I.L.R., 9 Bom., 68.

WHITE, C.J., the suit was to compel the defendant to produce the document for registration or to execute another document and duly register the same or to recover damages for wrongfully preventing the registration of the document already executed and the suit was dismissed on the ground that the document could not be received as evidence of the contract between the parties. The Full Bench merely observed that the High Court of Bombay had overlooked the prayer for damages for non-registration of the document. The authority of the Bombay decision as regards the non-admissibility of the document so far as the suit was for specific performance of the contract to give the lease is not rejected. But if the case of *Konduri Srinivasa Charyulu v. Gottumukkala Venkataraja*(1) be correctly decided the appellant is entitled to judgment. That was a suit for specific performance of an agreement to grant a lease. This Court was of opinion that the Full Bench decision in *Raja of Venkatagiri v. Narayana Reddi*(2) was authority for the view "that the document embodying the agreement to lease does not require registration to be admissible in evidence where it is only used for the purpose of proving the contract for the breach of which the action is brought." The Full Bench did not use the unregistered Kabuliat to prove a written contract to grant the lease but to prove an oral agreement to grant a cowle (for the draft cowle had not been executed) and to register the Kabuliat. There appears therefore to have been a misapprehension in *Konduri Srinivasa Charyulu v. Gottumukkala Venkataraja*(1), as to the true ground of decision in *Raja of Venkatagiri v. Narayana Reddy*(2), if I have understood it aright. I may add that we have found some difficulty in appreciating the grounds of that decision. As I entertain doubts about the correctness of the decision in *Konduri Srinivasa Charyulu v. Gottumukkala Venkataraja*(1), I think it desirable to refer to the Full Bench the following question :—

"Whether an agreement in writing to grant a lease which requires registration can be received in evidence in a suit for specific performance of such agreement, (1) where possession is given in pursuance of the agreement, (2) where it is not."

The appeal again came on for hearing in due course before the Full Bench constituted as above.

(1) (1607) 17 M.L.J., 218.

(2) (1894) I.L.R., 17 Mad., 456.

The case was argued on the assumption that the document in question required registration.

C. S. Venkatachari for appellant.

The definition of "lease" in Act III of 1877, section 3, includes "agreement to lease" but an agreement for a lease is not a "transaction affecting such property." It no doubt affects the parties but not the property. The words "agreement to lease" in section 3 only refer to those agreements which effect a demise. Section 49 only refers to documents which create a title or make an interest in property. *Raja of Venkatagiri v. Narayana Reddi*(1) read and explained.

[KRISHNASWAMI AYYAR, J.—The agreement there referred to is a previous oral agreement and not the kabuliat itself.]

The point decided was that an unregistered kabuliat could be received in evidence to prove the terms of an agreement for lease.

Subbarayudu v. Narasimha Row(2), *Purmanand Das Jwandas v. Dharsey Virji*(3), *Bangarayya Garu v. Jagannatha Raju Garu*(4), *Satyendra Nath Bose v. Anil Chandra Ghosh*(5) (judgment of Fletcher, J.), referred to.

[KRISHNASWAMY AYYAR, J.—In 7 M.L.J., 278 a document of 1877 was put in to prove an agreement of 1871. It was given in evidence to prove an admission of a previous transaction. That agreement is not a transaction about land.]

The 1877 agreement was to take land in lieu of maintenance. The document was admitted to show the party surrendered the one for the other. It may be that the matter was arranged previously but nonetheless the terms are reduced to writing (Sheppard and Brown's "Transfer of Property Act", sixth edition, page 487, referred to.)

In *Lalla Ram Saboy Lall v. Bibee Chowbain*(6), a mere agreement to lease is held not to create an interest in immoveable property. *Hurjiwan Virji v. Jamsetji Nowroji*(7) was a suit to compel registration not a suit for specific performance.

(1) (1894) I.L.R., 17 Mad. 456. (2) Second Appeal No. 973 of 1904 (unreported).

(3) (1886) I.L.R., 10 Bom., 101. (4) (1910) M.W.N., 485.

(5) (1908) 14 C.W.N., 65. (6) (1874) 22 Sath. W.R., 287.

(7) (1885) I.L.R., 9 Bom., 63.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

WHITE, C.J., [KRISHNASWAMI AYYAR, J.—That is a suit for specific performance.]

KRISHNASWAMI AYYAR AND AYLING, JJ. The vakil also relied on *Nagappa v. Devu*(1), *Adakkalam v. Theethan*(2), *Kadar v. Ismail*(3), *Purmanand Das Jwandas v. Dharsey Virji*(4).

NARAYANAN CHETTY v. MUTHIAH SERVAL.

S. Srinivasa Ayyangar for respondent. Section 49 is wider than section 17 because it makes all the things in section 17 compulsorily registrable and others besides. More restrictions are made in section 49. An agreement to lease is required to be registered for several purposes. These words cannot mean the lease itself or they would not have been used. The words in section 49 are not only "to effect immoveable property." There are more words than these. Both parts of the section must be considered. The legislature has treated a contract for sale as *affecting* the property. But contract for sale is not defined as a sale, whereas a contract for lease is defined as a lease in section 3. Further in a suit for specific performance the suit must affect the land (section 52, Transfer of Property Act). Reference was here made to Civil Procedure Code, section 16, clause (d), Indian Trusts Act, section 91, Transfer of Property Act, section 40 and Webster's Dictionary as to the meaning of the word "*affect*."

Under the Indian Stamp Act, sections 35 and 216, an agreement to lease has to be stamped with the same stamp as the lease itself (vide *Reference under Stamp Act, section 46*(5)).

Section 17 is not cut down by section 49. Documents which in fact operate *in presenti* must be registered. As regards 17 M.L.J., 280, the Full Bench decision is obscure and lays down no principle. It only discusses the document in that case.

The case *Hurjivan Virji v. Jamsetji Nowroji*(6) is a suit for specific performance.

In *Bangarayya Garu v. Jagannatha Raju Garu*(7) the learned Judges found a difficulty in justifying *Subbayya v. Madduleiah*(8), and in 17 M.L.J., 469, WALLIS, J., is inconsistent with himself in 17 M.L.J., 456.

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| (1) (1891) I.L.R., 14 Mad., 55. | (2) (1889) I.L.R., 12 Mad., 505. |
| (3) (1886) I.L.R., 9 Mad., 119. | (4) (1886) I.L.R., 10 Bom., 101. |
| (5) (1894) I.L.R., 17 Mad., 280. | (6) (1885) I.L.R., 9 Bom., 63. |
| (7) (1910) M.W.N., 485. | (8) (1907) 17 M.L.J., 469. |

Turner v. Wight(1), *Hadley v. The London Bank of Scotland*(2), *Pranjivan Govardhan Das v. Bajji*(3) and *Mati Lal Pal v. Preo Nath Mitra*(4), referred to.

S. Venkatachari in reply referred to Stroud's Judicial Dictionary, Vol. 1 and the Century Dictionary as to the meaning of the word "*affecting*." *Land Mortgage Bank v. Sudurudeen Ahmed*(5), *His Highness Maharaja Yashwantray Holkar v. Dadabhai Cursetji*(6) also referred to.

OPINION.—We answer the question referred in the negative. It is immaterial whether possession has passed or not in accordance with the agreement. It is clear that the decision of the Full Bench in *Raja of Venkatagiri v. Narayana Reddi*(7) does not cover the point. As is explained in the order of reference what was held in *Raja of Venkatagiri v. Narayana Reddi*(7) was that a *kabuliat* signed by the lessee but inadmissible to prove the lease for want of registration was admissible to prove the *karar* or the agreement to lease which preceded it. The decision in *Konduru Srinivasa Charyulu v. Gottumukkala Venkataraja*(8) would seem to have proceeded upon a misapprehension of the Full Bench case. The learned Judges who decided it assumed that the Full Bench case was a suit for damages for the breach of an agreement in writing to let which was unregistered though compulsorily, registrable. They held, and in our opinion rightly that there was no distinction between a suit for specific performance of such an agreement and one for damages for the breach of it. The learned Judges merely applied, as we venture to think, erroneously the decision of the Full Bench to the case before them. They did not discuss the provisions of the Registration Act. Mr. Justice BODDAM who was a party to this decision took the opposite view in *Venkata Narasimha v. Seshayya*(9) sitting with Mr. Justice SANKARAN-NAIR. The judgment of SUBRAMANIA AYYAR and MILLER, JJ., in *Subbarayudu v. Narasimha Row*(10) is open to the same observation as the decision in *Kondurru Srinivasa Charyulu v. Gottumukkala Venkataraja*(8). Our attention was invited to the

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| (1) (1841) 49 E.R., 252. | (2) (1865) 46 E.R., 562. |
| (3) (1880) I.L.R., 4 Bom., 34. | (4) (1909) 9 C.L.J., 96. |
| (5) (1892) I.L.R., 19 Cal., 358. | (6) (1890) I.L.R. 14 Bom., 353. |
| (7) (1894) I.L.R., 17 Mad., 456. | (8) (1907) 17 M.L.J., 218. |
| (9) Second Appeal, No. 525 of 1903 (unreported). | |
| (10) Second Appeal No. 973 of 1904 (unreported). | |

WHITE, C.J.,
KRISHNASWAMI
AYYAR
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

WHITE, C.J., judgment of the learned CHIEF JUSTICE and Mr. Justice MILLER in *Bangarayya v. Jaganatha Raju*(1). The document in that case was not an agreement to lease. There the instrument recited a request by the executant and an agreement by the other party to give certain lands to her and an actual grant by the same, and contained a promise to manage the lands and enjoy them subject to certain terms. The operative part of the instrument was held to require registration. The question was whether for want of registration it was inadmissible to prove the recital. The learned Judges held that the document was admissible to prove the recital, i.e., the admission by the plaintiff of the existence of an agreement to give some lands to the plaintiff which itself was not in writing or at all events did not require registration. But there are certain observations in their judgment which have been pressed upon us. After referring to *Raja of Venkatagiri v. Narayana Reddi*(2) and *Konduru Srinivasa Charyulu v. Gottumukkala Venkataraju*(3) the learned Judges observe "that an agreement to lease immovable property is not actually a transaction affecting land unless in cases whereby the agreement itself a right in the land is created" and that "on that ground it may be held that evidence can be given of such an agreement by means of an unregistered document which is compulsorily registrable." We do not think this can be regarded as an adjudication on the question which has been referred to us. The decision in *Satyendra Nath Bose v. Anil Chandra Ghosh*(4) is that of a single Judge sitting on the Original Side. He simply followed the decision in *Konduru Srinivasa Charyulu v. Gottumukkala Venkataraju*(3). As regards the suggestion made in that case that a lease is the sale of a limited interest and that an agreement to lease stands on the same footing as an agreement to sell *pro tanto*, the learned Judge would seem to have overlooked the fact that the legal incidents of the two transactions are entirely different. An agreement to lease is expressly included in the definition of lease in the Registration Act while it cannot be suggested that an agreement to sell falls within any definition of sale. Clause (h) of section 17 excludes an agreement to sell from the class of compulsorily registrable documents and

(1) Second Appeal No. 979 of 1904 (unreported).

(2) (1894) I.L.R., 17 Mad., 456.

(4) (1908) 14 C.W.N., 65.

(3) (1907) 17 M.L.J., 218.

section 54 of the Transfer of Property Act provides that a contract to sell does not create an interest in the property. It is true that an agreement to lease may likewise not create an interest in immovable property though clause (h) of section 17 has no application to it, and there is no statutory provision in India which says so. But Mr. S. Srinivasa Ayyangar has in his able argument drawn our attention to the provisions of section 40 of the Transfer of Property Act and section 91 of the Trusts Act. The first of these provisions speaks of an obligation arising out of a contract and annexed to the ownership of immovable property but not amounting to an interest therein or easement thereon being enforceable against a transferee with notice or a gratuitous transferee of the property affected thereby. This shows that a contract to sell or an agreement to lease immovable property is a transaction which affects the property. In fact, the illustration to that section puts the case of an agreement to sell being enforceable against the transferee with notice, as he has taken property affected by the previous contract to sell it. Section 91 of the Trusts Act puts the same case of a person acquiring property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced and consequently becoming liable to hold the property for the benefit of the other. When therefore section 49 of the Registration Act declares that a document compulsorily registrable but remaining unregistered shall not be "received in evidence of a transaction affecting such property" or, as put by the Calcutta High Court (See *Ulfat-unnessa Elahijan Bibi v. Hosain Khan*(1)) "of a transaction so far as it affects such property" it would seem that the legislature meant to indicate that the instrument should not be received in evidence even where the transaction sought to be proved did not amount to a transfer of interest in immovable property but only created an obligation to transfer the property.

Section 49 consists of two parts. It provides first "that no document required by section 17 to be registered shall affect any immovable property comprised therein, etc." The second part of the section says that such a document "shall not be received as evidence of any transaction affecting such property," i.e., as we take it, the immovable property comprised therein. As regards

(1) (1888) I.L.R., 9 Cal., 520 at p. 525.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

immoveable property other than that comprised in the instrument or a transaction in respect thereof, the section contains no prohibition against the admissibility of the instrument. We must assume that the two parts of the section deal with different subjects (See WILSON, J., in the Order of Reference to the Full Bench in *Ufatunnissa Elahijan Bibi v. Hosain Khan*(1)). The first part apparently presupposes that the document itself is the transaction or the mode in which it is carried out. The second part of the section seems to relate to cases where the document itself is not the transaction but is only a record of a transaction or being itself a transaction contains a reference to or a recital of another transaction which affects the immoveable property comprised therein. Even in the last case the document may be inadmissible to prove the other transaction provided it affects the immoveable property comprised therein. As the Registration Act deals only with written instruments it may be doubted whether the transaction referred to in section 49 can be merely oral. It is unnecessary to define the exact scope of this clause as to inadmissibility for proving a transaction affecting such property. It is enough for the purpose of this reference to say that a contract to lease immoveable property which is compulsorily registrable under section 17, clause (d) affects the immoveable property (see GREEN, J., in *Raju Babu v. Krishnarav Ramchandra*(2)) and cannot if unregistered affect the property or be received in evidence to prove the contract. Suits for specific performance of a contract to sell were referred to in the course of the argument as suits affecting property. That is no doubt true as the relief asked for is the conveyance of property. The doctrine of *lis pendens* has been held to apply to a transfer of immoveable property pending a suit for specific performance. *Turner v. Wight*(3), *Hadley v. The London Bank of Scotland*(4), *Pranjiwan Govardhan Das v. Bajji*(5), *Mati Lal Pal v. Preo Nuth Mitra*(6). If a transaction like a contract to sell or lease immoveable property does not affect it, it is difficult to see how a suit to enforce the transaction can be regarded as affecting it. A contract to sell immoveable property in writing, though it may affect the property without passing an interest in it, is exempted from registration by clause (h) [now clause (2) (v)] of

(1) (1883) I.L.R., 9 Calc., 520 at p. 525. (2) (1878) I.L.R., 2 Bom., 273 at p. 285.
(3) (1841) 49 E.R., 252. (4) (1865) 46 E.R., 562.
(5) (1880) I.L.R., 4 Bom., 34. (6) (1909) 9 C.L.J., 96.

section 17 of the Registration Act. But an agreement in writing to let falling within clause (d) of section 17 is not. It cannot be therefore received in evidence of the transaction which affects the immoveable property comprised therein.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR
AND
AYLING, JJ.
NARAYANAN
CHETTY
v.
MUTHIAH
SERVAL.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

RAJA KUMARA VENKATA PERUMAL RAJA BAHADUR,
MINOR, BY GUARDIAN MR. W. A. VARADACHARIAR
(SECOND PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANT,

v.

THATHA RAMASAMY CHETTY AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1911.
January 30,
31.
February 13.

Res judicata—Compromise decree—recision of—Civil Procedure Code, s. 257-A—
Agreement contravening, rule in, not opposed to public policy—Judgment-
debtor may waive rule.

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise is whether the parties decided for themselves the particular matter in dispute by the compromise and the matter was expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree.

The basis of a compromise decree is a contract between the parties to the litigation and the principles applicable to contracts would often have to be considered in determining the rules of estoppel applicable to such decrees; at the same time such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The parties to the decree cannot therefore put an end to it at their pleasure in the manner that they could rescind a mere contract. Nor can it be impeached on some grounds on which a mere contract could be impeached such as absence of consideration or mistake.

Jenkins v. Robertson, [(1867) (1., H.L., Sc. & Div., 117)], distinguished.

The reason is that the Court being bound to adopt the agreement between the parties as its own adjudication the interpretation to be placed upon such adjudication ought to be the same as that to be placed on the agreement itself.

* Appeal No. 193 of 1907.

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
V.
THATHA
RAMASAMY
CHETTY.

A compromise decree may in some respects have a greater validity than one passed after contest between the parties as such a decree has all the force of a compromise or a species of contract which is highly favoured by the Courts.

Judgments passed on mutual agreements of parties are distinguishable from judgments by default and decrees passed upon a confession of judgment or an admission by the defendant that the plaintiff is entitled to a particular relief.

An agreement in contravention of section 257-A of the Civil Procedure Code is not opposed to public policy. The prohibition in the section is not based on any rule of public policy rendering such an agreement illegal. It is merely unenforceable in execution proceedings or by a fresh suit as the case may be. A judgment-debtor is entitled to waive the benefit of the rule.

APPEAL against the decree of D. Venkoba Rao, Subordinate Judge of North Arcot, in Original Suit No. 3 of 1906.

The facts for the purpose of this case are fully set out in the judgment.

The Hon. Mr. L. A. Govindaragava Ayyar for appellant.

K. Srinivasa Ayyangar for respondents.

JUDGMENT. — The suit in this case was instituted for the recovery of a sum of Rs. 10,929-10-9 with interest which the plaintiff alleges to be due to him from the defendants from the 27th April 1900. The plaintiff's case is that the villages mentioned in schedules A and B appended to the plaint were mortgaged by the plaintiff to the defendants' father, Subbi Chetti, on the 21st of May 1890 under two documents for a sum of Rs. 100,000 and Rs. 51,500, respectively, that the first of these mortgage-deeds filed as exhibit A in the suit was void and unenforceable being contrary to section 257-A of the Code of Civil Procedure and that the second deed, exhibit B, was also void for the same reason with respect to Rs. 31,343-1-9 out of the total sum of Rs. 51,500; that the villages mortgaged under the two deeds passed into the possession of the mortgagee and continued to remain in his possession till July 1900, when they were taken possession of by the Court of Wards when the superintendence and management of the plaintiff's zamindari of Karvetnagar were assumed by it, and that the villages remained in the Court of Wards' possession till 1905, when the Court of Wards released its superintendence and handed over possession of the villages to the mortgagee. The plaintiff claims to be entitled to recover the entire profits of the villages in schedule A and included in the mortgage-deed, exhibit A. He claims also to be entitled to an account from the defendants of the incomes of the villages included

in exhibit B on the footing that the amount due to the defendants under exhibit B was only Rs. 20,156-14-3 and estimates the amount that would be due to the plaintiff on such account being taken at Rs. 2,935-9-6.

Subbi Chetty had obtained two decrees against the plaintiff in Civil Suits Nos. 197 of 1882 and 117 of 1883 on the Original Side of this Court for large sums of money. These decrees were transferred for execution to the District Court of North Arcot. He took out execution of the decrees in the District Court, and while the execution proceedings were pending, the parties made an adjustment of all their disputes, and the result was the execution of four mortgage bonds by the plaintiff to Subbi Chetty, two of which are the bonds, exhibits A and B, now sued on. The total amount found to be due to Subbi Chetty was Rs. 1,79,000 in which was included about Rs. 20,000 and odd on other accounts and the remainder was the amount due on account of the two decrees. The execution proceedings had previously been adjourned on several occasions in both cases, and the judgment-debtor had agreed, in consideration of the decree-holder consenting to the adjournments and giving him time for payment, to pay enhanced interest; the sanction of the District Court had been obtained by the parties for the agreements to pay enhanced interest but not the sanction of the High Court as required by section 257-A of the Civil Procedure Code. The total amount thus added to the amount of the decree in Civil Suit No. 197 was about Rs. 40,000 and Rs. 4,000 was added to the amount due under Civil Suit No. 117. The four mortgage bonds were all executed on the same day and evidently represented a single transaction. Each of them refers to the amounts secured under the other bonds and purports to be for the remaining amount out of the total found due by the plaintiff. Exhibits A and B are both usufructuary mortgage-deeds. The period fixed for redemption was fifteen years and the mortgagee was entitled to possession during the term, the entire usufruct being appropriated towards the interest due on the bonds. The plaintiff alleges that this Court which passed the decrees in the two Suits Nos. 197 of 1882 and 117 of 1883 not having sanctioned the arrangements made by the parties "for the payment of a larger sum than was legally due" under them, the mortgage exhibit A and so much of the mortgage exhibit B as went in satisfaction of the decree in Civil Suit No. 197

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
V.
THATHA
RAMASAMY
CHETTY.

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

are void in law, and he institutes this suit on the footing that the defendants obtained and kept possession of the properties included in exhibit A without any title at all and of those included in exhibit B as a mortgagee only for the sum of Rs. 20,000 and odd. The defendants denied that the mortgage-deeds secured the payment of any sum in excess of the amounts legally due under the two decrees, and contended *inter alia* that the bonds were, at any rate, valid for the amounts really due under the decrees and that they had in any event acquired by twelve years' adverse possession a title to hold the properties comprised in the mortgages for the amounts secured by them respectively. They further pleaded that the question relating to the validity of the mortgage-deeds was *res judicata* by reason of the decree in Original Suit No. 19 of 1893 on the file of the District Court of North Arcot, which was instituted against the plaintiff by Subbi Chetty in which he sought to enforce some of the obligations which the plaintiff was bound to perform under exhibits A and B and the two other mortgage-deeds of the same date. Sixteen issues were framed by the lower Court, of which the fourth issue referred to the question of *res judicata* and the second issue raised the question whether the mortgages were invalid as contravening the provisions of section 257-A of the Civil Procedure Code. The Subordinate Judge held on the second issue that the bonds were not invalid, as, in his opinion, section 257-A only applies to execution proceedings. He decided the question of *res judicata* also against the plaintiff. We invited the learned vakils on both sides to confine their arguments in the first instance to the question of *res judicata* raised by the fourth issue as, in case we agreed with the lower Court on that issue, a consideration of the other issues in the case would be unnecessary. The facts required for the disposal of that issue may be very briefly stated. Original Suit No. 19 of 1893 was instituted by Subbi Chetty against the plaintiff for the recovery of Rs. 3,843-1-4 which he claimed as due to him on the footing of the four mortgage-deeds executed on the 21st of May 1890, including exhibits A and B, and also to compel the plaintiff to provide Subbi Chetty with the necessary documents of title to enable Subbi Chetty to recover during the currency of the mortgage-deeds the rents due under various leases of trees, *thangedu* bark and other kinds of forest produce, which the plaintiff had executed in the years 1886, 1887, 1888, and 1889 to one Subbaraya Mudali,

one Sesham Chetty and Mutyala Mudali, one Rami Chetty, one Munisami Chetty and one Chenga Reddi. The above amount was made up of Rs. 741-1-1, road-cess paid by Subbi Chetty which the zamindar ought to have paid, and the proportionate rents which Subbi Chetty claimed as due to him out of the amounts collected by the plaintiff from the abovementioned lessees under the leases referred to above which included villages not comprised in the mortgages. The plaint in that suit was dated the 30th June 1893. It does not appear that the zamindar put in any written statement. The suit was terminated by a compromise, exhibit IX (a), dated the 10th April 1895, and a decree exhibit IX, dated the 17th April 1895, was passed in pursuance of the compromise. The terms of the compromise are very important for the decision of this appeal. Paragraph No. 1 provided for the payment to Subbi Chetty of an amount of Rs. 4,549-9-4 "towards the plaint amount, costs and interest." Paragraph No. 2 was to the effect that the plaintiff herein should pay to Subbi Chetty within six months for the period intervening from the date of plaint to the date of the decree at the rate of Rs. 200 per annum on account of the *ijara* amount of Chintam Sesham Chetty and others in respect of *thangedu* bark of the mortgage villages and at the rate of Rs. 280 per annum for the *ijara* amount of Rami Chetty and others. Paragraph No. 3 relating to the period subsequent to the Razinama is specially important and is in these terms:—"Within one month from this date the defendants should make arrangements so that the *ijara* amount should be paid directly to the plaintiff by the respective *ijaradars* at the abovementioned rates from the date of the razinama to the termination of the lease in respect of the abovementioned *thangedu* bark."

Mr. Govindaraghava Ayyar for the appellant contends that the razinama decree does not make the question of the validity of the mortgage-deeds *res judicata*. He urges that a compromise decree is not a judicial decision, that, although the parties to it cannot go behind the particular relief or reliefs granted or refused by it, it has no operation with respect to anything beyond those reliefs. He contends also that such a decree being passed on an arrangement between the parties to the compromise is on the same footing as a contract; that an agreement for the payment of a sum exceeding the amount legally due under a decree being void under section 257-A of the Civil Procedure Code unless sanctioned by

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

BENSON
AND
SUNDARA
AIYAR, JJ.
—
RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

the Court which passed the decree, a decree passed on such agreement is also void; and that the question whether such an agreement is void being one of law, the compromise decree, taking it to involve a decision as to the validity of the mortgages, is not binding upon the plaintiff in this suit.

Mr. Srinivasa Ayyangar for the respondents, on the other hand, contends that a compromise decree is legally as valid and binding on the parties as one passed by the Court after contest and that every question necessary for awarding relief to Subbi Chetty in Original Suit No. 19 must be taken to have been decided against the plaintiff in this suit. Our attention has not been drawn to any reported decision of this Court where the question how far a decree passed upon a compromise between parties will constitute the questions raised or involved in the suit *res judicata* in future litigation between them was considered and decided. We have therefore to consider the nature of such a decree and the principles on which the law of estoppel is to be applied with respect to it.

The basis of a compromise decree is of course a contract between the parties to the litigation, and the principles applicable to contracts would often have to be considered in determining the rules of estoppel applicable to such decrees; at the same time such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The arrangement between them is adopted by the Court and passes into an adjudication of the Court and acquires all the solemnity of a judicial pronouncement. The parties to the decree cannot therefore put an end to it at their pleasure in the manner that they could rescind a mere contract. This was decided in *The Belcairn*(1). There, the Assistant Registrar of the Court, by the consent of the parties to a compromise decree rescinded it, but the rescission was held to be illegal by the Court of Appeal. Lord Esher, M.R., observed (page 165) "I agree with BURR, J., that when at a trial the Court gives a judgment by the consent of the parties it is a binding judgment of the Court, and cannot be set aside by a subsequent agreement between the solicitors, or the parties, even though it be placed in the form of an order by consent on a summons and taken to a registrar or master, and by him made as a matter of course. It is only the Court, with full knowledge of the facts on which it is

(1) (1885) 10 P.D., 161.

called on to act, which can set aside the first judgment, and I doubt whether, unless some fraud in regard to such judgment is shown, even the Court would have jurisdiction to set aside its first judgment. It is clear then that the second consent order was absolutely void."

Again, it seems to be clear that a party to a consent decree cannot impeach it on some grounds on which a mere contract could be impeached, such as absence of consideration or mistake—See Black on 'Judgments,' 2nd edition, vol. I, page 16, footnote. Speaking of such judgments the learned author observes: "The judgment is not the agreement; it is the act of the law invoked by the parties in executing the agreement." He observes in an article in the American Cyclopædia of Law and Procedure, vol. 23, page 729, "A judgment by consent of the parties is more than a mere contract *in pais*: having the sanction of the Court, and entered as its determination of the controversy, it has all the force and effect of any other judgment, being conclusive as an estoppel upon the parties and their privies, and not invalidated by subsequent failure to perform a condition on which the consent was based, although it may be inquired into for fraud practised upon one of the parties, or as against other creditors of defendant." But while the agreement acquires in some respects greater force by a decree being passed in pursuance of it, the jurisdiction and powers of the Court in passing such a decree are limited. The Court does not decide the disputes between the parties. It only embodies the decision of the parties themselves and makes their decision its own, giving it the force and solemnity of its own adjudication.

Section 375 of the Civil Procedure Code (Order XXIII, Rule 3 of the present Code) lays down with respect to a compromise proved to the Court's satisfaction that the compromise "shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit." The jurisdiction of the Court therefore is to record the agreement between the parties and to adopt it as its own decree in so far as it relates to the suit. It has, however, the power and is bound to consider the question whether the compromise is a lawful one. It cannot record a compromise which is unlawful. As the jurisdiction of the Court is limited to an enquiry into its lawfulness, the law relating to decrees generally does not necessarily apply in all cases to consent

BENSON
AND
SUNDARA
AIYAR, JJ.
—
RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

decrees and these are governed by the rules relating to contracts. Incidents relating to contracts often hold good with respect to such decrees. Rules relating to construction are the same with respect to them as with respect to contracts. It has been held that a provision in a compromise decree that a lease shall be forfeited for non-payment of rent may be relieved against in the same manner as such a provision could be in an instrument of lease—*Krishna Bai v. Harigovind*(1), *Nagappa v. Venkat Rao*(2), *Lakshmanaswami Naidu v. Rangamma*(3). The reason is that the Court being bound to adopt the agreement between the parties as its own adjudication, the interpretation to be placed upon such adjudication ought to be the same as that to be placed on the agreement itself. For the same reason a compromise decree may in some respects have greater validity than one passed after the contest between the parties, as such a decree has all the force of a compromise, a species of contract which is highly favoured by the Courts. Thus, if parties agree to settle their disputes in a certain manner, one of them cannot claim to set it aside merely because he misunderstood the law which would be applicable in a Court for the determination of the dispute. The same principle would apparently be applicable to a compromise decree and the rule that estoppel by *res judicata* does not apply to a question of law, will not, we think, apply to decrees passed on compromise. Similarly legal defences to a claim which may be available to a party in a Court of law may be waived by him in a compromise, and he would often not be competent to impeach a compromise on the ground that his opponent's claim was one which would not be recognised by the Courts. The American author whom we have already cited says, "There are certain defences which the debtor has the option of waiving if he chooses, and he does waive them by confessing judgment. For example, such a judgment is not invalidated by the fact that a part of the claim for which it is given would be barred by the statute of limitations, provided the debt be an honest one. So where a bankrupt, subsequent to his discharge, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge" (section 69). Again he says "A judgment by

(1) (1907) I.L.R., 31 Bom., 15.

(2) (1901) I.L.R., 24 Mad., 265.

(3) (1903) I.L.R., 26 Mad., 31.

consent operates as a waiver of any defects in the process or pleadings, or irregularities in the previous proceedings, or grounds of objection which would have constituted errors in the judgment if rendered upon trial, provided they do not go to the jurisdiction," 'American Cyclopædia,' page 729.

In considering the question of estoppel by *res judicata* the nature of a compromise decree, as partaking in large measure of the nature of an agreement of compromise and at the same time possessing the characteristics of a decree of Court, has to be borne in mind. Section 13 of the Code of the Civil Procedure, which deals with the rule of *res judicata*, is not perhaps strictly applicable to compromise decrees, as it applies in terms only to what has been "heard and finally decided" by a Court. Explanation (1) no doubt refers to matter alleged by one party and admitted expressly or impliedly by the other party to a suit. But this refers to some matter admitted by a party in a suit which is itself decided by the Court. SCOTT, J., held in *Minalal Shadiram v. Kharsetji*(1) that section 13, Civil Procedure Code, has no application to compromise decrees—see page 408. What then is the test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise? In our opinion the answer must depend on the answer to the question "Did the parties decide for themselves the particular matter in dispute by the compromise? and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree?" For settling this point it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree. Even if the compromise was made before the defendant put in his written statement, it would still be proper to look at the allegations in the plaint to understand the terms of the compromise. It is no doubt open to the parties to agree to terminate a suit in a particular manner without any questions raised by the plaintiff or put in issue between the parties being determined, but whether a compromise in any particular case proceeds upon such an understanding or is based upon an admission of some or all of the allegations made by either of the

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

(1) (1906) I.L.R., 30 Bom., 395.

BENSON
AND
SUNDARA
ATTYAR, JJ.
—
RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

parties is a matter of construction in each case, and no hard-and-fast rule can be laid down applicable to all cases. It is stated in Halsbury's 'Laws of England,' vol. 13, paragraph 496 (page 357), "a defendant who has consented to judgment before delivery of any pleading is not estopped as against the plaintiff from subsequently setting up matters which might have constituted a defence, because they have never been in issue; but it is otherwise with a defendant who has consented to judgment after pleading in his defence the matters which he seeks to set up in the later proceeding." The question really dealt with in the above passage as shown by the cases cited in the footnote relates to what are known as judgments by default and not to judgments based upon an agreement arrived at between the parties, which alone constitutes a real compromise decree. The distinction between judgments by default and judgments passed on the mutual agreement of the parties is pointed out by HOLMES, L.J., in *Irish Land Commission v. Ryan* (1). In that case the plaintiff had obtained in the year 1891 a judgment by default against the defendants for a certain sum claimed as due as arrears of tithe rentcharge for six years. In 1896 another action instituted for further arrears for five years was dismissed on the merits. The plaintiff then in 1899 sued the defendants for two years' arrears. The plaintiffs contended that the defendant was estopped by the judgment of 1891 from disputing the plaintiff's claim to the tithe rentcharge and the defendant contended that the dismissal of the action of 1896 estopped the plaintiff from claiming the rentcharge. Both contentions were overruled. With respect to the judgment of 1896, the Court held that it did not appear from that judgment on what ground it was based and this absence of certainty made the rule of *res judicata* inapplicable. With respect to the judgment of 1891 the Court held that the mere failure of the defendant to plead and the entering of judgment consequent thereon could not estop him from contesting the subsequent claim. He admitted nothing and the Court therefore decided nothing. If the defendant did not appear and plead to the claim the plaintiff was entitled to judgment by default according to the law of Scotland. It must be noted that in India the plaintiff is not entitled to such a judgment on the ground of defendant's failure

(1) (1900) Ir. Rep. vol. 2, 565 at p. 584.

to appear. He is still bound to prove his claim and judgment will be given for him only if he proves it to the satisfaction of the Court, though the suit may be tried *ex parte*. It is pointed out in the judgment of HOLMES, L.J., that even the lands for which tithe was claimed were only imperfectly described by reference to the parish in which they were situated. The observations of HOLMES, L.J., with respect to compromise decrees are well worthy of attention. He says "It is a principle in every system of jurisprudence that there should be finality in litigation. A judgment not appealed from binds the parties and privies for all time by what appears upon its face; and if it can be shown that, in the course of the action that resulted in judgment, a certain definite and material issue not set forth in the judgment itself was raised by the parties and determined judicially or by consent, it would be contrary to public policy to allow the same parties to re-agitate the same matter in subsequent legal proceedings. Estoppel by matter of record rests on this principle, and although it may be said in one sense to exclude the truth, it is essentially just and righteous." It would seem from the passage already cited from Halsbury that in England if judgment even by default is passed after the defendant has raised his contentions, he will be estopped from raising in a future litigation the contentions so raised by him.

A compromise decree must also be distinguished from a decree passed upon a confession of judgment or an admission made by the defendant that the plaintiff is entitled to a particular relief. The effect of such an admission must be judged solely from its terms. A defendant may admit the plaintiff's right to the relief claimed—say a right to a certain sum of money—while denying the particulars of the claim or the cause of action alleged in the plaint, and it would be a proper rule to construe an admission made by the defendant strictly and not to stretch it beyond its terms. The judgment in such a case is the result of the admission of one of the parties to the suit, the defendant, and not of an agreement between the two parties to it. The principles applicable to the latter class of cases, that is, judgments based upon mutual agreement of the parties are not the same as those which would apply to judgments by default or judgments based on admissions of the defendant. What the Court has to do in determining with respect to what matter each of the parties to a compromise decree

BENSON
AND
SUNDARA
ATTYAR, JJ.
—
RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BARADUR
v.
THATHA
RAMASAMY
CHETTY.

is estopped, is to find out what it was that the parties agreed to in the previous action; and for this purpose it would not be enough merely to see what was the relief granted in the decree of the Court, but it would be necessary also to examine what was the basis on which it was granted. Whatever is necessarily involved in the decree pronounced cannot be reopened by either party. To this extent there can be no doubt that the principle of explanation II to section 13 of the Civil Procedure Code is applicable to compromise decrees. If the relief granted by a compromise decree would be inconsistent with the allowing of a particular defence, the invalidity of that defence must be taken to be necessarily involved in the grant of the relief and it cannot be allowed to be set up in a subsequent suit. This is the principle laid down in *In re South American and Mexican Company*(1). There, a previous action by the Bank of England against a company to recover the second instalment of a debt alleged to be due under an agreement which was denied by the company had been settled by compromise. It provided that the particular instalment sued for, the amount of which was £100,000 and costs, should be discharged if a sum of £60,000 was paid in the manner prescribed by the agreement within the time fixed; but if the amount of £60,000 was not so paid, then the bank "should be at liberty to issue execution for the full amount of the judgment debt

. and to enforce the payment of the further instalments claimed by them under the plaintiff's agreement with the defendants, set out in the statement of claim in this action." The Court adjudged that in case of default the plaintiffs do recover from the defendants £100,000 and costs and that the defendants' counter-claim be dismissed. The counter-claim had reference to the amount paid by the Company on account of the first instalment, and the further instalments mentioned in the compromise referred to a large sum of money which the Bank claimed would be due to them in future, but which was not due at the time they instituted the action before the Court. When the further instalments fell due and the Bank instituted an action for them, the Company denied its liability and the existence and validity of the agreement on which the claim was based. VAUGHAN WILLIAMS, J., held that the

(1) (1895) 1 Ch.D., 37.

Company was estopped from denying the agreement by the consent decree in the previous action. The learned Judge held that the previous suit was for an instalment due *under the agreement* which was the basis of the second action, that the compromise showed that it was for an instalment of the debt based on that agreement, that the Company could not therefore be permitted to deny the existence of the agreement and that the Court could not be asked to construe the decree as one merely to pay a sum of money equal in amount to that claimed under the agreement by the Bank and not for an instalment of what the agreement secured to the Bank. Lord Herschell, when the case went on appeal, observed, "it is said that, notwithstanding that agreement to give judgment for the claim, it was open to the defendants to make default in paying the £60,000, and then to say 'as regards all but this one instalment, for which you have got judgment, the matter is at large; you have got judgment as for an instalment of a debt in respect of which you sued; but we are to be at liberty now to say there never was a debt at all; we cannot undo this £100,000, but we may dispute our liability to anything further.' I do not think that is the meaning fairly to be gathered from the settlement arrived at or the order of the Judge."

VAUGHAN WILLIAMS, J., in the Court of First Instance distinguished the case (*Jenkins v. Robertson*(1)) which was relied on by the Company as showing that a compromise decree can only conclude the question of the right to the actual relief granted to a party in the previous litigation. That case was one in which the provost, bailies and councillors of a burgh and certain other individuals instituted an action for a declaration on behalf of the inhabitants and the public of a right of way for foot-passengers, and afterwards compromised the action with the owners of the land, through which the way was claimed, after a verdict had been given in their favour and a new trial granted on application by the defendants. The result of the compromise was that the benefit of the verdict was given up, and the plaintiffs agreed to pay the defendant's expenses. Afterwards two persons commenced a fresh action to establish the right of way. The House of Lords held, reversing the decision of the Scotch Courts, that

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BARADUR
v.
THATHA
RAMASAMY
CHETTY.

(1) (1887) 1 H.L. Sc. & Div., 117.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

the decree in the former action did not constitute the question of the right of way *res judicata*. But the judgment was based, as explained in *In re South American and Mexican Company*(1), on the ground that persons instituting a suit on behalf of the public had no right to bind the public by a compromise decree, though a decision passed against them on contest would bind the public. Lord Colonsay was disposed to think that even a compromise decree might bind other persons represented by the parties to a suit, but held that the compromise decree in the particular case was not binding on the public, because His Lordship came to the conclusion that it was to a certain extent 'purchased.' But no doubt was entertained by the House of Lords that a compromise decree would be as much binding on the actual parties to it and their privies in interest "in just the same way as if it had been a judgment arrived at after the case had been fought out." Lord Herschell no doubt thought that in *In re South American and Mexican Company*(1) the compromise decree itself provided for the payment of future instalments also in case the defendants failed to carry out the provision made with respect to the second instalment. But the principle enunciated by His Lordship as well as by Lindley, L.J., was that "a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end." The same view was held in *Thomson v. Moore*(2). The consent decree was one granting an injunction restraining the defendant from infringing the right of a patentee. In a second action for injunction instituted in consequence of a fresh infringement by the defendant, he denied the validity of the patent on the ground that the alleged invention was not a new one. Both Porter M.R. and the Court of Appeal held that the basis of the injunction granted by the compromise decree was that the plaintiff had a valid patent, although the decree made no declaration of its validity, and that therefore the question of validity was *res judicata*. Porter M.R. observed "the effect of the consent and order is absolutely to preclude the defendant from disputing the validity of the plaintiffs' patent, and the only defence he can now raise is that what he has done since is

(1) (1895) 1 Ch.D., 37.

(2) (1889) 23 Ir. Rep., 599.

not an infringement." Lord Ashbourne, L.C., said "other suitors might question these matters, but the defendant cannot." Fitz Gibbon, L.J., observed "the decree, to which the present defendant submitted on the 18th June 1885, has put it out of his power to rely upon it, and we must start with the assumption that Sir William Thomson's compass is a well-patented invention, of which the patentable characteristics must therefore be discoverable in his specification." On behalf of the appellant the decision in *Goucher v. Clayton*(1) was relied on. But that judgment is not in point. That case also related to the infringement of a patent. The defendants in the first action for infringement submitted to a judgment for 40 shillings for damages and costs of the suit. But no pleadings had been entered on either side. The invalidity of the invention was disputed in the second action. In the second action there were other defendants than those who were parties to the first. After the termination of the first action the defendants to it had obtained a license from the plaintiff to work the patent for five years and the license had expired before the second action was brought. It did not appear that the defendants submitted to judgment in the previous action on the footing of the validity of the patent. Wood, V.C., said "the defendants might have submitted either to avoid litigation or because they thought it not worth their while to try the question." He went on to say "as a perpetual injunction was sought he could not hold that the defendants were estopped from denying the validity of the patent. In any case, he could not prevent the defendants, who were not parties to the action at law, from setting up this defence." The Vice-Chancellor did not in that case lay down any rule contrary to what was held to be the law in *In re South American and Mexican Company*(2).

The judgment of this Court in *Achutha Varriar v. Chappanni Kurup*(3) was also cited in support of the appellant's position. In that case there was an *ex parte* decree for rent in a suit by a landlord against his tenant. The second suit was for the recovery of the property and future instalments of rent and it was held that the defendant was not estopped from denying the plaintiff's title to recover the land or the rent claimed. The judgment proceeds on

BENSON
AND
SUNDARA
AYYAR, JJ.
—
RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

(1) (1865) 34 L.J.Ch. (N.S.), 239.

(2) (1895) 1 Ch.D., 27.

(3) Second Appeal No. 1351 of 1909 (unreported).

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

the ground that it did not appear from the judgment in the first suit that it proceeded on any decision as to the plaintiff's title. The question was not one relating to estoppel by a compromise decree. In *Syed Bacha Sahib v. Karuppanna Pillai*(1), *Hukdar Syed Bacha Sahib v. Karuppanna Pillai*(2), on the other hand, cited by Mr. Srinivasa Aiyangar, the principle laid down in *In re South American and Mexican Company*(3) was accepted by ABDUR RAHIM and KRISHNASWAMI AYYAR, JJ., although on the facts of the case the learned Judges held that the consent decree did not involve an admission by the defendant with respect to the point contested in the second suit. The decision of the Bombay High Court in *Minalal Shadiram v. Kharsetji*(4) followed the same principle.

Turning now to the facts of the present case, we think there can be no doubt that the compromise and decree in Original Suit No. 19 of 1893 proceeded on the acceptance by the Zamindar of the validity of the mortgages executed in favour of Subbi Chetti. It provided for the payment by the Zamindar of a sum of Rs. 4,549 in discharge of the "plaint amount, interest and costs." The "plaint amount" was clearly the amount which the plaintiff claimed on the basis of the provisions in the mortgage-deeds. The decree further went on to provide that the defendant should make further payments for the period between the date of the plaint and the date of the razinama and for the future "the amounts that may become due at the above rates from the date of this razinama until the expiration of the terms of the aforesaid leases." The learned vakil for the plaintiff was unable to suggest on what other footing than the validity of the mortgages the decree could be taken to have proceeded. We cannot accept his contention that the decree should be taken merely to have directed payment of a certain sum of money without any regard to the title of the plaintiff. We are entitled and bound to look to the razinama itself, exhibit IX (a), to understand the terms of the decree which was passed in pursuance of it. The parties expressly reserved one point in dispute between them, namely the question relating to the Zamindar's liability to pay road-cess; but they had definitely resolved that the mortgage-deeds themselves should be

(1) Second Appeal No. 1957 of 1908 (unreported).

(2) Second Appeal No. 1957 of 1908 (unreported); 2 M.W.N., 69.

(3) (1895) 1 Ch. D., 37.

(4) (1906) I.L.R., 30 Bom., 395.

taken to be valid and binding on the Zamindar. The appellant's contention, that, as the validity of the mortgages with reference to section 257-A of the Civil Procedure Code should be regarded as a question of law and that therefore the plaintiff in this suit is entitled to re-agitate the question, must also be disallowed. In the first place, the question is not purely one of law but one of mixed fact and law, depending as it does on the point whether as a fact the Zamindar did agree by the mortgage-deeds to pay any sum in excess of the amounts due under the decrees in Civil Suit Nos. 197 and 117. But even were the question purely one of law, we are disposed to think that a decree on a compromise cannot be impeached on the ground that it was erroneous in law, because it is open to parties to decide both questions of law and of fact between themselves by consent in the manner they deem best. In this respect a compromise decree resembles not so much an actual decision of a Court after contest as an award by an arbitrator, whose decision cannot be impeached on the mere ground that he committed an error of law. See *Buta v. Municipal Committee of Lahore*(1).

We are also unable to accept the argument that an agreement in contravention of section 257-A is one opposed to public policy. We do not decide the question whether such an agreement is invalid at all when the parties agree that the decree should no longer be executed, and that the rights under the agreement should supersede the decree and be enforceable only by a suit upon the agreement. Such an agreement would more probably be an adjustment of the decree coming within section 258 of the Civil Procedure Code, and not one for the satisfaction of a judgment-debt. We also abstain from deciding the question whether section 257-A, clause (2) prohibits anything more than the recognition of the kind of agreement referred to therein in execution proceedings. Nor is it necessary to consider the exact scope of the rule that the doctrine of estoppel by decision of the Courts does not apply to questions of law. But it is clear to our minds that the prohibition in section 257-A is not based on any rule of public policy rendering such agreements illegal, it is merely unenforceable in execution proceedings or by a fresh suit as the case may be. The rule is merely enacted for the benefit of the

BENSON
AND
SUNDARA
AYYAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

(1) (1902) I.L.R., 29 Cal., 854.

BENSON
AND
SUNDARA
ATTAR, JJ.

RAJA
KUMARA
VENKATA
PERUMAL
RAJA
BAHADUR
v.
THATHA
RAMASAMY
CHETTY.

individual judgment-debtor, and one reason for the rule was probably that litigant parties should not have the right to interfere with the decrees of Courts, a reason which would probably indicate that the rule is applicable only to execution proceedings. A judgment-debtor is, in our opinion, entitled to waive the benefit of the rule. The compromise was a lawful compromise and was accepted by the Court as lawful and embodied in its decree. We therefore hold that the plaintiff in the present suit is estopped from contesting the validity of the mortgages. In the view we have taken on issue No. 4 it is unnecessary to consider the other questions in the case.

In the result the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
Krishnaswami Ayyar.

GOVINDASAMI PILLAI AND OTHERS (DEFENDANTS NOS. 2, 5,
9, 10, 13, 16, 20, 21 AND 23), APPELLANTS,

v.

DAKSHINAMURTHI POOSARI AND OTHERS (PLAINTIFFS
AND 24TH DEFENDANT), RESPONDENTS.*

Religious foundation—Endowed property—Limitation Act XV of 1877, s. 28, sched.
II, Arts. 124, 144—Temple trusteeship and properties, bar of suit for former
involves bar of suit for latter.

The dismissal of a suit to recover the office of trustee for a temple whereby
the right to the trusteeship is lost involves the loss of the right to recover a
portion of the endowment.

SECOND APPEAL against the decree of F. D. P. Oldfield,
District Judge of Tanjore, in Appeal Suit No. 334 of 1908,
presented against the decree of T. T. Rangachariar, Subordinate
Judge of Kumbakonam, in Original Suit No. 54 of 1907.

The Advocate-General (Hon. Mr. P. S. Sivaswami Ayyar)
for appellants.

* Second Appeal No. 690 of 1909.

T. R. Venkatarama Sastri for K. Srinivasa Ayyangar for first
to fifth respondents.

JUDGMENT.—The plaintiffs sued for possession of the pujah and
stanikam rights in the temples Nos. 1 to 3 of the idols themselves,
and of certain immoveable properties specified as items Nos. 19 to
27 in the schedule attached to the plaint. The Subordinate Judge
dismissed the entire suit as barred by limitation. It is agreed
that the pujah and stanikam rights referred to include the
trusteeship of the temples. The plaintiffs preferred an appeal to
the District Court and limited the relief claimed in the appeal to
the possession of items Nos. 19 to 24 of the plaint schedule with
mesne profits. This they did not merely by valuing items Nos. 18
to 24 only for purposes of Court fee, but also by adding a special
prayer limiting the relief claimed in appeal as above mentioned.
The District Judge has passed a decree in the plaintiffs' favour
as regards these items. It is argued in second appeal that this
decree is bad. The contention is that items Nos. 18 to 24 being
properties attached to the temples and the idols consecrated therein,
the plaintiffs, whose suit for the idols and the trusteeship of the
temples has been dismissed, are not entitled to claim possession
of the immoveable properties whose income has only to be appro-
priated for the purposes of the temples. We think this view is
correct. It is supported by the decision in *Doorga Proshad Dass*
v. *Sheo Proshad Pandah*(1). It is well established that the
consecrated idol of a temple is a juridical person for certain
purposes and that the trustee of the temple is in the position of a
manager for an infant heir with this difference that the infancy
is perpetual. The right of the trustee is to see that the property
of the juridical person in perpetual infancy is not divorced from
application to the infant's uses. If the plaintiffs are permitted to
recover the properties alone they will be enabled to separate the
properties from the legitimate purposes for which they are to be
applied, for the dismissal of the suit for the possession of the
trusteeship and of the idols by the Subordinate Judge stands and
the plaintiffs' right to the trusteeship is consequently at an end.
In *Gnana Sambhandu Pandara Sannadhi v. Velu Pandaram*(2), the
Privy Council observed at page 279, "their Lordships are of

ABDUR RAHIM
AND
KRISHNA-
SWAMI
ATTAR, JJ.
GOVINDASAMI
PILLAI
v.
DAKSHINA-
MURTHI
POOSARI.

(1) (1880) 7 C.L.R., 278.

(2) (1900) I.L.R., 23 Mad., 271

ABDUR RAHIM
AND
KRISHNA-
SWAMI
AWAR, JJ.
—
GOVINDASAMI
PILLAI
v.
DAKSHINA-
MURTHI
POOSARI.

opinion that there is no distinction between the office (that of trustee) and the property of the endowment. The one is attached to the other." They were inclined to hold that, if the right to the office was barred, the right to possession of the endowments attached to it was lost with it. In *Kidambi Ragavachariar v. Tirumalai Asari Nallur Ragavachariar*(1), this Court held "that the right to land which was the endowment of a temple was only secondary to, and dependent upon, the right to the office (of trustee) and that, if the right to recover the office was barred, the right to recover the land attached to it was equally barred." The same rule was laid down in *Tamirazu Ramazogi v. Pantina Narsiah*(2). Applying this principle to the present case we may safely hold that if the right to recover the office of trustee is lost by the dismissal of the suit by the Subordinate Judge the right to recover a portion of the endowments must fall to the ground along with the trusteeship. We must reverse the decree of the District Court and restore that of the Subordinate Judge with costs here and in the lower Appellate Court.

(1) (1903) I.L.R., 28 Mad., 113.

(2) (1871) 6 M.H.C.R., 301.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Krishnaswami Ayyar and Mr. Justice Ayling.

SYED AJAM SAHIB (DEFENDANT), APPELLANT,

v.

MADURA SREE MEENATCHI SUNDARESWARAL
DEVASTANAM THROUGH ITS MANAGER P. S.
ANANTHANARAYANA AIYAR (PLAINTIFF), RESPONDENT.*

Transfer of Property Act, IV of 1882, s. 107, Signature of lessor, necessity of, to registered instrument.

The registered instrument which, under section 107 of the Transfer of Property Act, is necessary to create a lease within the section need not necessarily be an instrument signed by the lessor. Such a lease may be created by a registered instrument signed by the lessee and accepted by the lessor.

Turof Sahib v. Esuf Sahib, [(1907)(I.L.R., 30 Mad., 322)], overruled.

Per CHIEF JUSTICE AND AYLING, J.—If a registered instrument signed by the lessee and accepted by the lessor is not a lease the mere fact that the instrument is signed by the lessee does not preclude him from denying his liability thereunder.

Per KRISHNASWAMI AYYAR, J.—If a registered instrument signed by the lessee and accepted by the vendor is not a lease, the lessee will not be liable except on the footing of use and occupation.

APPEAL against the order of F. H. Hamnett, District Judge of Madura, in Appeal Suit No. 135 of 1908.

The appeal first came on for hearing before (MUNRO and SANKARAN-NAIR, JJ.). When the court made the following

ORDER OF REFERENCE TO A FULL BENCH.—In this case the question arises whether a lease of immoveable property under section 107 of the Transfer of Property Act can be created by a document signed by the lessee only. In *Turof Sahib v. Esuf Sahib*(1), it was held that the registered instrument by which a lease can be effected under section 107 of the Transfer of Property Act must be an instrument bearing the signature of the lessor. The correctness of this ruling was doubted by Krishnaswami Ayyar, J., in *Thambi v. Avayambal*(2) (unreported), and also

* Civil Miscellaneous Appeal No. 50 of 1909.

(1) (1907) I.L.R., 30 Mad., 322. (2) S.A. No. 413 of 1908 (unreported).

1910.
March 24.
September
29, 30.
November 3.

WHITE, C.J., apparently by the Full Bench of the Allahabad High Court in *Sheo Karan Singh v. Maharaja Parbhu Narain Singh*(1). The matter is one of great importance, and should, we think, be set at rest. We therefore refer to the Full Bench the questions—

KRISHNASWAMI
AYYAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

(1) whether the registered instrument, referred to in section 107 of the Transfer of Property Act, must be signed by the lessor, and,

(2) if such instrument is signed by the lessee only, whether he can deny his liability thereunder.

The case again came on for hearing in due course before the Full Bench constituted as above.

S. T. Srinivasagopalachariar for appellant.

On the first point in the Order of Reference the advocate contended that a lease not signed by the lessor does not come within the scope of section 107, Transfer of Property Act. Transfer is defined in section 5 as the act which conveys property. The word "instrument" which is used in section 107 is not defined in the Act. A document to be a registered instrument must purport to be executed on the face of it.

[KRISHNASWAMI AYYAR, J.—Is signature necessary under section 5? Conveyance is doing an act. The act may be handing over the instrument without a signature.]

Such a document is of no effect—the delivery of possession or oral agreement is the real conveyance in such a case.

[THE CHIEF JUSTICE.—Your argument depends on registration but suppose a lease which is not compulsorily registrable—such as an agricultural lease.]

The advocate compared sections 59 and 123 of the Transfer of Property Act and argued that the word "signature" would be implied in these sections even if they were not there. He also referred to sections 106 and 130.

He contended that wherever a registered instrument is referred to in the Act the word "signed" is unnecessary. Section 59, one exception to this rule, contains a reference to attestors which necessitates the mentioning of signing. In section 54 signature is not mentioned yet the vendor must sign.

[KRISHNASWAMI AYYAR, J.—Look at section 130. Attestation is not required under this section but the word signature is used.]

(1) (1909) I.L.R., 31 All., 276.

There a registered document is not required.

The advocate referred to *Walsh v. Lonsdale*(1), Gour's 'Transfer of Property Act,' 3rd ed., vol. III, p. 1409 and Shephard and Brown's 'Transfer of Property Act,' 6th ed., p. 487, *Turof Sahib v. Esuf Sahib*(2), *Nand Lal v. Hanuman Das*(3), *Kashi Gir v. Jogendro Nath Ghose*(4), *Kaki Subbanadri v. Muthu Rangayya*(5), *Nilmamud Sarkar v. Boul Das*(6), and *Chinnaswami Padayachi v. Avayambal*(7). He contended that *Turof Sahib v. Esuf Sahib*(2) was rightly decided and that *Sheo Karan Singh v. Maharajah Parbhu Narain Singh*(8) did not really decide the point now at issue. *Walsh v. Lonsdale*(1), *Zimble v. Abrahams*(9), *Bibi Jawahir Kumari v. Chatterput Singh*(10) and *Singheeram Poddar v. Bhagbat Chander Nundi*(11) referred to.

On the second point in the Order of Reference the advocate said that having signed the document the lessee could not repudiate it. He quoted *Walsh v. Lonsdale*(1), *Zimble v. Abrahams*(9), *Bibi Jawahir Kumari v. Chatterput Singh*(10) and *Singheeram Poddar v. Bhagbat Chunder Nundi*(11).

C. V. Anantakrishna Ayyar for respondents.

A lease must connote a transfer of interest in immoveable property whether with reference to the Transfer of Property Act or any other system of law in the world. Under section 9 a transfer may take place without writing while under section 107 writing is required. "Registered instrument" only means (1) a transfer, i.e., something to show that a person transfers; (2) words of transfer. Signature is not necessary. The right to enjoy constitutes the transfer. There will not be a transfer of property, but there will be a transfer of interest. Suppose a lessee draws an instrument, and keeps it with him, tells the lessee who says "all right" and the lessee continues to keep it, it is a good lease. *Saminathiyan v. Saminathiyan*(12), read.

[KRISHNASWAMI AYYAR, J.—Can there be a sale signed only by the purchaser.]

That is distinguishable. We have then to take section 107, Transfer of Property Act, and the Registration Act into account.

(1) (1882) 21 Ch.D., 9 at p. 14.

(3) (1904) I.L.R., 28 All., 388.

(5) (1909) I.L.R., 32 Mad., 532.

(7) (1910) 20 M.L.J., 298.

(9) (1903) 1 K.B., 577.

(11) (1910) 11 C.L.J., 543.

(2) (1907) I.L.R., 30 Mad., 322.

(4) (1905) I.L.R., 27 All., 136.

(6) (1909) 14 C.W.N., 73.

(8) (1909) I.L.R., 31 All., 276.

(10) (1905) 2 C.L.J., 343.

(12) (1868) 4 M.H.C.R., 153.

WHITE, C.J.,
KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB.
v.
ANANTHA-
NARAYANA
AIYAR.

WHITE, C.J.,
KRISHNA-
SWAMI
ATTAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
ATTAR.

To make a correct definition I would combine sections 3, 105 and 107. My definition would then read "the transfer of property hereby called a lease can be made by an instrument hereby called a lease." Section 3 of the Registration Act must be read with as part of section 107, Transfer of Property Act.

The vakil commented on sections 106, 118, 130, 131, pointing out that wherever the legislature requires signature to an instrument it says so. He also referred to the Negotiable Instruments Act, sections 4 and 5, in the same connection. He argued that MILLER J., in *Kaki Subbanadri v. Muthu Rangaya* (1) felt bound by *Turof Sahib v. Esuf Sahib* (2). He also cited *Hunter v. Parker* (3), *Nand Lal v. Hanuman Das* (4), *Beni v. Puram Das* (5), *Vedapurati v. Vallabha Valia Raja* (6) and Stroud's 'Judicial Dictionary' Vol. II, p. 987.

On the second point he cited *Sheo Karan Singh v. Maharaja Parbhu Narain Singh* (7), *Ardesir Bejonji Surti v. Syed Sirdar Ali Khan* (8), *Makhan Lal Pal v. Bunku Behari Ghose* (9), *Seetharama Raju v. Bayanna Pantulu* (10), *Kaki Subbanadri v. Muthu Rangayya* (1), 7 ex. 543 and Baron Alderson's judgment.

THE CHIEF JUSTICE.—The first question which has been referred to us is whether the registered instrument referred to in section 107 of the Transfer of Property Act must be signed by the lessor. Section 9 of the Transfer of Property Act provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Section 107 provides that a lease to which the section applies can be made only by a registered instrument. This, I take it, is an express provision that a lease to which the section applies must be in writing. Section 105 defines a lease of immoveable property as a transfer of a right to enjoy such property. I do not think that section 107 can be relied on as enacting, either expressly or by implication, that a lease must be executed by the lessor. Can section 105 be relied on for this purpose? I think not. By

(1) (1909) I.L.R., 32 Mad., 532.

(3) (1840) 7 M. & W., 322 at 343.

(5) (1905) I.L.R., 27 All., 190.

(7) (1909) I.L.R., 31 All., 276.

(9) (1892) I.L.R., 19 Cal., 623.

(2) (1907) I.L.R., 30 Mad., 322.

(4) (1904) I.L.R., 26 All., 388.

(6) I.L.R., 25 Mad., 325.

(8) (1909) I.L.R., 33 Bom., 610.

(10) (1894) I.L.R., 17 Mad., 275.

section 105 a lease is a transfer of a right to enjoy property. I do not think, for the purposes of the question before us, any distinction can be drawn between a transfer of a right to enjoy property (section 105) and a transfer of property (section 9). When writing is not necessary the law requires no specific formal act for the purposes of a transfer. When writing is necessary the only specific formal act required by section 107 is registration. The Transfer of Property Act contains express provision that in the case of a mortgage (section 59) the registered instrument must be signed by the mortgagor, in the case of a gift (section 123) by the donor and in the case of a transfer of an actionable claim by the transferor (section 130). Section 107 contains no such provision. As regards sections 59 and 123 it may be that the provision for attestation required special mention of the signature of the mortgagor or donor (see the judgment in *Turof Sahib v. Esuf Sahib* (1)). In section 130, however, where special provision is made for the signature of the transferor, there is no provision for attestation.

Then is there anything in the Registration Act which expressly or by implication enacts that a lease which requires registration must be executed by the lessor?

I think the effect of section 4 of the Transfer of Property Act is correctly stated in the judgment in *Kaki Subbanadri v. Muthu Rangayya* (2). Under section 17 (d) of the Registration Act a lease, to which the paragraph applies, and which for the purposes of the Registration Act includes a counterpart (section 3), must be registered. Under section 107 of the Transfer of Property Act a lease, to which that section applies, must be registered. But although we cannot import into section 107 the definition of lease contained in the Registration Act (see by way of analogy *Vairananda Nadar v. Miyakan Rowter* (3)), it does not follow that an instrument signed by the lessee cannot be a lease for the purposes of section 107.

The provisions of sections 34 and 35 of the Registration Act as to "persons executing" throw no light on the question as they merely lay down the procedure in cases where an instrument is presented for registration.

(1) (1907) I.L.R., 30 Mad., 322.

(2) (1909) I.L.R., 32 Mad., 532.

(3) (1898) I.L.R., 21 Mad., 109.

WHITE, C.J.,
KRISHNA-
SWAMI
ATTAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
ATTAR.

WHITE, C.J.,
KRISHNASWAMI
AYYAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

Section 58 of the Registration Act prescribes the particulars which are to be endorsed on a document admitted to registration which includes the signature of the person admitting the execution of the document. It may be that the proper inference to be drawn from this section is that an instrument which purports to be a lease executed by the lessor cannot be admitted for registration unless it is signed by the lessor. But it does not follow that an instrument executed and signed by the lessee and registered may not be a "lease" for the purposes of section 107.

Then as to the authorities *Turof Sahib v. Esuf Sahib*(1) is a direct authority against the view that signature by the lessor is not necessary. This case was followed in *Nilmamud Sirkar v. Boul Das*(2). The reference to section 107 at the end of the judgment in *Turof Sahib v. Esuf Sahib*(1) as to the signature of the lessor being required is an obvious slip which does not affect the reasoning on which the judgment is based, but with all respect I venture to dissent from that decision.

In *Kaki Subbanadri v. Muthu Rangayya*(3), the learned Judges accepted the decision in *Turof Sahib v. Esuf Sahib*(1), but they did not discuss it. In *Sheo Karan Singh v. Maharaja Parbhu Narain Singh*(4), a Full Bench of the Allahabad High Court would seem to have been in doubt as to the correctness of the earlier decisions of that Court that signature of the lessor was necessary, as they declined to express any opinion on the question.

It would seem to be the law of England that signature is not necessary in the case of a lease under seal. But instruments under seal are unknown in this country and I do not think the English law affords us much assistance. The question has to be decided with reference to the provisions of the Transfer of Property Act and the Registration Act.

Although I at first found the proposition that there could be a lease enforceable against the lessor which had not been signed by him somewhat startling, after consideration of the provisions of the Transfer of Property Act and the Registration Act, I have come to the conclusion that there can be in cases where—and I desire to limit my judgment to this—there is a registered instru-

(1) (1907) I.L.R., 30 Mad., 322.

(3) (1909) I.L.R., 32 Mad., 532.

(2) (1909) 14 C.W.N., 73.

(4) (1909) I.L.R., 81 All., 276.

ment in writing signed by the lessee which has been accepted by the lessor and which purports to transfer a right to enjoy immovable property.

I think the answer to the first question which has been referred to us should be in the negative. As regards the second question it seems to me that if a registered instrument signed by the lessee and accepted by the lessor is not a lease, the mere fact that the instrument is signed by the lessee does not preclude him from denying his liability thereunder.

KRISHNASWAMI AYYAR, J.—This reference raises the important question "whether the registered instrument referred to in section 107 of the Transfer of Property Act must be signed by the lessor" or, in other words, whether to constitute a valid lease in writing the signature of the lessor appended to the writing is a necessary pre-requisite. This question has been answered in the affirmative in *Turof Sahib v. Esuf Sahib*(1), *Kaki Subbanadri v. Muthu Rangayya*(2), *Nand Lal v. Hanuman Das*(3), (by BLAIR, J., only); *Kashi Gir v. Jogendro Nath Ghose*(4), *Beni v. Puran Das*(5), and *Nilmamud Sirkar v. Boul Das*(6). In *Narayana Sah v. Parasurama Sah*(7), the learned Chief Justice and myself reserved our opinion on the point. The Full Bench of the Allahabad High Court did likewise in *Sheo Karan Singh v. Maharaja Parbhu Narain Singh*(8). In *Chinnaswami Padayachi v. Avayambal*(9) I raised a doubt as to the correctness of the decisions in *Turof Sahib v. Esuf Sahib*(1), and *Kaki Subbanadri v. Muthu Rangayya*(2), while Sir RALPH BENSON, J., adhered to the view which he had expressed in those cases. There is a considerable weight of authority in favour of the view already taken by this Court. But after careful consideration of the question in the light of the elaborate arguments addressed to us, I feel bound to express my dissent from that view.

Now a lease of immovable property, whether before or after the Transfer of Property Act, is a transfer of a right to enjoy such property. In Volume II of Blackstone's Commentaries,

(1) (1907) I.L.R., 30 Mad., 322.

(3) (1904) I.L.R., 26 All., 368.

(5) (1905) I.L.R., 27 All., 190.

(7) (1909) C.C.C.A. No. 1 (unreported).

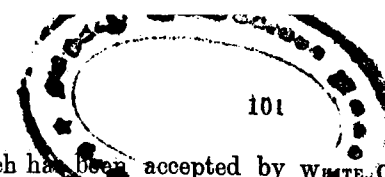
(9) (1910) 20 M.L.J., 298.

(2) (1909) I.L.R., 32 Mad., 532.

(4) (1905) I.L.R., 27 All., 186.

(6) (1909) 14 C.W.N., 73.

(8) (1909) I.L.R., 81 All., 276.



WHITE, C.J.,
KRISHNASWAMI
AYYAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

WHITE, C.J., KRISHNA-SWAMI, AYYAR AND AYLING, JJ.
 SYED AJAM SAHIB
 v.
 ANANTHA-NARAYANA AIYAR.

p. 317, a lease is defined as "a conveyance by which a person, having an estate in hereditaments, transfers a portion of his interest therein to another, usually in consideration of a certain periodical rent or other recompense." In Woodfall's *Landlord and Tenant* (18th Edition), p. 143, we have the following definition: "A lease is a conveyance by way of demise of lands or tenements, for a less term than the party conveying himself has in the premises. A lease is usually made in consideration of rent, or some other annual recompense rendered to the party conveying the premises—who is called the lessor or landlord—by the party to whom they are conveyed or let, who is called the lessee or tenant." Section 105 of the *Transfer of Property Act* defines a lease in terms closely similar to the foregoing definitions. It is "a transfer of a right to enjoy immoveable property made for a certain time in consideration of a price or of money a share of crops, service or any other thing of value. The transferor is called the lessor, the transferee is called the lessee." I have omitted in the above quotation some words unnecessary for my present purpose. The idea of a transfer from one person to another is present in the conception of a lease whether before or after the *Transfer of Property Act*. So far as section 105 goes there is no suggestion of the form of the transfer and no question of signature of the transferor can arise under that section, no writing itself being hinted at in the section. Before the passing of the *Transfer of Property Act* a lease of immoveable property could be brought into existence in this country by an oral arrangement or by writing setting out the terms of the tenancy and signed by the tenant or lessee only as much as by a similar writing signed by the lessor only and registered in accordance with the provisions of the *Registration Act* where registration is made compulsory. The fact that a lease is a transfer or that there is a transferor and a transferee who are parties to the transaction was not deemed sufficient to require that where the transfer was effected by a writing it should be signed by the transferor. Section 3 of the *Registration Act*, clause 1, which provides that "a lease includes a counterpart, *kabuliyat*, an undertaking to cultivate or occupy and an agreement to lease," largely helped to create the view that a writing signed by the tenant only and containing the terms of the tenancy was a transfer of the right to enjoy, not merely for the purposes of the

Registration Act, but also for the constitution of the jural relation of lessor and lessee. The enactment of section 105 of the *Transfer of Property Act*, which has introduced no new jural conception of what constitutes a lease, cannot by itself affect the law as to the creation of leases by writings signed only by the tenant. In Sheppard's '*Touchstone*,' the following statement is made as regards deeds in general before the *Statute of Frauds*: "And by all this that hath been said, it appeareth, that the putting to or subscribing of the parties name or mark to the deed he is to seal, is not essential; for a deed may be good, albeit the party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered" (7th edition), p. 60. See also Williams' '*Real Property*' (20th edition), p. 154. In his *Landlord and Tenant*, p. 218, Woodfall says "it is a point on which authorities are at variance, whether the *Statute of Frauds* requires leases by deed to be signed. The preponderance of authority seems to be in favour of the signature not being necessary." In the 4th edition of Foa's '*Law of Landlord and Tenant*,' p. 10, the learned author writes "nor does its provision" (of the *Statute of Frauds*) "requiring a party's signature extend to leases under seal." This was the view taken in *Aveline v. Whisson*(1), notwithstanding the doubt expressed in *Cooch v. Goodman*(2). In *Taunton v. Pepler*(3), Sir JOHN LEACH, V.C., said "There is no authority for saying that a release to be effectual must be signed as well as sealed and delivered." Deeds are unknown to this country. If the signature of the lessor was not essential to constitute a valid lease in England, there is no reason to suppose that it was in this country before the *Transfer of Property Act*. The question, however, is whether section 107 of the Act has made any change in this respect. It does not expressly say, as sections 59 and 123 do, that the signature of the lessor is necessary. But under the section, apart from the cases in which an oral agreement accompanied by delivery of possession is sufficient, a lease must be by a registered instrument. Does the mention of a registered instrument necessitate the signature of the lessor to the writing? A *kabuliyat* or a *muchilika* signed by the lessee is as much an instrument as a

WHITE, C.J.,
 KRISHNA-
 SWAMI
 AYYAR AND
 AYLING, JJ.
 —
 SYED AJAM
 SAHIB
 v.
 ANANTHA-
 NARAYANA
 AIYAR.

(1) (1842) 61 R.R., 662.

(2) (1842) 11 L.J.Q.B., 225.

(3) (1820) 56 E.R., 1055.

WHITE, C.J.,
KRISHNA-
SWAMI
AIYAR AND
ATLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

patta or cowle executed by the lessor and, so far as the registration law is concerned, there is no difficulty in getting any of them registered. Indeed an undertaking to cultivate or occupy for a term certain at a particular rent would be a lease under the Registration Act and registrable under that law. Unless, therefore, there is anything in the language of section 107 which requires the signature of the lessor to constitute a valid lease, it may well be held that a writing signed by the lessee only and accepted by the lessor is sufficient to constitute the transfer known to the law as a lease. Apart, however, from there being nothing in the section which requires the signature of the lessor, the last sentence in section 4 of the Transfer of Property Act, namely, that section 107 shall be read as supplemental to the Indian Registration Act, seems to me a strong argument the other way. This clause was introduced by the amending Act III of 1885. The object of the amendment was not merely to make this and the other sections referred to in that clause supplemental to section 17 of the Registration Act III of 1877, making registration compulsory in the cases specified therein but supplemental to the entire Act so as to make it part and parcel of the Registration Act itself. Section 3 of the Registration Act III of 1877, clause 1, must therefore be read with section 107 of the Transfer of Property Act. Now the question may arise whether section 107 is not governed by the definition of lease in section 105 of the Act and whether that should not be regarded as inconsistent with the provision in section 3, clause 1, of the Registration Act. There are no words in the Transfer of Property Act repealing the provision in section 3, clause 1, of the Registration Act of 1877. There can be no implied repeal if section 105 of the Transfer of Property Act and section 3, clause 1, of the Registration Act of 1877 can stand together. It seems to me that there is no difficulty whatever in reading the two provisions together without affecting section 3, clause 1, of the Registration Act except perhaps as regards the part saying that an agreement to lease is itself a lease. This clause of the Registration Act of 1877 has been re-enacted without any change in the Registration Act of 1908 as section 2, clause 7. Section 105 of the Transfer of Property Act deals with the character of the legal relation and not with its mode of creation. Section 107 of the Transfer of Property Act and

section 2, clause 7, of the Registration Act deal with certain formal requirements. That seems to my mind to be the reason why section 107 as well as the similar provisions of sections 54, 59 and 123 are to be read as supplemental to the Registration Act and not section 105. I am therefore inclined to hold that, altogether optional registration has been done away with under section 107 except in Provinces where the Local Government have issued notifications under the proviso, that section does not affect the creation of leases by writings signed only by the lessee and answering the requirements of section 2, clause 7. Such writings might amount to transfer under section 105 of the Transfer of Property Act as they could before the enactment of that section. The case of sales is not quite parallel, merely because the signature of the vendor is not mentioned in section 54, for there is no provision in the Registration Act about sales as in the case of leases.

As regards the cases, the first observation that occurs to me is that no reference is made in any of them, except in *Kaki Subbanadri v. Muthu Rangayya*(1) to the provision contained in the last clause of section 4 of the Transfer of Property Act. What the learned Judges who were parties to those decisions would have said, if their attention had been drawn to that provision, I am unable to say. In the latter case *Mr. Justice MILLER*, who was not a party to the decision in *Turof Sahib v. Esuf Sahib*(2) considered himself bound by that decision. The learned Judges who decided that case further say that section 4 of the Transfer of Property Act "cannot mean that an instrument which is not referred to in section 107 of the Transfer of Property Act becomes compulsorily registrable because it falls within the definition of a lease in section 3 of the Registration Act." Now with great respect that seems to me to be arguing in a circle. Why is not the undertaking to cultivate or occupy which amounts to a lease under section 2, clause 7, of the Registration Act referred to by the term lease in section 107 when it is required to be read as supplemental to the Registration Act, and why should section 107 be read as supplemental only to section 17 (d) of the Registration Act, and not to the whole Act itself including section 2, clause 7? As already remarked, the case in *Turof Sahib v. Esuf Sahib*(2) make

WHITE, C.J.,
KRISHNA-
SWAMI
AIYAR AND
ATLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

(1) (1909) I.L.R., 32 Mad., 532.

(2) (1907) I.L.R., 30 Mad., 322.

WHITE, C.J.,
KRISHNA-
SWAMI
AIYAR AND
AYLING, JJ.

—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

no reference to the last clause of section 4 of the Transfer of Property Act. And this omission detracts considerably from the weight of its authority. That case appears to assume that it is part of the idea of a transfer that not merely is the transferor a party to the transaction but that the words of transfer would have no operation but for the signature of the transferor. I do not think that there is any warrant for this assumption. It is again said that "sales and leases by registered instrument necessarily bear the signatures of the vendor or lessor under section 58 of the Registration Act." There appears to me to be no foundation for this statement about the signature of the lessor. The signature of every person admitting the execution of the document is certainly required under clause (a) of sub-section 1. But that requirement is sufficiently complied with by the signature of the lessee who executes the writing containing the undertaking to cultivate or occupy. Again the learned Judges say at page 324 of the report "The section now before us (107 P), as already pointed out, requires that the transfer shall be in writing and signed by the lessor." The last statement about the signature of the lessor appears to me an obvious mistake. For the reasons above given, I am unable to regard the decision in *Turaf Sahib v. Esuf Sahib*(1) and part of the reasoning on which the decision in *Kaki Subbanadri v. Muthu Rangayya*(2) is based as correct. My answer to the first question referred is in the negative.

If my answer to the first question is right, the lessee who signs the instrument is clearly liable. But if I am wrong on the first point and there is no lease created by the instrument, the question of the liability of the signatory to the instrument will depend upon the existence of consideration for his undertaking to pay. If a lease was the consideration it has failed because no valid instrument has been executed by the owner of the property. If the defendant has obtained possession of the property he would be liable as for use and occupation and his covenant to pay would be evidence of the measure of his liability. If no possession has been obtained it is clear that the signatory to the instrument is not liable merely because he has covenanted to pay. It has however been suggested that the writing may be used as evidence of an oral agreement to lease and that such an agree-

ment accompanied by delivery of possession would itself operate as a lease. The case of *Walsh v. Lonsdale*(1) supports this view. That case has been accepted as laying down the law correctly in later cases. *Louther v. Heaver*(2) and *Manchester Brewery Company v. Coombs*(3). But I do not think that view is consistent with section 107 of the Transfer of Property Act which requires a registered instrument for the creation of a valid lease except in the limited class of cases (of which the present case is not one) where an oral agreement accompanied by delivery of possession is sufficient. It may be that an agreement to lease specifically enforceable which is followed by delivery of possession is a good defence to a suit in ejectment (see *Bibi Jawahir Kumari v. Chatterput Sing*(4) and *Singheeram Poddar v. Bhagbat Chandur Nundi*(5)) but it is another thing to attempt to give effect to it as a lease in the face of sections 105 and 107 of the Transfer of Property Act. It seems to me therefore that the defendant is not liable except on the footing of use and occupation. I would answer the second question accordingly.

AYLING, J.—I agree in holding that the answer to the first question referred should be in the negative. On this view, the second question appears unnecessary; but if an answer is required I concur in that given in the judgment of the learned Chief Justice.

(1) (1882) 21 Ch.D., 9.
(3) (1901) 2 Ch.D., 608.
(5) (1910) 11 C.L.J., 543.

(2) (1889) 41 Ch. D., 248 at p. 264.
(4) (1905) 2 C.L.J., 343.

WHITE, C.J.,
KRISHNA-
SWAMI
AIYAR AND
AYLING, JJ.
—
SYED AJAM
SAHIB
v.
ANANTHA-
NARAYANA
AIYAR.

(1) (1907) I.L.R., 30 Mad., 322. (2) (1909) I.L.R., 32 Mad., 532.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Ayyar.

1910.
October 10,
11, 13, 28.

MAHARAJA SREE RAO SIR VENKATA SWETACHELAPATHI
RANGA RAO, BAHADUR GARU, K.C.I.E., MAHARAJA
OF BOBBILI (PLAINTIFF), APPELLANT,

v.

RAJA KAMINAYANI BANGARU KUMARA ANKAPPA
NAYANIM GARU, ZAMINDAR OF CHUNDI, BEING MINOR
REPRESENTED BY THE COLLECTOR OF NELLORE
(THIRD DEFENDANT), RESPONDENT.*

*Hindu Law -- Unsecured debt contracted by limited owner when binding on estate—
Will bind if made after due inquiry—Proof of due inquiry—Nature of right
liable to be divested by adoption—Transfer of Property Act, s. 38.*

Unsecured debts contracted by a limited owner will be binding on the estate if incurred for purposes which will justify a charge on such estate.

The rule laid down in the case of *Hunooman Persaud Panday v. Mussumat Koonveree*, (1856) 6 M.I.A., 393], as to the sufficiency of a reasonable inquiry satisfying the creditor of the existence of reasonable necessity to validate a claim against the estate in the hands of a manager applies in the case of all loans whether secured or unsecured.

Representations by the borrower are evidence of the existence of such necessity but are not generally in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan is contracted. In particular circumstances however they may suffice to shift the burden of proof to the person impeaching the debt or alienation.

If section 38 of the Transfer of Property Act is deemed to enact a rule as to reasonable inquiry in excess of what is required by the Privy Council in *Hanuman Pershad's* case, it cannot override the Hindu Law settled by the Privy Council.

The estate of a person whose right is liable to be divested by an adoption is not analogous to a life estate. It is that of a limited owner who represents the estate.

APPEAL against the decree of T. M. Rangachariar, District Judge of Nellore, in Original Suit No. 25 of 1904.

The facts for the purpose of this case are fully set out in the judgment.

P. R. Sundara Ayyar for appellant.

* Appeal No. 150 of 1907.

The Hon. the Advocate-General for respondent.

JUDGMENT.—The late Zamindar of Chundi, which was an impartible estate descendible according to the rule of primogeniture, died in 1899. On his death disputes arose between his brother, the first defendant, and his widow, the second defendant, as to the succession. There was litigation between the parties. A compromise was entered into and embodied in exhibit A dated the 13th April 1901. Under it both were to enjoy the zamindari in common, and, in case a son was born to the first defendant, the second defendant was to adopt him. A son was born to the first defendant in February 1903 and adopted by the second defendant on the 27th of June 1903. The adopted son is the third defendant represented by the Court of Wards. The plaintiff sued to recover a sum of Rs. 7,000 with interest thereon under the promissory note, exhibit C-2, dated the 16th September 1901 executed by defendants Nos. 1 and 2, on the liability of the Chundi estate in the hands of the third defendant. The third defendant admitted a part of the claim. The District Judge passed a decree in respect of it and dismissed the suit as regards the remainder as against the third defendant. The present appeal by the plaintiff relates to the amount disallowed. The District Judge based his decision on the authority of the judgment in *Nachiappa Chettiar v. Chinnayasami Naicker*(1) which held that in the case of an impartible zamindari the unsecured debt of the zamindar not incurred for family necessity was not recoverable from the estate in the hands of the next heir taking by survivorship. The principle of that decision must be held to be no longer good law. See *Rajah of Kalahasti v. Achigadu*(2) and *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams*(3).

The ground of the District Judge's judgment being erroneous, it becomes necessary to consider the third issue which raises the question whether a debt contracted by the first and second defendants not secured upon the estate is nevertheless binding upon it. The District Judge has given no finding but he has recorded the evidence. We think it unnecessary to send the case back as both sides have agreed that we may deal with the issue.

(1) (1906) I.L.R., 29 Mad., 453.

(2) (1907) I.L.R., 30 Mad., 454.

(3) (1909) I.L.R., 32 Mad., 429.

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AYYAR, JJ.
MAHARAJA
OF BOBBILI
v.
ZAMINDAR OF
CHUNDI.

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AYYAR, JJ.

MAHARAJA
OF BOBBILI
v.
ZAMINDAR OF
CHUNDI.

Before, however, going into the evidence it is necessary to deal with the legal contentions that were raised in connection with this issue. The first point to be noticed is whether, the debt not having been secured upon the estate by the first and second defendants, the estate in the hands of the third defendant, who has on adoption divested them of the zamindari, under the Hindu Law can be made liable. The learned Advocate-General who appeared for the third defendant admitted that *Reyelle Jogayya v. Venkataratnamma*(1) was against him and did not seriously dispute its authority. Although the execution of a promissory note by the first and second defendants might suggest *prima facie* that the creditor looked to their personal credit it would be competent to him to show that the estate was intended to be bound as well in the circumstances of the case. In the case of the present loan the estate was heavily involved and the very fact of the first and second defendants being both required to execute the promissory note shows that, if the loan was made after due enquiry as to the purpose being of a character binding upon the estate, there can be no difficulty in coming to the conclusion that the creditor looked to the estate for repayment and not merely to the personal credit of the first and second defendants. Mr. Sundara Ayyar for the appellant has argued that, apart from the evidence of the actual application of the loan, he is entitled to a decree binding upon the estate, because the loan was made after reasonable enquiry as to the purpose. The Advocate-General, however, raised a question that the decision in *Hunooman Persaud Panday v. Mussumat Koonweree*(2), as to the sufficiency of a reasonable enquiry to validate a claim against the estate in the hands of a manager should not be extended to loans unsecured upon the estate. His argument was that it is only where the widow or other limited owner of an estate or the manager of a joint family or guardian of an infant heir alienate the estate in some form that *bonâ fide* enquiry and the satisfaction of the creditor as to reasonable necessity have been held sufficient to justify the alienation. But we see no ground to limit the decision in that case in this manner. There is nothing in principle to confine the observations of their Lordships as to the sufficiency of a *bonâ fide* and reasonable enquiry to the case of

(1) (1910) 20 M.L.J., 412.

(2) (1856) 6 M.I.A., 393.

alienation. In the case of *Kotta Ramasami Chetti v. Bangari Seshama Nayanivaru*(1), both Mr. Justice KERNAN and Mr. Justice MUTHUSAMI AYYAR were of opinion that the *dicta* of the Privy Council applied with equal force to a simple loan as well as an alienation. Mr. Justice KERNAN observed "In *Hunooman Persaud Panday v. Mussumat Koonweree*(2), the case dealt with was one of an express charge and so it was in very many other cases. The principle, however, to be applied, whether in respect of an express charge in writing or by deposit, or of a loan of money to, or other debt created by, a manager without such express charge, is the same." After referring to the sufficiency of due and proper enquiry the learned Judge proceeds to add "The same principle applies to a simple loan or debt. In each case the manager acts as agent of the family and his acts are subject to the same consideration and question. In point of principle and law, the simple loan and express charge require the same foundation to bind the family and the estate" (pages 148 and 149). Mr. Justice MUTHUSAMI AYYAR observed at page 161 with reference to a debt not secured upon the estate by the *de facto* Poligar but sought to be recovered from the rightful successor "It is true that though there was no real necessity for the debt, the plaintiffs should not fail if their claim were within the equity recognised by *Hunooman Persaud Panday v. Mussumat Koonweree*(2)." This being the law, the only question that we have to consider in the case is whether, as contended by the learned vakil for the appellant, there was a reasonable and *bona-fide* enquiry by the lender as to the purpose of the loan. The learned Advocate-General argued that the enquiry contemplated by the Privy Council is one independent of the representations of the borrower and that such representations, even if evidence, are not in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable enquiry as to the binding nature of the purpose for which the loan is contracted. In *Hunooman Persaud Panday v. Mussumat Koonweree*(2), the Privy Council said at pages 419 and 420 of the report "The representations by the manager accompanying the loan as part of the *res gestae*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AYYAR, JJ.

MAHARAJA
OF
BOBBILI
v.
ZAMINDAR
OF
CHUNDI.

(1) (1881) I.L.R., 3 Mad., 145.

(2) (1856) 6 M.I.A., 393.

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AIYAR, JJ.
—
MAHARAJA
OF
BOBBILI
v.
ZAMINDAR
OF
CHUNDI.

the heir; and as their Lordships are informed that such *prima-facie* proof has been generally required in the Supreme Court of *Calcutta* between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required." The foregoing extract from the judgment of their Lordships makes it abundantly clear that the representations of the borrower are not merely evidence but may in particular circumstances be sufficient to shift the onus from the lender to the person impeaching the debt or alienation. The above principle has been accepted by the Courts in India. In *Sarat Chandra Banerjee v. Bhupendra Nath Bosu*(1), Chief Justice MACLEAN applied the rule above enunciated to the case of a loan to an executor not governed by the Succession Act. We wish, however, to guard ourselves from being supposed to lay down the rule that the representations by the borrower are generally sufficient. In many cases the interests of the borrower are likely to be opposed to those of the reversioner or the infant heir or other person whose manager he or she may happen to be and in such cases reasonable enquiry should not be limited to the representations of the borrower. Section 38 of the Transfer of Property Act seems to require, in addition to good faith, reasonable care in ascertaining the existence of circumstances alleged by the transferor of immoveable property. This section, if deemed to enact a rule as to reasonable enquiry in excess of what is required by the Privy Council in *Hunooman Persaud's* case(2) cannot override the Hindu Law so settled by the *Privy Council*. See section 2, clause (d). But it may well be taken to indicate that ordinarily something more than the mere representation of the borrower is necessary to constitute reasonable enquiry on the part of the lender.

Taking the law to be as above indicated we have to see how the facts stand in this case. It is perfectly clear that at the time of the suit loan there was a debt due of a lac and a half recoverable from the estate. The Advocate-General did not practically dispute this. Exhibit Ag 2 which is a draft mortgage-deed, dated the 8th of October 1901, is sufficient evidence of the liability. By the letter, Exhibit D, dated the 10th September 1901,

(1) (1898) I.L.R., 25 Calc., 103 at p. 108.

(2) (1856) 6 M.I.A., 393.

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AIYAR, JJ.
—
MAHARAJA
OF
BOBBILI
v.
ZAMINDAR
OF
CHUNDI.

the first defendant asked for a loan of a lac and a half. There can be no doubt that this loan was applied for to meet the liability which was enforceable against the estate. In the same letter the first defendant applied for an immediate loan of Rs. 7,000 on account of urgency to meet a decree-debt and other debts out of the debts amounting to a lac and a half that were recoverable from him. Before the date of the loan the defendant's agent had been sent to the plaintiff to represent the urgency. The first defendant examined as the plaintiff's witness No. 3 says that the loan of a lac and a half was absolutely necessary and that the amount of the suit promissory note was also comprised in the said loan. The witness also adds "As I told him (Narasimhayya) that money was urgently needed, he spoke to the Maharajah of Bobbili at Madras on my behalf about the urgency and caused money to be advanced." The second witness for the plaintiff, his second Manager, says "From my enquiries I came to know that defendants Nos. 1 and 2 had a necessity to borrow and I was satisfied with the necessity for borrowing money." It is true he is now unable to give any details of the debts. But we are on the whole satisfied in the circumstances of this case that, even apart from the representations of the borrower, there was enquiry by the lender which was reasonably sufficient to justify the loan so as to make it recoverable from the estate.

It is unnecessary to consider the contention of Mr. Sundara Ayyar that as the first defendant was at the time of the loan the full owner of the estate the amount is recoverable from the estate in the hands of the successor apart from any necessity or reasonable enquiry as to the purpose of the loan. It is difficult to treat the first defendant's estate, which was liable to be divested on adoption by the second defendant and which has as a matter of fact been so divested, as an absolute estate for purposes of validating loans or alienations by the holder of the estate. (See the judgment in *Lakshminarayana Nainar v. Valliammal*(1)). It is, however, unnecessary to express any opinion on this point. But we cannot agree with the learned Advocate-General's argument that the estate of the first defendant should be treated on the same footing as that of the holder of a life estate. If that were the true view an alienation for whatever purpose would be

(1) (1911) I.L.R., 34 Mad., 250.

ABDUR
RAHIM AND
KRISHNA
SWAMI
AYYAR, JJ.
—
MAHARAJA
OF
BOBHILI
v.
ZAMINDAR
OF
CHUNDI.

inooperative beyond the date on which the estate was devested. This is not in accordance with the tenor of the observations of the Privy Council in *Shri Raghunadha v. Sri Broso Kishoro*(1) (See also Mayne's 'Hindu Law', section 198). The analogy of the first defendant's estate is rather to that of a limited owner like a widow than to that of a life owner. There is a vested reversion or remainder where there is a life estate. But both in the case of the widow and in the case of a person in the position of the first defendant the holder for the time being represents the estate completely. If a debt or alienation by a widow for proper purposes would bind the reversion it stands to reason that a debt contracted, or alienation made by the first defendant must be dealt with on the same footing. We, therefore, allow the appeal with costs here and in the Court below.

APPELLATE CIVIL.

Before Mr. Justice Krishnaswamy Ayyar, and Mr. Justice Ayling.

1910.
December 14, 15.
—
1911.
January 18.

RAJAI TIRUMAL RAJU BAHADUR VARU AND OTHERS
(SECOND PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

PANDLA MUTHIAL NAIDU AND OTHERS (DEFENDANTS 2 TO 8),
RESPONDENTS.*

Mortgage, validity of, when only part of the consideration paid—Mortgagees in possession cannot prescribe for higher interest by asserting a larger amount as due—Limitation Act, Schedule II, Articles 148, 144.

Where only a part of the consideration for a mortgage has been paid, the mortgage is a good security for the amount that has validly passed. The mortgagee by remaining in possession for more than 12 years under such a mortgage, cannot by merely claiming to hold for the full amount, acquire by prescription a right to hold as mortgagee for such full amount.

Notwithstanding the assertion by the mortgagee of a larger interest than was validly passed to him by the mortgage, article 148 of the Limitation Act will apply to a suit for redemption by the mortgagor. Article 144 will not apply as article 148 specially provides for the case.

APPEAL against the decree of T. M. Rangachariar, Subordinate Judge of North Arcot, in Original Suit No. 2 of 1906.

(1) (1876) 3 I.A., 154.

* Appeal No. 145 of 1906.

The facts are stated in the judgment of the Lower Court as follows:—

Suit to recover Rs. 38,527-3-0. The suit was launched by the Regulation Collector on behalf of the Rajah of Karvetnagar. The present plaintiff is the son of the late Rajah.

On the 24th May 1882, the late Rajah and his father executed to the first defendant and to the father of the second defendant a usufructuary mortgage deed for Rs. 24,600. A is the registration copy of this deed filed by consent of parties. The deed stipulates that the annual income of the village should be taken as Rs. 1,764 of which Rs. 1,476 should be taken by the mortgagees (every year) for the interest due on the amount secured (calculated at 6 per cent. per annum) and that the balance, namely Rs. 288, should be paid by the mortgagees into the taluk treasury on account of the peishoush of the village.

The plaint is dated 29th June 1903 and the cause of action is set forth in the plaint in this wise. The sum of Rs. 24,600 secured by the mortgage deed is made up of Rs. 17,309-13-4, alleged to have been due on account of the decree in Original Suit 24 of 1881 on the file of the North Arcot District Court, and Rs. 587-15-7 alleged to have been due on account of the decree in Original Suit 25 of 1881 on the file of the same Court and other sums, and that the amounts alleged to have been due on account of the said two decrees are larger than the amounts actually due thereunder. And the agreement to pay the said two amounts as per the mortgage deed is void owing to want of sanction of the Court under section 257A, the Code of Civil Procedure.

Plaintiff arrives at the amount sued for thus:—

The principal legally due under the deed is Rs. 6,702-3-1. Defendants were entitled to interest on that amount only at the stipulated rate. Therefore the difference between Rs. 1,476 and the interest due on Rs. 6,702-3-1 should have gone towards the liquidation of the latter amount. In so calculating, the amount became discharged prior to 1st July 1888. Indeed the defendants had to the credit of the plaintiff, Rs. 983-15-11 on that day. On the 1st July 1900 the sum in the hands of the defendants to the credit of the plaintiff had risen to Rs. 38,527-3-0 including interest at 12 per cent. per annum in consequence of defendant having continued to remain in possession of the mortgaged village

KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.

RAJAI
TIRUMAL
RAJU
v.
PANDLA
MUTHIAL
NAIDU.

KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.

RAJAI
TIRUMAL
RAJU
v.
PANDLA
MUTHIAL
NAIDU.

till that day when the Court of Wards took possession of the village under Madras Act IV of 1899.

Among other objections to the suit, defendants contend that they having been in possession of the village under the terms of the mortgage deed for more than 12 years, they have acquired a valid title as usufructuary mortgagees with all the rights mentioned in the mortgage deed by prescription. Defendants say that in consequence plaintiff's suit must be held time-barred, the title of the defendants having become perfected owing to the lapse of time. The point is covered by the 7th issue:—

Whether the defendants have acquired by prescription the right of a usufructuary mortgagee for the amount mentioned in the mortgage deed.

Defendants' Vakil relies on the case reported in 12 Mad. L.J., 410. He also relies on cases in 9 Mad., 214 and 13 Mad., 407 as well as on the case in 27 Bom., 515 at page 537.

The position established by these cases is that a limited right can be acquired by prescription, that a person having no legal title at the inception can acquire a valid title by prescription, that in finding what that right is, the Court ought to see what was the right which he openly enjoyed to the knowledge of the owner or his representative for the time being, and not what was the right which actually existed at the beginning. In this case, defendants obtained the mortgage under the terms above set forth. The usufructuary mortgage is a limited right. Defendants were in possession of the mortgaged village admittedly under the terms of the mortgage deed for over 12 years, and the rights set up by them are the rights as set forth in the mortgage deed. Therefore the rights as stated in the mortgage deed were acquired by the defendants and their title therefore became perfected.

In this view of the case, the lower Court dismissed the suit.

Second plaintiff appealed.

The Hon. Mr. L. A. Govindaraghava Ayyar and A. Ramachandra Ayyar for second appellant.

K. Srinivasa Ayyangar for P. R. Sundara Ayyar for respondents.

AYLING, J. (Appeal 145 of 1906).—The plaintiffs' predecessors in title gave a usufructuary mortgage to the first defendant and the second defendant's father for Rs. 24,600 in the year 1882. Part of the consideration for the bond consisted of Rs. 17,000 stated to be due under decrees previously obtained

against the mortgagors. It is contended for the plaintiff that this sum was in excess of the amount actually due under the decrees and that the agreement to pay was in contravention of section 257 (a) of the old code and therefore void. The Court below has given no finding on the question no evidence having been taken on the point. Assuming the plaintiff's contention to be well founded, the further point arises whether the defendants having been in possession for more than 12 years under the usufructuary mortgage for Rs. 24,600, they have acquired a prescriptive title to that mortgage interest. The District Judge has decided in their favour. On appeal it is argued for the appellant that there was a good usufructuary mortgage for Rs. 7,600 at all events, and, the possession of the mortgages having commenced under a valid mortgage for that sum, the defendants could not by assertion of a larger interest acquire a prescriptive title to it.

The first question we have then to consider is whether there is a good usufructuary mortgage for Rs. 7,600. There is nothing to show as pointed out in *Srinivasa Swami Aiyangar v. Athmarama Aiyar*(1), that the parties expressly stipulated that the mortgage should not take effect unless the whole consideration was really and validly given by the mortgagee. It cannot be said that there is an implied understanding in the case of every mortgage where less than the full consideration is advanced by the mortgage that the mortgage should fall through unless the balance of the consideration is made good. It may also be that, if there is an agreement to advance the full consideration for the mortgage and there is a breach of the agreement on the part of the mortgagee, section 39 of the Indian Contract Act will as suggested in *Subba Rau v. Devu Shetti*(2), justify the mortgagor in putting an end to the contract of mortgage. It seems to us that the mortgagor may treat the mortgage as good to the extent of the consideration received and sue for damages for non-payment of the balance as suggested in *Anakaran Kasmi v. Saidamadath Avulla*(3) and expressly decided in *Chinnayya Rawutan v. Chidambaram Chetti*(4). He may allow the mortgagee to treat the mortgage as good and to sue the mortgagor for sale as in *Rajane Kumar Dass v. Gaur Kishore*

KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.

RAJAI
TIRUMAL
RAJU
v.
PANDLA
MUTHIAL
NAIDU.

(1) (1909) I.L.R., 32 Mad., 281.

(3) (1878) I.L.R., 2 Mad., 79.

(2) (1895) I.L.R., 18 Mad., 126.

(4) (1878) I.L.R., 2 Mad., 212.

KRISHNA-
SWAMI
ATTAR AND
AYLING, JJ.

RAJAI
TIRUMAL
RAJU
v.
PANDLA
MUTHIAL
NAIDU.

Shaha(1) or for foreclosure as in *Munshi Bajranji Sahai v. Udit Narain Singh*(2). The decision in *Subba Rau v. Devu Shetti*(3) which treated the mortgage as invalid because part only of the consideration agreed upon was advanced was based on the view that the mortgagor cancelled the mortgage and the mortgagee had acquiesced in the cancellation. Where part of the consideration is void, or fails, or the mortgagee makes default in paying it, the right principle seems to be that the mortgage is good to the extent of the consideration that has validly passed. In Jones on Mortgages, Vol. I, section 378, the rule is thus stated "If the mortgagee advance only a part of the sum contemplated in the mortgage it is a valid security for so much as he does advance and for so much only. For the advances actually made the mortgage is good against the mortgagor's assignee in bankruptcy." A number of American cases are cited at the foot in support of the above principle. Mr. K. Srinivasa Aiyangar who appeared for the respondents pressed upon our attention the case of *Walker v. Carleton*(4) as a decision in his favour. Apart from the fact that the decision is adversely criticised by the learned author, the case appears to be clearly distinguishable because the mortgagor gave a separate note payable in a shorter time for the part of the consideration, which was all that was advanced. Putting aside this case therefore as inapplicable the whole weight of authority appears to be in favour of the rule enunciated in the passage cited. Mr. Srinivasa Aiyangar further contended that to give effect to the mortgage as good for the consideration actually given would be to make a new contract between the parties. We do not think the argument is sustainable. It would be perfectly open to the mortgagor as already pointed out, treating the whole contract as valid and enforceable, to recover damages for the partial breach. If then the mortgage of the entire property for the consideration that validly passed between the parties is a valid transaction, there is no foundation for the further contention that the mortgagees have acquired a prescriptive title to the usufructuary mortgage interest of Rs. 24,600. If the defendants were entitled to remain in possession as mortgagees under the valid mortgage for Rs. 7,600 time could not run in

(1) (1908) I.L.R., 35 Cal., 1051.

(3) (1895) I.L.R., 18 Mad., 126.

(2) (1906) 10 C.W.N., 932.

(4) 97 Ill., 582.

KRISHNA-
SWAMI
ATTAR AND
AYLING, JJ.

RAJAI
TIRUMAL
RAJU
v.
PANDLA
MUTHIAL
NAIDU.

favour of the defendants for the acquisition of a larger interest by their mere assertion of it to the knowledge of the mortgagor. Under the terms of the mortgage instrument exhibit A, interest was payable at 8 annas per cent. per mensem. The usufructuary mortgage of the property was till the principal and interest were paid off. The income of the entire mortgaged property receivable by the mortgagees was fixed at Rs. 1,764, out of which Rs. 1,476 was to be appropriated towards interest, estimated to be due at the rate mentioned and the balance of Rs. 288 towards the Peish kist. If the consideration for the mortgage became void to the extent of Rs. 17,000, a proportionate amount of the annual interest would not be payable out of the income fixed, but under section 76 of the Transfer of Property Act, clause 6, the sum was liable to be debited against the mortgagee in reduction of the principal sum due under the mortgage. But whether this is so or not, the question as to what becomes of the available surplus does not affect the relation of mortgagee. Notwithstanding then the invalidity of part of the consideration that the mortgagee's right to possession under the mortgage remains. Article 148 applies to a suit for redemption or for recovery of possession of immoveable property mortgaged. Notwithstanding any assertion by the mortgagee of a larger interest than was validly passed to him under the mortgage. Article 144 has no application where other special provision is made by the Limitation Act for a suit for possession of immoveable property. It cannot be denied that article 148 is such a provision. The mortgagor's right of redemption is not extinguished, and as the whole property had been validly mortgaged the sixty years period under Article 148 applies. This was the decision of the Privy Council in *Khiurajmal v. Daim*(1). The mortgagees were bound to pay part of the income of the mortgaged property of which they had possession as a subsistence allowance to the mortgagor. Under an invalid sale the mortgagees purchased the mortgagor's interest though the sale was in somebody else's name *benami* for them. The Privy Council said "as between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption

(1) (1905) I.L.R., 32 Cal., 296.

KRISHNA-
SWAMI
AYYAR AND
AYLING, JJ.

RAJAI
TIRUMAL
RAJU
v.
PANDIA
MUTHIAL
NAIDU.

will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem." This view was followed in *Muzaffar Alikhan v. Parbati*(1). The same principle was applied in *Ali Muhammad v. Lalta Bakhsh*(2), *Rairu Nayar v. Moidin*(3) and *Byari v. Puttanna*(4). As the mortgagor has a subsisting right to redeem and to recover possession the mortgagee cannot prescribe for a larger interest, we must set aside the decree of the subordinate Court and remand the case for disposal according to law. The cost hitherto incurred will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

FAKIR NYNAR MUHAMED ROWTHER, MINOR BY HIS MOTHER
AND NEXT FRIEND, NATHER AMMAL *alias*
PATHUMUTHI BI BI, (PLAINTIFFS), APPELLANTS,

v.

KANDASAWMY KULATHU VANDAN AND OTHERS,
(DEFENDANTS AND LEGAL REPRESENTATIVE OF 1ST DEFENDANT)
RESPONDENTS*.

Muhammadian Law—Gift under, Validity of—Transfer of possession when unnecessary—Possession of donor necessary to validate gift.

To make a valid gift under Muhammadan law the donee should be put in possession. But where the donee is a minor at the time of the gift and the donor remains in possession of the property as guardian of the donee on his behalf, the gift would be valid under Muhammadan law. Unless the subject matter of a gift is in the possession of a trustee or agent of the donor whose custody is regarded in law as the custody of the donor, the owner of a property, if not in possession, cannot make a valid gift of it or rather a gift made by him, will not pass the ownership of the property to the donee until the donee takes possession by the donor's consent.

SECOND APPEAL against the decree of Lionel Vibert, District Judge of Coimbatore, in Appeal Suit No. 49 of 1906, presented against the decree of D. K. Virasawamy Aiyar, District Munsif of Udumalpet, in Original Suit No. 840 of 1904.

(1) (1907) I.L.R., 29 All., 640 at p. 64.

(2) (1878) I.L.R., 1 All., 655.

(3) (1890) I.L.R., 18 Mad., 39.

(4) (1891) I.L.R., 14 Mad., 38.

* Second Appeal No. 529 of 1907.

The facts are sufficiently set out in the findings of the lower Courts which appear in the judgment.

Joseph Satya Nadar for appellants.

T. R. Ramachandra Ayyar, *T. R. Venkatarama Sastri* and *K. B. Ranganadha Ayyar* for fourth respondent.

JUDGMENT.—We are constrained to hold that the Lower Appellate Court has not satisfactorily determined the two main questions raised in the suit. The first question is whether the sale by the second defendant to the third defendant was nominal. That is the subject-matter of the first issue. On this there is no finding by the District Judge. The question involved in the second issue is whether the gift in favour of the plaintiff by the third defendant is valid. As to this what the Judge says is that having regard to the previous transactions between the parties it is clear that the gift was fraudulent. It is difficult to understand what the exact significance of the finding is. Supposing the sale to the third defendant was valid and effectual the property passed to her from the moment of the sale and any gift subsequently made by her of the property would be valid if it were in accordance with the provisions of the law. It does not appear to have been alleged that the third defendant made the gift in order to defraud any creditors of hers, if she had in fact any creditors to defraud. We must therefore ask the District Judge to submit fresh findings on issues Nos. 1 and 2 upon the evidence on the record.

The findings should be submitted in eight weeks, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Coimbatore submitted the following

FINDING.—It is difficult to ascertain the facts accurately. But as far as I can make out they are as follows:—One Fakir Nina Rowthen died about 1880. He left one son who is the second defendant, a widow who is the third defendant, and 5 daughters; three of whom were born to different wives who are dead. Thus his property goes into eight shares, of which the son is entitled to two and each of the females to one.

2. On 13th June 1883, by exhibit IV, two of the daughters sold their shares to the son, and on 15th October 1884, by exhibit V, the son and his mother sold the same two shares to the wife of the

MUNRO AND
ABDUR
RAHIM, JJ.

FAKIR
NYNAR
MUHAMED
ROWTHER

v.
KANDASAWMY
KULATHU
VANDAN.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

son. Another daughter seems to have sold her one share to the son; but there is not any document filed for this transaction. Thus second defendant's wife had two shares, and the second defendant himself had three shares; the widow and her daughters had three shares among them. The shares were never ascertained.

3. On 24th July 1891, by exhibit A, second defendant sold his three shares to his mother, third defendant. A month later, he executed exhibit II, dated 21st August 1891 by which he hypothecated all the property except the two shares of his wife. A suit was filed on this hypothecation, Original Suit No. 863 of 1902. The property was brought to sale and first defendant purchased something. Exactly what he got is not clear. For the decree is not clear. Apparently he got the three undivided shares belonging to second defendant; the sale certificate is dated 3rd March 1904. Meantime, third defendant had executed exhibit VIII, dated 20th July 1899. This purports to be a deed of gift, for three shares, to the son of second defendant. These are apparently the three shares, which were transferred under exhibit A. The grandson now sues to recover the undivided shares.

4. The High Court asks me to find whether the sale, exhibit A, is nominal; and whether the gift, exhibit VIII, is valid.

5. Exhibit A recites that "the sale amount Rs. 500 has been received in cash this day." The second defendant examined as defence first witness says that he executed Exhibit A to his mother for three shares and she paid him Rs. 500 at the time of the registration. Third defendant examined as defence second witness says that her son did not sell her any land and she did not pay Rs. 500; she says that the second defendant had the sale-deed in his possession and gave it to her only two months before she was examined in Court. She does not explain for what purpose the sale-deed was got up nominally. Defence third witness is the writer of exhibit A. He says that money was not paid in his presence. It does not follow, that money was never paid. Defence fourth witness is an attester of exhibit A. He says that money was not paid in his presence, but he adds, that when he questioned second defendant why the price was low, second defendant replied that he was charging a low price because the sale was to his own mother. I think this goes to show that the transaction was real. There is no other evidence on the point.

6. The District Munsif found that exhibit A was a genuine transaction. I see no reason to differ. People wishing to set aside a registered document must show clearly, for what reason it was got up nominally. Such evidence is entirely absent in this case. I find that the sale, exhibit A, is valid and not nominal.

7. With regard to the so-called deed of gift, I have no doubt that the third defendant registered it. Plaintiff's first witness is the karnam of the village; he attested the document and he says that the third defendant touched the pen. Third defendant now says that she executed the document, under the influence of her son. Except her own statement, there is nothing to show that the son used any improper influence. He was not cross-examined on the point. If the parties had not been Muhammadans, I should hold that the gift was valid and binding.

8. But to make a valid gift under Muhammadan Law, it is essential that the donee should be at once put in possession. In the present case, as far as I can see, the donee had never any possession. Plaintiff's first witness, the karnam, speaks of possession by defendants Nos. 3, 2 and 1, but makes no reference to any possession by plaintiff. The Munsif has referred to this matter in paragraphs 16, 17 and 18 in his judgment. I agree with him that the deed of gift is not valid under the Muhammadan Law.

JUDGMENT.—The learned District Judge finds that the sale by the second defendant to the third defendant was a valid transaction and he also finds that the third defendant made a gift of the property to the plaintiff, but he says that the gift is invalid in Muhammadan Law inasmuch as possession was not given to the plaintiff. But the plaintiff was a minor at the time of the gift and the donor, the third defendant, who is grand-mother of the plaintiff, states in the deed of gift that she would remain in possession of the property as guardian of the plaintiff and on his behalf. That being so there can be no doubt that the objection to the gift on the ground mentioned by the District Judge is not a valid objection in Muhammadan law.

But it appears that the first defendant raised another question in paragraph 3 of his written statement. It is alleged therein that the third defendant never obtained possession of the property nor the deed of sale, and it is argued before us that if the third defendant was not in possession at the time of the gift the gift

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

would be invalid according to Muhammadan Law. There is no finding by the District Judge on this point and we think that before we dispose of the question of law raised before us we must ask the lower Appellate Court to return a finding as to whether the third defendant at the time of the gift to the plaintiff had possession of the property. The finding should be returned within one month after the re-opening of the District Court, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Coimbatore submitted the following

FINDING.—Plaintiff a minor sued for plaint property on the strength of a gift (exhibit VIII), from third defendant, his grand-mother.

2. First defendant was assignee of a mortgage from second defendant.

3. Third defendant derived her title from a sale-deed to her by second defendant dated about a month before his mortgage to first defendant's assignor.

4. The Munsif found the deed of gift was a fraud to cheat the mortgagee. Third defendant had no possession which she could give, and no intention of giving it. He dismissed the suit. Plaintiff appealed, but this Court held the gift was fraudulent, and he appealed in vain. Plaintiff went on second appeal. The High Court called for certain findings and this Court found that the sale-deed by the second defendant to third defendant was real; that third defendant apparently got possession under the sale-deed but did not in fact hand it on to the donee at the time of the gift. Hence the gift was not valid.

5. On this the High Court have called for a further finding from this Court as to whether third defendant at the time of the gift to plaintiff had possession of plaint property since this Court had not in express terms found that point one way or the other; and all I can say is that apparently it accepted the evidence of the karnam that third defendant had possession.

6. It is not possible to make up one's mind on this question without considering the whole matter.

7. Second defendant is son of third defendant. Plaintiff is son of second defendant. The property belonged to the father of second defendant and husband of third defendant. On his death

second defendant inherited two-eighths of his property, third defendant inherited one-eighth, and five-eighths went to five daughters.

8. The family then played about with these shares in the most puzzling way. Second defendant bought two shares from two of his sisters. Then he sold to his wife in 1884—*vide* exhibits IV and V. So his wife has two shares. One sister bought two shares from her mother and one sister, so has three-eighths.

9. Second defendant had his own two-eighths and is said to have bought the one-eighth of his remaining sister. So he had three-eighths. Now in July 1891 the son purports to have sold to his mother three-eighths of the property for Rs. 500. This three-eighths was assessed at 28. It was good wet land and must have been worth nearly Rs. 2,000 instead of Rs. 500. Good wet land paid four times its revenue as rent, or three times the revenue as net income or 84 a year. This at twenty years' purchase gives Rs. 1,684, and this was I consider the value of the lands in 1891. Having sold his three-eighths to his mother in July 1891, second defendant who, if that sale be genuine, possessed then no further interest in the property, actually mortgaged for Rs. 800 in August 1891, no less than six-eighths of the property to first defendant's assignor. It is contended for first defendant that though the sale to third defendant was a month prior to the mortgage, yet the mortgage began before the sale and Rs. 100 was actually advanced and that the sale was therefore a mere family nominal transaction to cheat the mortgagee.

Fifth defence witness, the monigar of Kadathur, wrote the mortgage deed, exhibit II, and he swears that Rs. 100 was in fact paid one and a half months before the document was written; this then seems to be a fact and we thus find a motive for second defendant's nominal sale to his mother; seeing that we have a motive for a nominal sale and seeing also that the price Rs. 500 was wholly inadequate, I am of opinion that the sale was not real. One has to have a clear view of these undoubted facts in order to judge the meagre direct evidence.

It is clear that no shares of his property were ever divided off by metes and bounds. The mother and son, defendants Nos. 2 and 3, continued to live and occupy the property as they had done in the father's lifetime, and I do not see how any strangers could

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

possibly say which member of the family actually enjoyed what piece of land. Plaintiff's only witness is the karnam who wrote the gift-deed. He swears that third defendant was in possession. He means apparently of the lands in the gift-deed. But as mother and son, defendants Nos. 3 and 2, cultivated and possessed jointly and as the son of a Mussalman mother must have done all the actual work, and as the mother had merely some sort of claim to one-eighth, three-eighths, I do not see how the karnam can say the mother ever possessed actually the particular shares given by the gift-deed.

Second defendant says he gave his mother possession of her separated shares. Third defendant, however, says she never bought anything from second defendant and never paid him Rs. 500 at all. Second defendant gave her one kani of land, and she gave that away in turn to plaintiff who is second defendant's heir.

The lands were always kept intact and enjoyed together by her son and heir. This woman in another deposition on 15th August 1903, in Original Suit No. 1244 of 1902 supported both the sale and gift-deeds. So the only evidence we have of third defendant's possession is her statement on 15th August 1903, which is now contradicted by her statement in this suit; the evidence of second defendant who of course supports the documents which the mortgagee says were intended by second defendant merely to cheat him; and the karnam's evidence that third defendant had possession, and the monigar's evidence that she paid revenue; this does not satisfy me that she ever had exclusive possession under the sale-deed. She and her son kept the property together as in the father's life-time. She probably did pay the revenue. The son probably cultivated. The produce they divided according to their shares. The karnam cannot be in a position to know whether the son's sale-deed took effect or not; and when I find the sale-deed is for almost a nominal value to the vendor's mother; and the transaction is followed by no apparent change of ownership, but is followed a month later by a mortgage begun before the sale-deed of six-eighths of the property, three-eighths of which any how did not belong to the mortgagor, the only conclusion I can come to is that the whole transaction was nominal. Third defendant got no special possession under the sale-deed, but retained merely the joint possession with her son that had

obtained in her husband's life-time, and that having no special possession under the sale-deed she had none to give, and therefore the gift was not valid.

This second appeal coming on for further hearing before ABDUR RAHIM and KRISHNASWAMI AYYAR, JJ., after the return of the finding of the lower Appellate Court upon the further issue referred by the order of this Court, and the case having stood over for consideration the Court delivered the following:—

ABDUR RAHIM, J.—In response to our order of the 6th of May, the District Judge has submitted his finding on the question remitted to him, namely, whether the third defendant in the suit at the time of the gift to the plaintiff had possession of the property. Objection is taken to the manner in which the learned Judge has dealt with the matter and we have also heard the question argued at the bar whether the gift would be invalid under the Muhammadan law even if the donor, the third defendant, was not in possession of the property at the time she made the gift.

We shall first of all dispose of the question of law, and the facts on which it arises appear to be these. One Fakir Nayinar Rowthen died about 1880, leaving as his heirs his wife, the third defendant, the second defendant, his son, and three daughters. There appear to have been certain dealings among the different heirs in respect of their respective shares. But all that we need mention is that in 1884 the second defendant sold a certain share to his wife and in July 1891 he sold the property in question which consists of three-eighths share in certain land to his mother, the third defendant, and in August 1891 he mortgaged the very same property to one Kabundan Selathi Rowthen, uncle of the second defendant's wife; the third defendant on the 20th July 1899 made a gift of the property to the plaintiff in the present suit, the third defendant's grandson, and son of the second defendant. The first defendant is the assignee of Kabundan Selathi Rowthen and obtained a decree against defendants Nos. 2 and 3 in Suit No. 863 of 1902 and obtained possession of the property in execution of the decree. This suit is instituted by the plaintiff who is a minor for recovery of the property by establishment of his title on the basis of the gift of 1899. It has been found on a previous remand by this Court that the sale by the second defendant to the third defendant was *bonâ fide* and valid and we accepted that finding; and we also held that the gift being to a minor and the third defendant

MUNRO AND
ABDUR
RAHIM, JJ.

—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

purporting to retain possession of the property as guardian of the minor, the requirements of Muhammadan law as to the necessity for delivering possession of property, the subject of the gift, to the donee would be satisfied if in fact the third defendant was in possession of the property. Now proceeding on the basis that the third defendant at the time of the gift was not in possession of the property, the position would be this: the subject-matter of the gift is a certain undivided share in immoveable property which the third defendant had bought from the second defendant, but of which she did not obtain possession from the second defendant. But in the deed of gift it is stated—and for the present purpose we will assume incorrectly—that she was in possession of the undivided share, the subject of the gift. It is now settled that under the Muhammadan law as applied in India, a gift of an undivided share in property capable of division is not invalid. See *Mullick Abdool Guffoor v. Muleka*(1), *Muhammad Mumtaz Ahmad v. Zubaida Jan*(2), *Mahomed Buksh Khan v. Hosseini Bibi*(3) and *Ibrahim Goolam Ariff v. Saiboo*(4).

As regards the necessity for delivery of seisin in order to make a gift valid and effective we think that the authorities on Hanafi Law leave no room for doubt on the question. It is stated in Grady's 'Hedaya,' p. 482, second column: "Gifts are rendered "valid by tender, acceptance and seisin. Tender and acceptance are "necessary because a gift is a contract and tender and acceptance "are requisite in the formation of all contracts; and seisin is "necessary in order to establish a right of property in the gift "because a right of property according to our doctors (meaning "Hanafi doctors) is not established in the thing given merely by "means of contract without seisin," and their Lordships of the Privy Council have also laid down the general rule of law on the point to be as stated in this passage (see *Mahomed Buksh Khan v. Hosseini Bibi*(3)). The reason for the rule requiring delivery of seisin in order to complete the gift is that such a disposition of property being without consideration, the donor if he has failed to divest himself completely of every interest in the property he cannot be called upon to do any act in order to give effect to his intention. This is the juristic ground on which the condition a

to delivery of position is based and is stated as the second argument of the Hanafi doctors, at page 482 of Hamilton's 'Hedaya' (Grady's edition) "Secondly gifts are voluntary deeds and if the "right of property were established in them previous to the seisin "it would follow that the delivery would be incumbent on the "voluntary agent before he had voluntarily engaged for it," and this is what is alluded to by the Privy Council in *Mahomed Buksh Khan v. Hosseini Bibi*(1), where they refer to a passage in their judgment in *Kalidas Mulhek v. Kanhaya Lal Pundit*(2). The other authority for the rule in question is a reported precept of the Prophet where he says "a gift is not valid without seisin," see Grady's 'Hedaya,' p. 482. It is true that Inam Malik, the founder of one of the four Sunni schools holds on the analogy of a sale that a gift is effective without seisin, and although it may be a matter for argument whether on a question of this character it is not open to the Courts according to the theory of Sunni Jurisprudence, in a case where the parties are Hanafis, to adopt a rule of law laid down by jurists of one of the others of the four Sunni schools if that rule is more in consonance with substantial justice than the rule laid down by the Hanafi doctors themselves, the question is concluded by the authority of the Privy Council.

But it is however argued that the rule should not be applied in a case where the donor himself is not in possession of the property, because the result of that would be to unduly hamper free disposition of property. On this point also it seems to us that the view of the Hanafi authorities is clearly opposed to the appellant's contention. The law as laid down by them is that unless the subject-matter of the gift is in the possession of a trustee or agent of the donor whose custody is regarded in law as the custody of the donor, the owner of a property, if not in possession, cannot make a valid gift of it or rather a gift made by him will not pass the ownership of the property to the donee until the donee takes possession by the donor's consent. For instance, if the thing is in the hands of a pledgee or a hirer or lessee or any other person whose possession is attributable to the existence of some right or interest of his own in the property, or in the hands of a *ghasib*, that is, a person who has obtained possession of the

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

(1) (1884) I.L.R., 10 Calc., 1112.

(2) (1889) I.L.R., 11 All., 460.

(3) (1888) I.L.R., 15 Calc., 684 at p. 702. (4) (1908) I.L.R., 35 Calc., 1 at p. 21

(1) (1888) I.L.R., 15 Calc., 684 at p. 702.

(2) (1885) I.L.R., 11 Calc., 121 at p. 135.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

property without the consent of the owner, the owner in all such cases cannot make a valid gift. The possession of the second defendant in this case, if after sale he refused to give possession of the property sold by him to the third defendant but continued to enjoy it adversely to the third defendant, would be that of a *ghasib* or trespasser by implication of law. The present case is therefore exactly covered by the rule enunciated by Muhammadan Jurists of the Hanafi school. We have however been referred to the well-known judgment of the Privy Council on the question of gifts of *musha* or an undivided share in the property which lay down the principle that the prohibition of gifts of undivided shares is inapplicable to modern conditions of societies and ought to be confined within the narrowest limits or rather be disregarded altogether, and we have been asked to extend that principle of interpretation to this case. The Privy Council cases referred to are those reported in *Muhammad Muntaz Ahmad v. Zubaida Jan*(1), *Mahomed Buksh Khan v. Hosseini Bibi*(2), and *Ibrahim Goolam Ariff v. Saihoo*(3), and it may be that in the eye of the modern law relating to dispositions of property the two cases stand on substantially the same footing. It is however to be observed that so far as the text already referred to is concerned, its requirement would be satisfied if such possession is given to the donee as the nature of the subject of the gift admits of. Were we however to hold a gift of property to be valid without any seisin at all it would be a direct violation of the precept of the Prophet. The Hanafi doctors no doubt construed the nature of possession to be given as "complete seisin" as they call it and this according to them would not be possible in respect of an undivided share of a property because the right of all co-sharers extends to each part of the thing and there is hence a confusion or mixing up of rights although the law provides modes of enjoyment of an undivided share. The Judicial Committee of the Privy Council however held that this interpretation of the law was narrow and in fact unintelligible *Mahomed Buksh Khan v. Hosseini Bibi*(2); but if we were to hold that where an owner is not in possession of the property being in the hands of a trespasser, he could make a valid gift we should be making a further breach in the rule

(1) (1889) I.L.R., 11 All., 460 (P.C.). (2) (1888) I.L.R., 15 Calc., 684 at p. 702.
(3) (1908) I.L.R., 35 Calc., 1.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMED
ROWTHER
v.
KANDASAWMY
KULATHU
VANDAN.

of Muhammadan law in a case in which the reason given by the Privy Council for not applying the doctrine of *musha* in the circumstances of modern life in India do not hold good to the same extent. And this we should not be justified in doing. In this case there is all the less reason for giving effect to such a contention if the fact be as it is found at present that the third defendant allowed about eight years to elapse from the date of the sale to her without attempting to take possession of the property and falsely stated in her deed of gift that she was in possession. In *Khajooroonissa v. Rowshan Jehan*(1), Sir Robert Collier delivering the judgment of the Privy Council lays down that the forms of Muhammadan law relating to dispositions of property by gift should be complied with before such an alienation can be upheld by the Court (see also *Chaudhri Mehdi Hasan v. Muhammad Hasan*(2)). And we cannot uphold the contention of the learned advocate for the appellant without violating this principle.

The next question is whether the finding of the learned District Judge should be accepted. We find it impossible to accept his finding. The only question he was asked to determine was whether at the time of the gift to the plaintiff the third defendant had possession of the property. We had accepted the finding on the previous remand that the sale was a valid transaction and it was not competent to the learned Judge to treat the validity of the sale as a matter still open for enquiry. The finding of the District Judge that the third defendant was not in possession is entirely the result, as his report shows, of his conclusion that the sale itself was a colourable and nominal transaction. Mr. Harding says that it was not possible for him to make up his mind on the question of possession without considering the whole matter. But we fail to understand why he should find it impossible or difficult to arrive at a decision on the question whether the third defendant was in possession on the date of the gift, proceeding on the hypothesis that the sale itself was *bona fide* and valid. We must therefore ask the learned District Judge to return a fresh finding on the question whether the third defendant at the time of the gift to the plaintiff had possession of the property in dispute. Six weeks for the finding and seven days for objections.

(1) (1877) I.L.R., 2 Calc., 184.

(2) (1906) I.L.R., 28 All., 439 at p. 448.

MUNRO AND
ABDUR
RAHIM, JJ.

FAKIR
NYNAR
MUHAMED
ROWTHER

v.
KANDASAWMY
KULATHU
VANDAN.

KRISHNASWAMI AYYAR, J.—I concur.

In compliance with the order contained in the above judgment, the District Judge of Coimbatore submitted the following fresh finding on the issue referred to him.

FINDING.—In this case I am asked by the High Court to return a finding on the point whether the third defendant was in possession of the plaint properties at the time she is alleged to have gifted them to the plaintiff.

The plaintiff who is a minor happens to be her grandson. It is said she got these lands by right of purchase from the second defendant, her son and the father of plaintiff. The sale to her has been held to be genuine; but did she get possession of the lands covered by it? I think she did not, for within a month of the sale (exhibit A) we find the son mortgaging these lands and others to his wife's maternal uncle for consideration, Rs. 700 of the mortgage amount being paid by the mortgagee before the Sub-Registrar. This document seems to me to be genuine, and the second defendant executed it, because he did not give possession of the plaint lands to the third defendant, his mother, nor had he any intention of doing so. Third defendant herself says that she never purchased and never got possession.

It is recited in the deed of gift (exhibit VIII) that the lands were in her possession at the time, but the document was written for her and such recitals are not evidence of actual possession without independent testimony to confirm them. In that deed of gift she constitutes herself guardian of the minor grandson and administratrix of the very lands she is giving him. She herself says in her evidence that second defendant and his wife were in possession of the lands at the time of her sale (of other lands) to Asanammal and are in possession still. The sale to Asanammal is on the same day as the deed of gift and refer to other lands. The District Munsif found that the sale to Asanammal and the deed of gift to the minor grandson were both executed with the intention of defrauding first defendant who had obtained an assignment of the mortgage to the maternal uncle. I agree with him.

The High Court in second appeal first called on Mr. Broadfoot for a finding as to (a) whether the sale to the grandmother was genuine and (b) whether the gift was valid. Mr. Broadfoot found that the sale, exhibit A, was genuine and that

the gift was not valid. Mr. Harding was then asked to find if the grandmother was in possession of the lands at the time of the gift-deed eight years after the son's sale to her. He found that the grandmother had no special possession under the sale-deed, that the gift was not valid and that the sale itself was nominal. The High Court has asked me to accept the genuineness of the sale and find whether third defendant was in possession at the time of the gift.

As regards the possession the onus is on the plaintiff to prove it. He relies on the recital in the deed of gift and on the evidence of the karnam who attested it. The karnam says that the grandmother was in possession before the gift-deed and even after it for two or three years. It is not clear if he means that the grandmother was in possession of the properties she gifted; and he does not say how he knows that the third defendant was in such possession. He produces no cultivation accounts or revenue collection accounts to prove it. He simply says orally that she was in possession, but cannot say for how many years it was and whether she was in exclusive possession of the plaint lands. The monigar whose duty it is to collect kist says that the grandmother paid Government tax for ten years twenty years ago; subsequently she and second defendant paid together. That is to say that she paid kist up till 1885 alone and then jointly with her son, second defendant. When second defendant was a minor, the grandmother paid all the kist and afterwards she paid kist jointly because she herself had a natural share in the property as widow of the last holder. The monigar also says that he heard that for ten years the grand mother does not live with her son, that is, after 1895. Kandasami, first defendant, says that for the last four or five years the grandmother lives with her daughter (Asanammal) and not with her son.

That is all the evidence as to possession which can be gathered from the record. As already observed by me above, the mere recital in the gift-deed of possession is not proof of possession without other independent testimony to corroborate it. Every document, whether nominal or real, will contain such a recital. Plaintiff, on whom lay the burden of proving possession of the grandmother at the time of the gift-deed in 1899, has not proved the point. Besides I do not believe that the grandmother was given possession by the second defendant under the sale-deed. Exclusive

MUNRO AND
ABDUR
RAHIM, JJ.

FAKIR
NYNAR
MUHAMED
ROWTHER

v.
KANDASAWMY
KULATHU
VANDAN.

MUNRO AND
ABDUR
RAHIM, JJ.
—
FAKIR
NYNAR
MUHAMMED
ROWTHER
v.
KANDASAWMI
KULATHU
VANDAN.

possession of the plaint lands she had not; and the plaintiff has not established that she had even joint possession with her son at the time of the gift. I therefore find that there is no proof that the third defendant, the grandmother, was in possession of the lands at the time she gifted them to her minor grandson.

This second appeal coming on for final hearing after the return of the finding called for by the order of this Court, the Court delivered the following

JUDGMENT.—Accepting the finding we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

ARUMUGAM CHETTY (PLAINTIFF), APPELLANT IN SECOND APPEAL
No. 1195 OF 1908,

v.

RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA
MAHARAJA AIYAR AVARGAL (DEFENDANT), RESPONDENT
IN THE ABOVE.*

Rent Recovery Act (Madras) VIII of 1865, ss. 3, 11—Right of landlord to enhance rent on dry land cultivated with garden crop by wells dug at tenant's cost—No such right in the absence of a contract supported by consideration.

Dry lands liable to pay a fixed rent were cultivated with garden crops by the tenant by means of wells excavated at his cost with the consent of the landlord. The landlord claimed and the tenant for some years paid, an enhanced rate of rent for the crop so raised. In a suit by the tenant to compel the landlord to grant pattas at the usual dry rate, it was contended for the landlord that a contract to pay the enhanced rate must be implied from the payment for a number of years of such rate and that such contract was supported by consideration, as the landlord had consented to the digging of wells and as he had forbore from claiming the varam rate, which he had a right to do under section 11, clause 3, of the Rent Recovery Act. There was no evidence that rent was chargeable according to the nature of the crop raised:

Held (1) that the word 'contract' in section 11 cannot be construed as a mere agreement but as an enforceable contract supported by consideration; (2) that the consent of the landlord not being necessary to entitle the tenant to sink the

* Second Appeals Nos. 1195 to 1270, 1271 to 1347 and 1349 to 1384 of 1908.

well, such consent was no legal consideration for an agreement to pay the enhanced rate; (3) that payment of a fixed rate of rent prior to the sinking of the wells was evidence of an implied contract to pay rent at that rate; and in the absence of evidence to show that the rate was fixed not on the holding but on the nature of the crop and was liable to be altered with a variation in the crop raised; that the existence of such a contract debarred the landlord's claim to varam rates under section 11, clause 3, of the Rent Recovery Act. The promise not to press such an unenforceable claim was no legal consideration.

SECOND APPEALS against the decrees of Arthur F. Pinhey, District Judge of Madura, in Appeal Suits Nos. 388, etc., of 1908, presented against the decision of A. Edgington, Sub-Collector of Dindigul Division, in Summary Suits Nos. 14, etc., of 1905.

The facts for the purpose of this case are fully set out in the judgment.

V. V. Srinivasa Ayyangar for appellants in Second Appeals Nos. 1195 to 1207 of 1908.

The Advocate-General (Hon. Mr. P. S. Sivaswami Ayyar) for respondent in the above.

P. R. Srinivasa Ayyangar for appellants in Second Appeals Nos. 1271 to 1347 and 1349 to 1384 of 1908.

The Advocate-General (Hon. Mr. P. S. Sivaswami Ayyar) for respondent in the above.

AYLING, J.—The sole question for determination in these appeals is the right of the respondent, the Zamindar of Ganta-manaickanur to charge rent at the enhanced rate of eight fanams a guli on lands originally dry, but cultivated with garden crops by means of wells sunk at the tenant's sole cost.

This right was originally based (1) on an alleged custom and (2) on an implied contract. With the former we have now nothing to do. As pointed out by SUBRAMANIA AYYAR, J., in his judgment in this case when it first came before this Court *Arumugam Chetty v. Raja Jagaveera Rama Venkateswara Ettappa* (1). Such a custom even if established would be unenforceable as conflicting with section 11 of Madras Act VIII of 1865; and in *Arumugam Chetty v. Raja Venkatewara Ettappa* (2) the judgment, in upholding the order of remand specifically lays down that the question of custom could not be reopened (*vide also Paramasami Iyengar v. Pusala Tevan* (3)). It has therefore only to be

(1) (1905) I.L.J., 28 Mad., 444. (2) L.P.A. Nos. 35 to 61 of 1905 (unreported).
(3) (1910) 20 M.L.J., 142.

ABDUR
RAHIM AND
AYLING, JJ.
—
ARUMUGAM
CHETTY
v.
RAJA
JAGAVEERA
RAMA
VENKATES-
WARA
ETTAPPA.

ABDUR
RAHIM AND
AYLING, JJ.

ARUMUGAM
CHETTY

v.
RAJA

JAGAVEERRA

RAMA

VENKATES-

WARA

ETTAPPA.

considered whether there is a valid and enforceable contract for the payment of the enhanced rate. The learned District Judge, reversing the decision of the Sub-Collector, has found that there was an implied contract (agreement) in every case, and that it is not void for want of consideration.

The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants (appellants) for a number of years varying from 2 to 40. The corroborative evidence is meagre, but I am not prepared in second appeal to set aside the District Judge's finding in this respect.

The second point stands on a different footing. The necessity for consideration of some sort from implied contract to pay enhanced rent has been pointed out by SUBRAMANIA AYYAR, J., in the clearest manner in his judgment above referred to, and I do not understand it to be seriously disputed by the learned Advocate-General. Nothing to the contrary is contained in either of the judgments referred to by the District Judge. *Natesa Gramani v. Venkatarama Reddi*(1) and *Suppa Pillai v. Nagayasami Thumbichi Naicker*(2). The suggestion that the word 'contract' in the section is loosely used in the sense of 'agreement' cannot possibly be accepted. Of course the consideration may be of the same implied nature as the covenant to pay. But consideration of some kind there must be if the latter is to be treated as an enforceable contract.

Now what is the consideration in the present case? The learned District Judge says that there was "ample consideration," but it is very difficult to see from a perusal of his judgment, what form he considers it to have taken. He agrees with the Sub-Collector that the landlord's permission was not necessary for the tenant to sink a well so that such consent was not the consideration. The only consideration which I can find indicated in paragraphs 14-16 of his judgment is in the shape of an abstention on the part of the landlord from exercising his right to revert to the varam system when the tenant began to cultivate the more valuable crop with the aid of the well water. Of course, if the landlord really had such a right his abstention from resorting to it might be viewed as consideration, but the District Judge appears

(1) (1907) I.L.R., 30 Mad., 511.

(2) (1908) I.L.R., 31 Mad., 19.

to me to have assumed the existence of such a right without any evidence whatever.

The right in question is conferred by clause 3 of section 11 of the Rent Recovery Act and applies only to cases where there is no contract, express or implied, regulating the rates of rent. In the present suits it is admitted that prior to the construction of the wells, the tenants had always been paying at the uniform punjah rate of four fanams a guli for the suit lands, a circumstance which justifies the difference of an implied contract to continue to pay at the rate (*vide Venkatagopal v. Rangappa*(1)).

The learned Advocate-General, however, seeks to meet this objection by arguing that in these cases the money rents were fixed with reference to the particular crop raised, and not on the holding itself; that the payment of four fanams a guli was only for so long as a dry crop was raised; that on the tenant raising a garden crop the implied contract ceased to apply that a new rate had then to be determined, and that, in the absence of a contract regulating it, clause 3 became applicable and the landlord was entitled to claim varam; and that his abstention from so doing forms the real consideration for the tenants agreement to pay the higher rent.

This is precisely the kind of case referred to as conceivable by HUTCHINS, J., in *Venkatagiri Raja v. Pitchana*(2), and if the existence of such a system were established the argument would be perfectly sound. But it is certainly not established here, any more than four was in the case last quoted. In *Suppa Pillai v. Nagayasami Thambichi Naicker*(3), there was a distinct finding in support of it, and the case of *Natesa Gramani v. Venkatarama Reddi*(4) simply lays down that such a system is not illegal and remands the case for evidence as to its existence.

In the present case the District Judge has certainly not found in favour of such a system: all he says is this: "Under clause 3, the local usage would have to be ascertained, and it might very well prove that the local usages was, as appellants originally alleged, to pay different rates according to the crops raised, and not according to the classification of the land."

And, indeed, there is absolutely no evidence in the case to support the existence of such a system. I have already referred

(1) (1884) I.L.R., 7 Mad., 365.

(3) (1908) I.L.R., 31 Mad., 19.

(2) (1886) I.L.R., 9 Mad., 27.

(4) (1907) I.L.R., 30 Mad., 511.

ABDUR
RAHIM AND
AYLING, JJ.

ARUMUGAM
CHETTY

v.
RAJA

JAGAVEERRA

RAMA

VENKATES-

WARA

ETTAPPA.

ABDUR
RAHIM AND
AYLING, JJ.

ARUMUGAM
CHETTY
v.

RAJA
JAGAVEERA
RAMA
VENKATES-
WARA
ETTAPPA.

to the fact that the tenants were admittedly, prior to the sinking of the wells, paying at a uniform dry rate as far back as can be traced. There is nothing to indicate that this charge was variable according to the crops raised and the evidence of the respondent's own manager (defendant's seventh witness) is incompatible with such a suggestion. He says not a word of any variable charge according to the nature of the crop, but speaks of the dry lands being assessed at a uniform rate of four fanams a guli. In fact the learned Advocate-General has to rely solely on passages quoted from the 'Madura District Manual' tending to show that a system of the kind he alleges formerly prevailed in the Dindigul taluk. It is impossible to accept if as established by such means. The passages quoted are of a general nature without reference to this particular village or zamindari and while remarks in a 'District Manual' may legitimately be referred to and are of great service in corroborating or contradicting evidence recorded in any individual case, they cannot take the place of such evidence or be made the sole basis for a finding on a point of this nature.

I am therefore constrained to hold that the finding of the learned District Judge that the agreements to pay the enhanced rent were supported by consideration is unsupported by any evidence, and cannot be upheld.

There is no reason for remanding the suits for a fresh finding after taking further evidence: the question of consideration was most prominently put forward when the suits were last remanded; and if the respondent has not adduced proper evidence he has only himself to thank.

The decrees of the District Judge must therefore be set aside and those of the Sub-Collector restored. The respondent will be liable for the appellant's costs throughout.

ABDUR RAHIM, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

SREE RAJA BOMMADEVARA VENKATA NARASIMHA
NAIDU BAHADUR, ZAMINDAR GARU OF NORTH
VALLUR ESTATE (DEFENDANT), APPELLANT IN BOTH,

1911.
January
18, 24.

v.

SAGGA S. MAYYA (PLAINTIFF), RESPONDENT IN SECOND
APPEAL No. 1125 of 1909,

RAVI SUBBAYYA (PLAINTIFF), RESPONDENT IN SECOND APPEAL
No. 1126 OF 1909.*

Rent Recovery Act (Madras) VIII of 1865, s. 7—Distraint for larger amount than is legally due not good even for the amount due.

Where, after tender by landlord and refusal by the tenant of a patta providing for a larger rent than is really due, the landlord distrains property of the tenant for such larger amount, such distraint will not hold good even for the amount properly claimable.

SECOND APPEAL against the decree of A. C. Dutt, District Judge of Kistna, in Appeal Suits Nos. 749 and 750 of 1907, presented against the decision of H. H. Burkitt, Sub-Collector of Bezwada Division, in Summary Suits Nos. 565 and 566 of 1907.

The facts of the case are fully set out in the judgment.

P. Nagabhushunam for appellant.

T. Prakasam for respondents.

JUDGMENT.—The appellant is the Zamindar of Vallur, and the respondents are his tenants. The respondents refused the patta tendered by the appellant for fasli 1316, and the appellant distrained the respondents' property for arrears of rent for that fasli. The respondents sued to set aside the distraint. Both the lower Courts have found that the tendered patta was improper in that it provided for rent at the rate of Rs. 5 per acre instead of Rs. 4½, the proper rate, and have accordingly given the respondents the decree sued for.

It is now argued on behalf of the appellant that in spite of the tendered patta being improper, the distraint should nevertheless be held valid to the extent of the rent actually due and that the

* Second Appeals Nos. 1125 and 1126 of 1909.

ABDUR
RAHIM AND
AYLING, JJ.

RAJA
VENKATA
NARASIMHA
v.
RAVI
SUBBAYYA.

decrees of the lower Courts setting it aside altogether are wrong. This contention which was considered and rejected by the District Judge is the only one now put forward in support of the appeal.

The question has to be disposed of with reference to the provisions of Act VIII of 1865 as retrospective effect cannot be given to section 53 of Act I of 1908. Section 7 of Act VIII of 1865 enacts that no suit shall be brought and no legal proceedings taken to enforce the terms of a tenancy, unless patta and muchilika have been exchanged or agreed to be dispensed with or unless a proper patta has been tendered. There has been no exchange or agreement to dispense with patta and muchilika in the present case, and the only patta tendered has been found to be improper. The provisions of this section would therefore appear to be conclusive against the appellant.

The appellant however relies on the rulings reported in *Karnam Venkatakrishna Pillai v. Muthialu Reddi*(1), *Periakaruppa Pillai v. The Manager of the Lessees of the Sivaganga Zamindari*(2) and *Ramachandra v. Narayanasami*(3). On the other hand, *Munisami Naidu v. Perumal Reddi*(4), *Bashyakarl Naidu v. Gundapaneni Subbanna*(5) and *Vama Dava Desikar v. Murugesu Mudali*(6) are quoted by the respondents.

In considering the first named cases, it is to be noted that the learned Judges in *Karnam Venkatakrishna Pillai v. Muthialu Reddi*(1) do not profess to discuss the point, but merely remark "It has been held by this Court in recent cases that the attachment is good for the amount actually due." The only recent case to which we are referred is *Periakaruppa Pillai v. The Manager of the Lessees of the Sivaganga Zamindari*(2). But here also, although there is some discussion of adverse rulings, their Lordships' decision appears to be chiefly based on the ground that the question was concluded by the express authority of a still earlier case (*Ramachandra v. Narayanasami*(3)). Turning again to this, the earliest of the cases relied on by the appellant, it will be found that the effect of section 7 of the Rent Recovery Act is not considered at all in connection with the conclusion arrived at. The legality of the distraint in that case was questioned not on the ground that the requirements of section 7 as to the tender of a

(1) (1910) 20 M.L.J., 821.

(3) (1887) I.L.R., 10 Mad., 229.

(5) (1904) I.L.R., 27 Mad., 4.

(2) (1908) I.L.R., 31 Mad., 22.

(4) (1900) I.L.R., 23 Mad., 616.

(6) (1906) I.L.R., 29 Mad., 75.

ABDUR
RAHIM AND
AYLING, JJ.

RAJA
VENKATA
NARASIMHA
v.
RAVI
SUBBAYYA.

proper patta had not been complied with but on the ground that the distraint had been effected for arrears of *two* faslis, the claim for one of which was time-barred under section 2 of the same Act. This is a totally different point, section 7 is not even alluded to in the judgment in that case; and there is nothing to indicate that its provisions were infringed.

On the other hand, *Vama Dava Desikar v. Murugesu Mudali*(1) appears to us to be a distinct authority for the contrary view, which is also in general accord with the principles enunciated by the Full Bench in *Shanmuga Mudaly v. Palnati Kuppu Chetti*(2) and *Bashyakarl Naidu v. Gundapaneni Subbanna*(3). We may also refer to the remarks of SHEPPARD, J., in another Full Bench case, *Munisami Naidu v. Perumal Reddi*(4) to the effect that any landlord who elects to distrain in preference to suing for acceptance of patta "takes his chance of some flaw being discovered in the patta."

Pichuwayengar v. Oliver(5) is another case which is mentioned in *Periakaruppa Pillai v. The Manager of the Lessees of the Sivaganga Zamindari*(6) but distinguished on the ground that it relates to a sale and not to a distraint. But a tenant is certainly aggrieved even by a mere distraint of his property. He can only procure its release by payment of the amount demanded (*i.e.*, more than what is really due); and although he may be entitled to recover damages by a summary suit, he should not be driven to such a troublesome remedy.

In these circumstances we feel justified in following the last noted series of decisions which appear to us to be in accordance with the true meaning of section 7. We therefore agree with the District Judge in holding the distraint to be altogether illegal, and we dismiss these second appeals with costs.

(1) (1906) I.L.R., 29 Mad., 75.

(3) (1904) I.L.R., 27 Mad., 4.

(5) (1903) I.L.R., 26 Mad., 260.

(2) (1902) I.L.R., 25 Mad., 613.

(4) (1900) I.L.R., 23 Mad., 616.

(6) (1908) I.L.R., 31 Mad., 22.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Sankaran-Nair.*

1911.
January 20.

SHAIK MOHIDEEN SAHIB (FIRST DEFENDANT), APPELLANT,
v.

THE OFFICIAL ASSIGNEE, AND AS SUCH, ASSIGNEE OF
THE ESTATE AND EFFECTS OF T. H. KUTBUDDIN
SAHIB AND BROTHERS, THE ORIGINAL RESPONDENTS,
PLAINTIFFS, SINCE ADJUDICATED INSOLVENTS
(PLAINTIFFS), RESPONDENTS.*

*Limitation Act, XV of 1877, ss. 19, 20, 21—Acknowledgment by
one partner binding on others.*

The mere fact that one of the partners of a going concern is in charge of a branch of such concern cannot lead to the inference that such partner has authority to bind the firm by an acknowledgment when pressed for payment.

A letter by one of two partners to a creditor acknowledging the debt due and asking such creditor to correspond with and supply goods to, the other partner on behalf of the firm, cannot be construed as authorising such other partner to make an acknowledgment which will bind the firm for the purposes of limitation.

APPEAL against the judgment of WALLIS, J., passed in the exercise of the ordinary Original Civil Jurisdiction of this Court in Original Suit No. 316 of 1908.

The facts are stated in the judgment of the learned Judge, the material portions of which are as follows:—

This is a suit brought by the plaintiffs against one M. A. O. Sheik Mohideen Sahib and against the second and third defendants as the wife and daughter of one Abubucker Sahib. Mohideen and Abubucker are said to have ordered goods from the plaintiffs and are sued for the price of the goods supplied. Now there is really no contest whatever that the goods were supplied and the only defences to this suit are of a purely technical character. It is said in the first place that the suit is wrongly framed. It is said that the real firm to which the goods were supplied consisted of Sheik Mohideen Sahib, Abubucker Sahib, Sulaiman Sahib, Muhammad Meera Sahib and Kayarohana Chetty. Now I agree with Mr. Grant that the *onus* is certainly upon the

* Original Side Appeal No. 26 of 1909.

defendants who set up a defence of this kind to prove it, because they ought to know better than anybody else who are the members of the firm. It is impossible for outsiders to know who are the members of the firm. And as they must know perfectly well that nobody else could know very well who the members were, I think that the *onus* is on them to establish it by clear and satisfactory evidence if they wish to repudiate the evidence of the plaintiffs who can, of course, only speak to what they very often know from general repute. In the result I am unable to accept the evidence of the defendants. And I accept the evidence of the plaintiffs that the persons with whom they dealt were these two partners Sheik Mohideen and Abubucker. That really disposes of the case, because there is nothing in the other objections. It is said that the whole cause of action did not arise in Madras. Now the order is sent to Madras and if there was any acceptance the acceptance was in Madras and the performance of the contract was in Madras in so far as it consisted in delivery of the goods to the Railway Company, because as Mr. Grant has pointed out under section 91 of the Contract Act, delivery to the carrier is delivery to the vendee. And therefore it appears to me that the contract was both made and performed in Madras. And further it is also clear that payment was to be made in Madras because the creditors were in Madras and there is no other place specified for payment to be made. Then as to the question of limitation, it appears to me that the letter of Abubucker of 16th February 1906 contains a perfectly clear acknowledgment of the indebtedness and even contains a promise to pay. That acknowledgment was made by a partner who was in charge of and conducting the business at Negapatam and therefore it would not come within the meaning of section 21 of the Limitation Act. That section says:—"Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent, of, any other or others of them." But here as I say there was not merely the fact that Abubucker was a partner of Sheik Mohideen but there is also the fact that he was in charge of the business at Negapatam and he was managing it. This section is only aimed at preventing partners who really do not take any active part at all in the business from imposing liability upon others. That shows that it was clearly within the

WHITE, C.J.,
AND
SANKARAN-
NAIR, J.
—
SHAIK
MOHIDEEN
SAHIB
v.
OFFICIAL
ASSIGNEE
OF MADRAS.

WHITE, C.J.,
AND
SANKARAN-
NAIR, J.
—
SHAIK
MOHIDEEN
SAHIB
v.
OFFICIAL
ASSIGNEE
OF MADRAS.

scope of Abubucker's authority to make such an acknowledgment when the firm was being pressed for payment by the plaintiffs. Therefore I hold that there is no bar of limitation. Then there is no other question. The amount is not disputed. There must be judgment for Rs. 6,256-8-6 with interest at 9 per cent. up to date of decree and costs. Interest at 6 per cent. As to the second and third defendants the decree against them will be to the extent of the assets of the deceased Abubucker in their hands.

Against this judgment defendants appealed under clause 15 of Letters Patent.

V. Visvanatha Sastri for appellant.

Nugent Grant instructed by Messrs. Branson and Branson for first respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of Mr. Justice WALLIS in favour of the plaintiffs in a suit for the balance of the price of goods sold and delivered. Pending the appeal the plaintiffs became insolvents and the Official Assignee has been made a party. The only points taken in appeal before us were, a point as to the jurisdiction of the High Court and a point as to limitation. As regards the question of jurisdiction, we are of opinion that the learned Judge was right for the reasons stated in his judgment in holding that the cause of action arose wholly within the local limits of the jurisdiction of the High Court.

The question of limitation is one which is not altogether free from difficulty. But as we have had the benefit of hearing the point fully argued, and have made up our mind with regard to it, we do not think any useful purpose will be served by considering it further. With regard to this question I have come to the conclusion with some reluctance that I cannot adopt the view which the learned Judge has taken and I feel constrained to hold that the plea of limitation has been made out. What is relied on in this case to bar the application of the law of limitation is a letter written by Abubucker Sahib on the 16th February 1906. Abubucker Sahib is dead and he is represented in this suit by his widow and daughter, the second and the third defendants. The learned Judge has held that this letter is an acknowledgment which bars the application of the law of limitation as against the firm of which the deceased Abubucker and the first defendant were members when the letter was written. Explanation II to section 19 of the Limitation Act provides that 'signed' means

WHITE, C.J.,
AND
SANKARAN-
NAIR, J.
—
SHAIK
MOHIDEEN
SAHIB
v.
OFFICIAL
ASSIGNEE
OF MADRAS.

"signed either personally or by an agent duly authorised in this behalf." Section 21 says "nothing in sections 19 and 20 renders one of several . . . partners . . . chargeable by reason only of a written acknowledgment signed . . . by any other . . . of them"—I read the words material for the purposes of the point before us. The law is therefore clear that the mere fact that the acknowledgment is signed by one member of the firm does not in itself render the firm liable on the acknowledgment. The point came before the Bombay High Court in *Premji Ludha v. Dossa Doon Gersey*(1) where Mr. Justice SCOTT observed that in a going mercantile concern the agency of one partner to make an acknowledgment for the purpose of barring the law of limitation against the others was to be presumed as an ordinary rule. Now this case was cited before Mr. Justice WALLIS and his decision appears to have been given following the decision in this case or, at any rate, he took the same view of the law as that taken by SCOTT, J. The learned Judge does not refer to a decision of this Court in *Vala Subramania Pillai v. S. V. R. R. M. Ramanathan Chettiar*(2). We are told that reference was made to this case before Mr. Justice WALLIS but so far as appears from his judgment there is nothing to show that this was so. The case has not been reported in the authorised reports of the time. In that case we held that a part payment by one partner of a going mercantile firm of a debt will not save the operation of limitation under section 21 of the Limitation Act in the absence of evidence to show that, in the course of business the partner had authority to do so on behalf of the firm. Now, following the principle we here lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm. I do not think the decision in *Dalsukhram v. Kalidas*(3) helps the respondents. Can it be said in the present case that the course of business was for one partner to have authority to make an acknowledgment which would bind the firm? WALLIS, J., says that Abubucker, the man who wrote the letter of the 16th of February 1906, was a partner and "there is also the fact that he was in charge of the business at Negapatam and he was managing it." Then he goes

(1) (1886) I.L.R., 10 Bom., 358.

(2) (1909) I.L.R., 32 Mad., 421.

(3) (1902) I.L.R., 26 Bom., 12.

WHITE, C.J.,
AND
SANKARAN-
NAIR, J.
—
SHAIK
MOHIDEEN
SAHIB
v.
OFFICIAL
ASSIGNEE
OF MADRAS.

on to observe: "This section is only aimed at preventing partners who really do not take any active part in the business from imposing liability upon others." In the learned Judge's view it follows from the fact that the man who wrote the letter was in charge of the business at Negapatam that it was within the scope of his authority to make an acknowledgment which would bind his partners when the firm was being pressed for payment. This view, it seems to me with all deference, is not consistent with the rule we laid down in *Vala Subramania Pillai v. S. V. R. R. M. Ramanathan Chetty* (1). And I myself am unable to take the view that from the fact that the partner is actively engaged in the business, and from that fact alone, having regard to the language of section 21 of the Limitation Act, it is to be inferred that he had authority to make an acknowledgment to bar the law of limitation, which would bind the other partners.

Mr. Grant has argued before us that there is something more before us than the fact that the man who gave the acknowledgment managed the business in Negapatam. He has referred to a letter which had been written by the first defendant on the 6th September 1905. This letter was written more than three years before the institution of the suit. I will take it that the letter refers to the plaintiff's claim which is the subject-matter of the present suit. It gives a reason for not having sent the money, it contains a promise that the writer will send the money, it contains an acknowledgment that the money was due. Then it goes on to say "you need not feel anxious" and the letter closes and this is the portion of the letter on which Mr. Grant relies: "the letters you may write to this place hereafter should be addressed to my brother Abubucker Sahib"—that is, the writer of the letter of the 16th February—"you should also purchase and send such goods as he may write to you for." Now Mr. Grant says this ought to be construed as an intimation to plaintiff that the brother of the first defendant was authorised to give an acknowledgment which would bind his partner. It seems to me that the letter amounts to nothing more than an intimation to plaintiff that the debt was admitted to be due, that any further business letters were to be sent to the brother of the first defendant, Abubucker Sahib, and that he had authority to purchase goods on behalf of the firm. Reading

(1) (1909) I.L.R., 32 Mad., 421.

the two letters together I find myself unable to hold that they show an authority to make an acknowledgment which would bar limitation.

With regard to the question of costs though the appeal succeeds the case was complicated by a question as to nonjoinder and the question of jurisdiction, and I think the proper order would be the first defendant will bear his own costs throughout.

The second and third defendants will pay to the Official Assignee the costs of the plaintiff in the Court of First Instance.

The Official Assignee may take his costs of the appeal out of the estate.

SANKARAN-NAIR, J.—I agree.

Messrs. Branson and Branson, attorneys for first respondent.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Munro.

T. SUBBARAYALU CHETTI AND OTHERS (DEFENDANTS Nos. 1, 3, 4 AND 5), APPELLANTS,

1911.
April 7.

v.

T. KAMALAVALLITHAYARAMMA, LATE A MINOR BY M. VARADARAJULU CHETTI, HER NEXT FRIEND, BUT NOW OF AGE (PLAINTIFF), RESPONDENT.*

Hindu Law—Maintenance—Right to maintenance of widow in undivided family enforceable against the whole family and not only against the branch to which the husband belonged.

Where a member of an undivided family, comprising several branches dies, his widow's right to maintenance is enforceable against the whole family and not only against the branch to which her husband belonged and which took by survivorship his undivided share. A suit for partition, subsequent to the widow's suit for maintenance, will not affect her right as aforesaid.

APPEAL from the judgment of Sankaran-Nair, J., dated the 12th day of January 1910, in Civil Suit No. 264 of 1906.

The facts of this case are fully set out in the judgment.

C. V. Anantakrishna Ayyar for appellants.

Messrs. Venkatasubba Ayyar and Radhakrishnayyar for respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of SANKARAN-NAIR, J., awarding the plaintiff Rs. 25 a month by way

* Original Side Appeal No. 9 of 1910.

WHITE, C.J.,
AND
SANKARAN-
NAIR, J.
—
SHAIK
MOHIDEEN
SAHIB
v.
OFFICIAL
ASSIGNEE
OF MADRAS.

WHITE, C.J.,
AND
MUNRO, J.
—
SUBBA-
RAYALU
CHETTI
v.
KAMALA-
VALLI-
THAYARAMMA.

of maintenance and giving a decree in her favour for a sum of Rs. 700 which represents the value of certain jewels which she claimed as her property

Three points were raised on behalf of the appellants. The first was that the decree was wrong inasmuch as it was given against all the members of the family of the plaintiff's deceased husband. The second point was that Rs. 25 a month was too much for her maintenance. The third point was that the learned judge was wrong in giving plaintiff a decree for Rs. 700 for the jewels which she claimed.

I can deal with the second and third points quite shortly and I will take them first. I am not prepared to hold that the learned judge was wrong in assessing the maintenance at that amount. The third point was not seriously pressed by Mr. Ananthakrishna Ayyar. The learned Judge says that he is inclined to accept the evidence of the plaintiff that the jewels claimed belonged to her and accordingly found in her favour. I am not prepared to say he was wrong.

We come now to what is really the important point in this case. The contention on behalf of the appellant is that the Judge was wrong in giving a decree against all the members of the undivided family of the plaintiff's husband. The actual form of the decree is that the first, third, fourth and fifth defendants do pay to the plaintiff her arrears of maintenance and a further sum of Rs. 25 a month and that the arrears and the monthly maintenance be a charge on a certain house, No. 334, Mint Street, which forms part of the family property. Now it appears from the genealogical tree which has been furnished to us that the fifth defendant is the brother of the deceased husband of the plaintiff and represents the plaintiff's husband's branch of the family. The plaintiff's husband was the grandson of the common ancestor Rangiah Chetti, he and the fifth defendant representing one branch of the family. The fourth defendant is the grandson of the common ancestor through another son and the first defendant is a son of the common ancestor. The third defendant is the grandson of the common ancestor through another son. There are thus four branches of the family of which Rangiah Chetti was the common ancestor.

After the presentation of the plaint by the plaintiff in this case, an agreement was come to amongst the surviving members of the family for a partition of the family property. It is fairly

obvious that this was a counter move to the plaintiff's claim for maintenance. Of course the other members of the family are perfectly entitled in law to take any steps which the law allows to defeat a claim for maintenance which is raised by a widow of a deceased member of the family.

In regard to the partition agreement the learned Judge observes that no transaction amongst defendants subsequent to the plaint can prejudicially affect the plaintiff's claim and her claim must therefore be treated as that of a widow of a member of an undivided family. It was said on behalf of the respondent that the learned judge might have put the case higher than he did. His reference to the presentation of the plaint was of course with regard to the argument that was presented to him in the case, and it may well be that he could have put it that a completed partition among the defendants before the suit was instituted would not defeat the claim of a widow for maintenance. However it is not necessary for me to discuss that question. I prefer to deal with this case on the facts that actually arise. The case we have to deal with is a case where a widow presents a plaint for maintenance against the surviving members of her deceased husband's family, and after the institution of the suit, as a matter of fact in this case after the settlement of issues, a partition is arranged between the members of the family. Mr. Ananthakrishna Aiyar contended that the proposition of the learned Judge was wrong. He relied upon the authority of the decision in *Hemangini Dasi v. Kedarnath Kundu Chowdhry*(1). In that case there is to be found on page 766 this passage: "Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed in accordance to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation." In the course of the judgment reference is made to a passage in *Dayabhaga*, chapter III, section 1 referred to at page 764 of the report. It seems perfectly clear that the decision was given with reference to *Dayabhaga* law and with reference to the special facts of that particular case, where there were several groups of sons, and

WHITE, C.J.,
AND
MUNRO, J.
—
SUBBA-
RAYALU
CHETTI
v.
KAMALA-
VALLI-
THAYARAMMA.

(1) (1889) I.L.R., 16 Calc., 758.

WHITE, C.J., the right to maintenance of their mothers had to be decided. I do not think the judgment in that case is binding upon us in any way with reference to the question which we have to decide under the mitakshara law as administered in this Presidency. I am of opinion therefore that the learned Judge was perfectly right when he says that the transaction subsequent to the suit cannot prejudicially affect the plaintiff's claim and that her plaint must be treated as that of a widow of a deceased member of an undivided family.

Mr. Ananthakrishna Aiyar's argument was this, as I understood it, that the share or interest of the deceased husband of the plaintiff passed not to the members of the undivided family as a whole but to the surviving member of that branch of the family of which he and the fifth defendant were members and that the decree against the other members of the family was wrong. In support of that proposition he relied upon an observation of Mr. Justice BHASHYAM AYYANGAR in the case of *Jayanti Subbiah v. Alamelu Mangamma* (1) the observation appearing on page 48. The learned Judge there says: "When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property such portion of course not exceeding her husband's share or interest therein." Now Mr. Ananthakrishna Aiyar contended that the words "share or interest of the deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners" were only meant to apply to surviving co-parceners who derived an immediate benefit from the fact of their being the survivors in respect of the share or interest of the deceased member of the family. That is to say to put the case concretely with reference to the facts of this case, he contended

(1) (1904) I.L.R., 27 Mad., 45.

that the 'surviving co-parcener' meant the fifth defendant, the other member of the plaintiff's branch of the family, and not the other members of the undivided family. The expression 'into the hands of the surviving co-parceners' is of course figurative because nothing but an intangible share passes by way of survivorship. It is no doubt true here the fifth defendant's share increases *eo instanti* by right of survivorship on the death of the only other member of his branch of the family, and that the shares of the other members of the family do not increase *eo instanti*.

But I am not prepared to hold that the words of the learned Judge were intended to apply to the members of the branch of the family of which the deceased man was a member, and not to the members of the joint family generally.

We have been referred to various text books and authorities by the learned vakil for the respondent and I daresay he would have cited more if we had not stopped him. I may refer to a few of them. I shall first take paragraph 470 in Mayne's book on 'Hindu Law': "Having ascertained what property there is to divide the next step is to ascertain its amount. For this purpose it is necessary first to deduct all claims against the united family for debts due by it, or other charges on account of maintenance, marriages or ceremonies, which it would have to provide for, if it remained united." So the obligation to maintenance is placed on exactly the same basis as an obligation to pay any other family debt.

Then in Bhattachariyar's 'Law relating to Hindu Joint Family', edition of 1885, at page 390, the learned author observes: "I have already noticed that in many instances the right of a family member to maintenance founds itself upon two or three relationships. Thus since a mitakshara family may be composed of brothers or cousins of the first degree or those of second or third degrees; as soon as any of the members dies, his widow as such gets maintenance from all the surviving members together."

In West and Buhler on page 791, the learned authors say: "Other liabilities, that is provisions for the maintenance or portions of persons not entitled to shares may be distributed by agreement amongst the co-sharers. But the estate at large is liable, at least in the hands of the members of the family making a partition; and co-parceners who desire to limit their responsibilities must obtain the assent of the persons interested."

WHITE, C.J.,
AND
MUNRO, J.
SUBBA-
RAYALU
CHETTI
v.
KAMALA-
VALLI-
THAYARAMMA.

WHITE, C.J.,
AND
MUNRO, J.

SUBBA-
RAYALU
CHETTI
v.
KAMALA-
VALLI-
THAYARAMMA.

I do not propose to cite more authorities.

With regard to so much of the decree as directs that the maintenance will be a charge on the house, No. 334, Mint Street, we are not satisfied that the sum of Rs. 25 a month, which the learned Judge has awarded to the plaintiff, is more than the value of the share of her deceased husband or the income derivable therefrom. It may be that a decree would not be enforceable against a member of a joint family which gave something more than the interest of the deceased husband which passed by survivorship to the surviving members. But we have not to consider this. Rs. 25 a month does not represent more than the share to which the husband would have been entitled to if during his lifetime he had obtained partition of the joint family property. I think the learned Judge was right and I would dismiss the appeal with costs.

MUNRO, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Abulur Rahim.

CHINNASAMI PILLAI alias SUBRAMANIA PILLAI
(PLAINTIFF), APPELLANT IN APPEAL No. 68 of 1906,

v.

KUNJU PILLAI alias MUTHUSAMI PILLAI AND OTHERS
(DEFENDANTS Nos. 1 to 4, 6, 7, 11, 12, 17 to 24, 26 to 30,
32 to 35, 45 to 50, 55 to 68 AND LEGAL REPRESENTATIVES
OF DEFENDANTS Nos. 58 AND 68), RESPONDENTS IN THE ABOVE.*

ANNAMALAI PILLAI AND ANOTHER (PLAINTIFFS), APPELLANTS,
IN APPEAL SUIT No. 73 of 1907,

v.

KUNJU PILLAI AND OTHERS (DEFENDANTS Nos. 3 to 6), RESPONDENTS
IN THE ABOVE.*

Hindu Law, succession—Mitakshara Law—Succession among collateral sapindas—'Brother's son' in Mitakshara does not include brother's grandson—Under Mitakshara Law, test in determining priority among unenumerated heirs is not spiritual efficacy but nearness of relationship—Brother's great-grandson succeeds in preference to uncle's grandson.

The word 'sons' in the text of the Mitakshara, chapter II, section I, verse 2, section IV, verses 7 and 8, and in section V, verse 1, should not be given an

* Appeals Nos. 68 of 1906 and 73 of 1907.

1910.
November
24, 25, 28.
December
1, 2.

1911.
April 4.

extended meaning so as to include the grandsons. In enumerating therefore the heirs in the ascending line or among collaterals in the passages above stated, Vignaneswara did not mean to include in the word 'sons,' the grandsons as well, whether of the brother, the paternal uncle or the great-uncle. Such grandsons cannot claim rights of inheritance as heirs enumerated in the above texts.

Lakshmi Narasamma v. Jagannadham, [(1882) (I.L.R., 5 Mad., 291), approved.

Kalian Rai v. Ramachendru, [(1902) (I.L.R., 24 All., 128), not followed.

In the case of competition between sapindas not enumerated in the above texts, the nearest sapinda entitled to succeed must be determined not by considerations of superior religious efficacy but by nearness of relationship and preference should be given to the sapinda belonging to the nearer line. The great principle pervading the law of inheritance under the Mitakshara system is that the nearer line excludes the more remote. The brother's great-grandson succeeds in preference to the uncle's grandson.

APPEALS against the decrees of W. Gopalachariar, Subordinate Judge of Trichinopoly, in Original Suits Nos. 31 and 17 of 1905, respectively.

The facts of this case are fully set out in the judgment.

P. R. Sundara Ayyar and S. Gopalaswami Ayyangar for appellant in Appeal Suit No. 68 of 1906.

The Hon. The Advocate-General for respondents Nos. 32 and 49 in the above.

V. C. Seshachariar for respondents Nos. 26 to 30, 33 and 38 in the above.

K. Srinivasa Ayyangar, S. Muthiah Mudaliar, R. Narayanaswami Ayyar and S. Ramaswami Ayyar for thirty-second respondent in the above.

T. Natesa Ayyar for respondents Nos. 34, 42, 43, 44, 46, 47, 48 and 52 in the above.

T. R. Venkatarama Sastri for second respondent in the above.

T. Natesa Ayyar for appellants in Appeal Suit No. 73 of 1907.

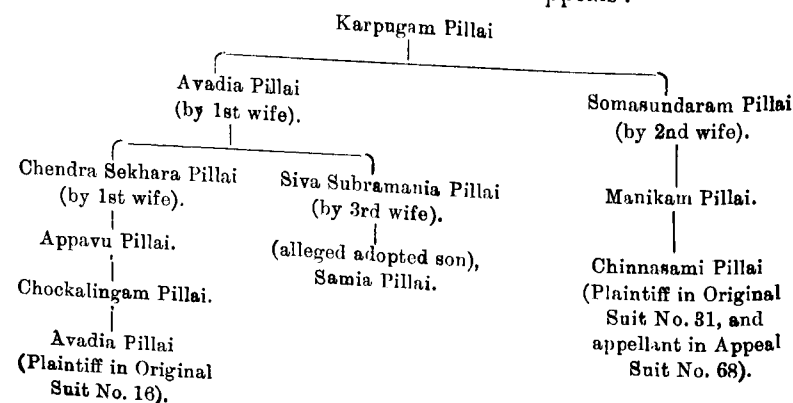
T. R. Venkatarama Sastri for second respondent in the above.

JUDGMENT.—The question involved in these appeals is one relating to succession under the Hindu Law and has arisen among certain sapindas of one Samia Pillai alleged to have been adopted by one Siva Subramania Pillai. There are several claimants to the properties which originally belonged to Siva Subramania Pillai who died in 1844, but the dispute arose only on the death of the widow of Samia Pillai in 1900. The genealogical tree, exhibit A, shows in full the relationship of the parties in all the suits to the deceased, but if the claim of Avadia Pillai, the plaintiff in Original Suit No. 16, is entitled to preference, as held by the

BENSON
AND
ABDUR
RAHIM, JJ.
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI

BENSON
AND
ABDUR
RAHIM, JJ.
—
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

Subordinate Judge, over the claim of Chinnasami Pillai the plaintiff in Original Suit No. 31 and the appellant in Appeal No. 68, then, it is conceded, the plaintiffs in the other suits would have no right to the properties. We have come to the conclusion that Avadia Pillai's claim is preferable to that of Chinnasami Pillai, and on this view the following table shows the relationship of the parties sufficiently for the purposes of these appeals :—



For the purpose of this enquiry it would make no difference whether succession is reckoned from Samia Pillai or from his adoptive father, Siva Subramania Pillai. It will be observed that Avadia Pillai is the great-grandson of a brother of Siva Subramania, while Chinnasami Pillai is the grandson of a paternal uncle of Siva Subramania, the common ancestor of all being Karpugam Pillai, the grandfather of Siva Subramania. Both Avadia Pillai and Chinnasami Pillai are, therefore, removed from Siva Subramania by an equal number of steps, and while Avadia Pillai belongs to a nearer line, Chinnasami Pillai is entitled to offer full oblations to the common ancestor of himself and Siva Subramania, while Avadia Pillai is entitled to offer only divided oblations to the common ancestor of Siva Subramania and himself. Mr. P. R. Sundara Aiyar who appeared in support of Chinnasami's claim argued that in the passages in the Mitakshara where Vijnaneswara enumerates the heirs in the ascending line or among the collaterals he means to include in the word 'sons' the grandsons as well, whether of the brother, the paternal uncle or the great uncle. If this interpretation be accepted, then Chinnasami would be included within the list of enumerated heirs and as such would have precedence over Avadia Pillai. The learned vakil for

Chinnasami, besides relying upon the language of the text of the Mitakshara, also relies upon the superior benefit of oblations and the analogy to the case of great-grandsons. The learned Advocate-General who appeared to support Avadia Pillai's case disputes the correctness of the interpretation which the appellant seeks to put on the text, and argues that spiritual benefit affords no test according to Vijnaneswara, either of heirship or of preference among persons who are within the category of heirs. He contends that where the text is silent the nearness of sapindaship in the sense of the author of the Mitakshara is determined by the nearness of the line of descent from the common ancestor.

The question as to what is the proper construction of the texts of the Mitakshara relating to this matter was very fully considered by this Court in *Suraya v. Lakshminarasamma* and *Lakshminarasamma v. Jaganadham* (1) per TURNER, C.J., and KINDERSLEY, J., and recently by the Allahabad High Court in *Kalan Rai v. Ramchendra* (2) per BURKITT and CHAMIER, JJ. According to the former the expression 'brothers' sons' does not include brothers' grandsons, while the learned Judges in the Allahabad case hold the opposite view. Of the modern writers on Hindu Law Mr. V. N. Mandlik of Bombay (see his 'Hindu Law,' pages 360, 361 and 378); Mr. G. C. Sirkar (see his 'Hindu Law,' 3rd edition, page 260); Messrs. West and Buhler (see their 'Digest of the Hindu Law of Inheritance' at page 124); Dr. Jolly (see his 'Hindu Law of Partition and Inheritance,' page 208); Mr. Battacharya (see his 'Commentaries on Hindu Law,' page 444); Mr. Sarvadhikari (see his 'Principles of the Hindu Law of Inheritance,' page 422, and 'Table of Succession No. 1' appended to section X); and Mr. Mayne (see his 'Hindu Law,' 7th edition, page 775); all are of opinion, though some are more emphatic and clear on the point than the others, that the brother's grandson is not one of the heirs enumerated in the Mitakshara, while Shyama Churn Sircar alone (see 'Vyavastha Chandrika,' page 178) can perhaps be said to hold the opposite view. Some of these learned authors, however, would place the brother's grandson next after the nephew on other grounds.

Among the commentaries which are regarded as authoritative in Southern India or in the Mitakshara school generally, other

BENSON
AND
ABDUR
RAHIM, JJ.
—
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

(1) (1882) I.L.R., 5 Mad., 291. (2) (1902) I.L.R., 24 All., 128 at pp. 132-134.

BENSON
AND
ABDUR
RAHIM, JJ.
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

than the Mitakshara itself, the *Saraswati Vilasa* (see Translation of the Rev. Thomas Foulkes, placita 581-589, pages 116-117), the *Madhaviya* (see Translation by Mr. A. C. Burnell, paras 40 and 41, pages 27 and 28), the *Smrithi Chandrika* (see Translation by Mr. T. Krishnaswamy Iyer, chapter XI, section V, pl. 8, pages 209-210), the *Subhodhini* by Visveswara (see Mandlik's 'Hindu Law,' pages 360 and 361) do not assign to the brother's grandson a place after the brother's son, while Apararka (see Mr. Sarva-dhikary's 'Principles of the Hindu Law of Inheritance,' pages 427-428), Nanda Pandita (see *ibid.* page 481) and Varadaraja (see his *Vyrahara Nirnaya* translated by Burnell, page 36) place the brother's grandson immediately after the brother's son.

As for the text of the Mitakshara itself we agree with the learned Judges who decided *Surya v. Lakshminarasamma* and *Lakshminarasamma v. Jaganadham*(1) that Vijnaneswara did not mean to include the brother's, the paternal uncle's or the great-uncle's grandsons in the list of heirs named by him and that the word 'sons' in the text of the Mitakshara, chapter II, sec. I v. 2, sec. IV v. 7 and 8, sec. V v. 1, should not be given an extended meaning so as to include the grandsons. The learned author in the passages referred to was laying down the order of succession and it is not to be presumed, especially in such connection, that he would use the word 'sons' in its secondary sense rather than in its primary sense unless there are good reasons for holding the contrary. We find no such reasons. Much reliance has indeed been placed on the analogy of the case of the great-grandson of the propositus, who admittedly has a place in the same category of heirs as the sons and grandsons. But chapter I, section I, pl. 3, expressly mentions sons of the grandsons and further the succession in the case of lineal descendants is what is called unobstructed while the succession of collaterals is obstructed, a distinction on which Vijnaneswara himself lays emphasis in the passage last cited. The learned Judges of the Allahabad High Court in dealing with the question of interpretation rely mainly (see *Kalian Rai v. Ram Chandar*(2) on the opinion of Mr Harrington as set out in *Rutchepetty Dutt Iha v. Rajunder Marain Rai*(3), but the case which Mr. Harrington had to deal

(1) (1882) I.L.R., 5 Mad., 291. (2) (1902) I.L.R., 24 All., 128 at pp. 132-134.
(3) (1839) 2 M.J.A., 132 at pp. 154-158.

with raised only the question whether a man lineally descended in the sixth degree from the ancestor of the deceased in the sixth degree was entitled to succeed at all, his title being denied by the rival claimant, a maternal first cousin of the deceased. Mr. Harrington after an elaborate discussion of the texts came to the conclusion that the paternal kindred were entitled to the inheritance, according to the Mithila school of the Hindu Law, before the maternal kindred who would be bandhus or kinsmen belonging to a different gotra or family, could be admitted. The only proposition which he had to establish was that, according to the Mitakshara, the right of the sapindas to succeed to the inheritance in preference to persons belonging to the class of bandhus is not confined to the sapindas specifically named by Vijnaneswara and Mr. Harrington was not called upon to consider any question of preference among the sapindas themselves. He no doubt (see pages 157 and 158 of the report) says that the term 'putra,' and the words 'santana' and 'sunava' should be understood as generic terms for the male issue or descendants, but all that he wanted to prove was that in the Mitakshara sapindaship is extended to the seventh degree, and, as he himself points out, the provisions of chapter II, section 5, paragraphs Nos. 5 and 6, expressly confer the rights of succession on all sapindas. We may also observe that Mr. Harrington apparently did not notice that Mr. Colebrook's translation of the word 'sapinda' as one connected by funeral oblations is incorrect as has now been clearly proved (Mayne's 'Hindu Law', 7th edition, paragraph 510), *Lallubhai Bapubhai v. Mankuwarbahi*(1) and the same case by the Privy Council, *Lallubhai Bapubhai v. Cassibai*(2) and he further relies in support of his reasoning on Jimuta Vahana and texts which have no authority in the Mitakshara school of law as prevalent in this presidency. If Mr. Harrington's opinion was to be accepted in its full logical conclusion and not confined to the question he had to consider, the result would be that the descendants of the father up to the 7th degree would exclude the paternal grandmother and grandfather expressly mentioned by Vijnaneswara, and similarly the descendants of the grandfather up to the 7th degree must be exhausted before the claims of the great-grandfather and his sons and grandsons could be admitted and so on. Indeed the learned

BENSON
AND
ABDUR
RAHIM, JJ.
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

(1) (1878) I.L.R., 2 Bom., 368 at p. 431. (2) (1881) I.L.R., 5 Bom., 110 at p. 121.

BENSON
AND
ABDUR
RAHIM, JJ.
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

Judges of the Allahabad High Court would seem prepared to go as far as that, though it was not necessary for them to decide that point. But it seems to us that such an interpretation would be opposed to the consensus of opinion among lawyers dealing with the Mitakshara school of law as prevalent in this presidency. We may mention that the learned vakil for the appellant in Appeal No. 68 would not for obvious reasons support such a construction, according to which his client's claim must be postponed to that of Avadia Pillai. We may also mention that the other cases relied on in *Kalian Rai v. Ramchandrar*(1), viz., *Kureemchand Gurain v. Oodung Gurain*(2) and *Oorhya Koor v. Rajoo Nye Soakool*(3) only decided that a brother's grandson may be an heir, though in the former case Mr. Justice Jackson in arriving at the conclusion relied on Mr. Harrington's view that the word 'sons' in the Mitakshara should have an extended meaning. We are, however, unable to accept that construction and agree with the learned Judges in *Surya v. Lakshminarasamma*(4), that the word should be understood in its primary and limited sense.

The next question is which of the two claimants is the nearer sapinda, according to the principle enunciated in verse 3, section III, chapter II of the Mitakshara—"To the nearest sapinda the inheritance next belongs." The author of Mitakshara throws no further light and among the other commentators there is divergence of opinion as to the place to be assigned to the brother's grandson. Apararka, a commentator of the Yagnavalkya Smriti, the same text of which the Mitakshara is a commentary, would hold that among the gotrajas nearness is to be reckoned according to the comparative efficacy of spiritual offerings (see Sarvadhikari's "Hindu Law," pp. 427—8). Varadaraja lays down that in default of brother's sons, brother's grandsons succeed but does not mention the principle on which he bases this rule (see "Burnell's Translation," p. 36). Nanda Pandita holds that the three successive descendants of the father should be exhausted first, then the three descendants of the grandfather and then of the great-grandfather, and so on, relying on the text of Manu, that the fifth has no concern with funeral oblations (see Sarvadhikari's "Hindu Law," p. 481). The Smriti Chandrika (see Ch. XI, Sec. V, paragraphs

(1) (1902) I.L.R., 24 All., 128.

(3) (1870) 14 W.R., 208.

(2) (1866) 6 W.R., 158.

(4) (1882) I.L.R., 5 Mad., 291.

BENSON
AND
ABDUR
RAHIM, JJ.
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

2 and 8) may be said to support the respondent's claim, while the Saraswati Vilasa, Madhaviya, Subhodini and Viramitrodaya, though they do not place the brother's grandson in the list of enumerated heirs, do not express any opinion as to what is his proper place among the gotrajas. The learned Advocate-General urges that Apararka's authority is acknowledged chiefly in Cashmere and that the learned commentator makes no reference at all in his writings to the Mitakshara (see "Mayne," p. 28), which is the governing authority in the south, while the Vaijayanti of Nanda Pandita (who lived in the 17th century) is a commentary on Vishnu Smriti and both writers are saturated with the notion of spiritual benefit which is not adopted in the south. As regards the value of the opinion of the author of the Smriti Chandrika on this point, Mr. P. R. Sundara Ayyar urged that his scheme of succession is so substantially at variance with that of Vijnaneswara that he cannot be relied upon as a safe guide in this connection. That the Smriti Chandrika's rule relating to the succession of ascendants and collaterals is in many respects different from that of the Mitakshara is apparent and is not denied by the Advocate-General and that fact must deprive the view expressed in that commentary, in so far as it represents the opinion of its author, of much weight in dealing with the present question. But the statement by that commentator that according to Vijnaneswara the right of the brother's grandsons must be postponed cannot altogether be ignored. As regards Apararka he is, like Vijnaneswara, a commentator of Yagnavalkya's Smriti and his views are very similar to those of the Mitakshara and we think that his work may be usefully consulted on points on which the Mitakshara is silent, while Varadaraja's Vyavahara Nirnaya is a supplementary authority in southern India (see "Mayne," paragraphs 26 and 27 and "Burnell's Preface to Vyavahara Nirnaya"). But we should not be justified in accepting the opinion of those commentators if such opinion is opposed to a clear principle of succession established by the Mitakshara as interpreted in this Presidency. Of the modern writers, Mr. Sarvadhikari would include the great-grandsons of each ancestor as nearer sapindas on the ground mainly of superior spiritual benefits which they can confer and as such having a preferential right over other unenumerated sapindas; Dr. Jolly would place the great-grandson of an ancestor on the list of the compact series of heirs relying on the analogy of a man's own

BENSON
AND
ABDUR
RAHIM, JJ.
—
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

great-grandsons; Mr. Bhattacharya would give him preference apparently both on the analogy of the great-grandson of the propositus himself and on the principle of spiritual benefit. Mr. V. N. Mandlik (see his "Hindu Law," p. 378), Messrs. West and Buhler ("Hindu Law," p. 114) and Mr. G. Sircar (see his "Principles of Hindu Law", pp. 261 and 262), would after the enumerated heirs, first exhaust the man's own descendants from the third to the sixth generation, then the father's line from the third to the sixth descendant, then the grandfather's line from the third to the sixth descendants, acting on the principle that the nearer line should exclude the more remote. Mr. Shyama Churn Sircar ("Vyavastha Chandrika", p. 178) says that though the brother's grandson is not clearly mentioned in the Mitakshara and other digests in Sanskrit, yet it has been determined—referring to the rulings of the Calcutta High Court which have already been noticed—that he succeeds in default of a brother's son, because the term "brother's son" is inclusive of the brother's grandson. Mr. Mayne cannot be said to have expressed any decided opinion on the point.

The real point, therefore, on which the decision of the question depends is whether the superiority of spiritual benefit or the nearness of line is the determining test as to who should be deemed the nearer sapinda. We have already indicated that mere analogy to the case of the great-grandson cannot be a very satisfactory guide in this connection.

That Vijnaneswara laid much stress on the nearness of line in framing his scheme of succession cannot admit of any doubt, and is patent from the order in which he arranges the heirs both in the ascending line and among the collaterals. In fact, as stated in very emphatic terms in *Balusami Pandithar v. Narayana Rao*(1), the first of the great principles pervading the law of inheritance under the Mitakshara system is that the nearer line excludes the more remote (see also *Krishna Aiyangar v. Venkatarama Aiyangar*(2)). Should this clear principle then be outweighed so far as this Presidency is concerned by considerations of the greater or less capacity of rival sapindas to confer spiritual benefit on the deceased? We think not. Nothing is more clearly established than that the author of the Mitakshara, which is the supreme authority in this province, would generally allow very little, if any

(1) (1897) I.L.R., 20 Mad., 342 at p. 348. (2) (1906) I.L.R., 29 Mad., 116.

BENSON
AND
ABDUR
RAHIM, JJ.
—
CHINNASAMI
PILLAI
v.
KUNJU
PILLAI.

force to the theory of spiritual benefit in his scheme of succession and as far as the succession of sapindas goes, nowhere does he seem to rely upon any such principle, whether in determining who is entitled to succeed as a sapinda or which of the several sapindas should have a preferential right. He defines sapindas as men who are connected through particles of the same body and not by funeral oblations and in the whole of the law of inheritance as propounded by him in the Mitakshara, at least according to the interpretation it has received in this Presidency, the tests of heirship are consanguinity and propinquity, and not the capacity to confer spiritual benefit. In many cases the two elements are combined in the same person, but, if they are not so combined, the person who is nearer in relationship, as ordinarily understood, is given preference (see the discussion in Mayne's 'Hindu Law,' 7th edition, paras. 509 to 511). Much reliance has been placed on a dictum of their Lordships of the Privy Council in *Bhyah Ram Singh v. Bhyah Ugur Singh*(1), to the effect that the question of preference is founded on superior efficacy of oblations, but the observation was made in a case governed by the Benares school of law and their Lordships had not to consider in that case the question whether the nearness of line or the capacity to confer greater spiritual benefit should determine the preferential right to succession. It may be that, all other tests being equal, the superior efficacy of oblations would be a legitimate ground for giving preference, though it is difficult to conceive of a case among the sapindas in which the nearness of line would not be present as a determining factor. As pointed out in *Muthusami v. Muthukumarasami*(2), the question may arise among bandhus of the same class and then the quality or the quantity of the spiritual benefit which they confer on the propositus may be a good ground for preference. The only rule which we need lay down in the present case is that, where the competition is between two collateral sapindas not included among the enumerated heirs, preference should be given to the sapinda belonging to the nearer line.

The judgment of the Subordinate Judge is, therefore, confirmed and Appeals Nos. 68 and 73 are dismissed with costs. The costs will be divided among the respondents in proportion to the interests which they claim in the property.

(1) (1870) 13 M.L.A., 373 at p. 392. (2) (1898) I.L.R., 16 Mad., 23 at p. 30.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911.
February 28.
March 3.

THE ORIENTAL GOVERNMENT SECURITY LIFE
ASSURANCE, LIMITED (FIRST DEFENDANT), APPELLANT,

v.

VANTEDDU AMMIRAJU AND OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

*Policy of Life Insurance, money payable under—Such money forms part of estate
of assured and is recoverable by his representatives.*

Where the assured does not, in his lifetime, create any trust in respect of the money payable under a policy of Life Insurance for the benefit of his wife and children, such money, in cases where the provisions of the Married Woman's Property Act do not apply, forms part of his estate and is recoverable by his legal representatives.

The contract between the Company and the assured gives no right of action to the beneficiaries named. Where the Company refuses payment on the death of the assured, the legal representatives and not the beneficiary will be entitled to enforce the contract.

The Company will be bound to pay the amount to a person who has obtained a succession certificate under section 16 of the Succession Certificate Act.

Cleaver v. Mutual Reserve Fund Life Association, [(1892) 1 Q.B., 147], referred to.

APPEAL against the decree of M. O. Parthasarathy Aiyangar, District Judge of Gōdāvari, in Original Suit No. 55 of 1905.

The facts for the purpose of this case are fully set out in the judgment.

D. M. C. Downing for appellants.

The Hon. Mr. T. V. Seshagiri Ayyar for first and fourth respondents.

JUDGMENT.—This is an appeal from the decision of the District Court of Rajahmundry in a suit by the four sons of one Nagayya against the Oriental Government Life Assurance Company to recover the amount alleged to be due to them on a life insurance policy dated the 9th December 1896, executed by the company in favour of the said Nagayya. The policy was intended for the

benefit of Nagayya's wife and children. He died in 1902, leaving four sons and two daughters. The sons were all minors. A succession certificate, exhibit B, was obtained on their behalf by their maternal uncle as their guardian for the amount due on the policy. The four sons claimed to be entitled to the amount to the exclusion of the two daughters of Nagayya on the ground that the policy was the ancestral property of Nagayya. But the Company repudiated their exclusive claim, being of opinion that under the contract of insurance all the children of Nagayya including the daughters were entitled to the amount due under the policy, exhibit I, in the case. This document sets out that the insurance was intended for the benefit of Nagayya's wife and children and the Company undertook on the death of Nagayya to pay the amount due to "the trustee or trustees who may be appointed by the assured in terms of the Married Woman's Property Act of 1874 by separate writing duly executed by him and of which the Company shall have due notice given to them in trust for the benefit of his wife Winitesthu Bowaramma and children by her marriage and in default of any such trustee or trustees to the beneficiary or beneficiaries, if she, he or they be of age and otherwise capable of giving a discharge to the Company and, if any one or more of them be not of age, then jointly those of the beneficiaries who shall be of age and to the legal guardian of such of them as shall not be of age". We may point out that the Married Women's Property Act is not applicable to Hindus. The Company overlooked this important circumstance and a printed form of policy appropriate to cases to which the Act would be applicable was used for the occasion. One of the daughters died subsequently, and the Company required the production of an order appointing some one as guardian to the minors under the Guardian and Wards' Act, VIII of 1890, and a succession certificate for the share which according to them was due to the deceased daughter, and they took up the position that the certificate granted for the policy amount as a debt due to the deceased Nagayya was of no use (see their letter exhibit E, dated the 6th October 1904, to the plaintiff's pleader Mr. Venkata Reddi). The first plaintiff on the 17th October 1905 wrote to the Company stating that he had attained majority, that he was the guardian of his minor brothers under the Hindu Law and was entitled to receive the policy money without any order appointing

BENSON
AND
SUNDARA
AYYAR, JJ.
—
ORIENTAL
GOVERNMENT
SECURITY
LIFE
ASSURANCE,
LTD.
v.
VANTEDDU
AMMIRAJU.

* Appeal No. 138 of 1908.

BENSON
AND
SUNDARA
AIYAR, JJ.

ORIENTAL
GOVERNMENT
SECURITY
LIFE
ASSURANCE,
LTD.

V. V.
VANTEDDU
AMMIRAJU.

him as guardian under Act VIII of 1890, but offering to obtain such an order if insisted on, and wished to know whether Company would be prepared to pay him four-sixths of the amount due to himself and his brothers leaving the question of their right to the remaining two-sixths to be determined by a court of competent jurisdiction (see exhibit VII). He also pointed out in the letter that the Additional Sub-Court of Rajahmundry had decided in a suit brought by the son of the deceased daughter claiming a portion of the policy amount against Nagayya's sons that the daughter was not entitled to any share of the policy money. The Company replied declining to accept the decision of the Additional Subordinate Court as concluding the right of the daughters, and stating that the amount due on the policy was not part of the estate of the deceased Nagayya, and insisting on the production of an order under Act VIII of 1890 referred to in the previous letter. They subsequently offered however by letter, dated the 31st October 1905, to pay the first plaintiff his one-sixth share of the amount, but insisted with respect to the remainder on the production of a guardianship order and succession certificate which they had already demanded. The first plaintiff by another letter, dated the 6th November 1905, pointed out the difficulty in obtaining an order appointing a guardian to his minor brothers as the property belonged to his undivided family and offering to give an indemnity bond with respect to the amount due to his minor brothers. But the Company adhered to the position already taken up by it. In their defence to the suit also, the Company took up the same position and contended that the plaintiffs were entitled only to four-sixths of the policy amount. The District Judge held that the premia paid for the policy came out of the joint family property of Nagayya and his children and that the plaintiffs alone were entitled to the amount. This finding has not been impeached before us, and the plaintiff's title to recover the whole amount is admitted. There can be no doubt that this view is correct (see *Rajamma v. Ramakrishnayya*(1) and *Mahadeva Pandia v. Rama Narayana Pandia*(2)). The Company denied the plaintiff's claim for any interest, the plaintiffs allege that they were entitled to it from the 9th July 1904, the date when that plaintiff's guardian first gave notice that interest would be

(1) (1908) I.L.R., 29 Mad., 121.

(2) (1908) 18 M.L.J., 75.

BENSON
AND
SUNDARA
AIYAR, JJ.

ORIENTAL
GOVERNMENT
SECURITY
LIFE
ASSURANCE,
LTD.

V. V.
VANTEDDU
AMMIRAJU.

charged. The District Judge held that the plaintiffs were entitled interest on Rs. 1,461-2-8, i.e., four-sixths of the amount due on the 9th October 1904 when the Company refused to recognise the succession certificate (exhibit B) and insisted on the production of the guardianship order and succession certificate for the deceased daughter's one-sixth share, up to the 28th February, 1906, on which date the Company paid the above amount into Court. But he held that, with regard to the remaining two-sixths share having regard to the terms of the policy, the Company was justified in withholding payment of the proof now given in respect of the plaintiff's claim for such a share was not before the Company, and it would not be in a safe position in paying it to the plaintiffs. The fourth issue in the case was whether the plaintiffs are entitled to collect the whole amount under the succession certificate obtained by them from the District Court. The District Judge observes that it was conceded for the plaintiffs that the finding on this issue should be in favour of the Company. The learned counsel for the appellant contends that the reason given by the lower Court for disallowing interest on the two-sixths share is equally applicable to the sum of Rs. 1,461-2-8, that the Company had no proof that the policy was joint family property, and that the Company was justified in requiring a guardianship order for the minor sons. Mr. Seshagiri Aiyar for the respondents contends that the amount due on the policy was due to the deceased, that the succession certificate (exhibit B) gave a conclusive title to the sons of Nagayya to recover it from the Company, and that the Company was in law guilty of wrongful detention of the money in refusing to recognise the plaintiff's title to recover it under exhibit B and that the admission made by the plaintiff's pleader in the lower Court relating to a question of law is not binding on his clients. We are of opinion that his contention is well founded, and must be upheld. Beyond obtaining the policy (exhibit I) Nagayya took no steps to create any trust in favour of his wife and children with respect to the policy. The decision in *Cleaver v. Mutual Reserve Fund Life Association*(1) is exactly applicable to this case, and shows conclusively that the policy was part of the estate of Nagayya, and that his heirs were entitled to the

(1) (1892) 1 Q.B., 147.

BENSON
AND
SUNDARA
ATTAR, JJ.
—
ORIENTAL
GOVERNMENT
SECURITY
LIFE
ASSURANCE,
LTD.
v.
VANTEDDU
AMMIRAJU.

payment of the money on his death. In that case one James Maybrick effected an insurance on his life with the Assurance Company for a sum of money in favour of his wife. The Company promised by the policy to pay the amount to the wife if living at the time of the death of the insured. The question arose whether the executors of James Maybrick's will were entitled to sue the Company upon the policy granted by it to the testator. There was another important question in the case to which it is not necessary to refer here. The Court of Appeal held that apart from the Married Woman's Property Act no one would have any right under the policy except the assured and his representatives. Lord Esher, Master of the Rolls, observes: "The contract is with the husband, and with nobody else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, and therefore it must be meant to be enforced by them. The condition on which the money is to become payable is the death of James Maybrick Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it could have no effect. She is no party to the contract, and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that apart from the statute, such a policy would create any trust in favour of the wife. James Maybrick might have altered the destination of the money at any time, and might have dealt with it by will or settlement. If he had done so, the defendants could not have interfered. I think that, apart from the statute, no interest would have passed to the wife by reason merely of her being named in the policy; and, if the husband wished any such interest to pass to her, he must have left the money to her by will or settled it upon her during his life, otherwise it would have passed to his executors or administrators." Fry, Lord Justice, says: "Independently of the Married Woman's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick two thousand pounds assured; it

would be broken by non-payment to her; but the cause of action resulting from such breach would rest in the executors of the assured, and not in the payee. She was, independently of the statute, a stranger to the contract, it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against any one." *Cleaver v. Mutual Reserve Fund Life Association*(1). In *Rajamma v. Ramakrishnayya*(2), this Court held that the widow of a person holding a policy of insurance would be entitled to a succession certificate if it was his self-acquired property. In *Banchharam Majumdar v. Adyanath Bhatta Charjee*(3), the Full Bench of the Calcutta High Court held that the fact that a debt existing during the lifetime of the creditor was not payable until after his death did not affect its being a part of his estate, and that a decree could not be passed for it in favour of his representatives without a succession certificate. We are clearly of opinion that the policy money was part of the estate of the deceased Nagayya and that under section 16 of the Succession Certificate Act, the plaintiffs obtained a conclusive title to recover it from the defendant Company and that the Company acted wrongly in refusing to make payment and that the decision of the District Court awarding interest to the plaintiff is right. We dismiss the appeal with costs.

Messrs. Short & Bewes, attorneys for appellant.

(1) (1892) 1 Q.B., 147.

(2) (1906) I.L.R., 29 Mad., 121.

(3) (1909) I.L.R., 36 Calc., 936.

BENSON
AND
SUNDARA
ATTAR, JJ.
—
ORIENTAL
GOVERNMENT
SECURITY
LIFE
ASSURANCE,
LTD.
v.
VANTEDDU
AMMIRAJU.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911.
January 20,
28, 24
February 6.

KUNYIL PARKUM PUTHUKKAYI KOTTAYI KANARAN
(NINTH DEFENDANT), APPELLANT IN APPEAL No. 76 OF 1908,

v.

VARANAKOT ILLOTH GANAPATHI NAMBUDEI AND
OTHERS (PLAINTIFF AND DEFENDANTS, NOS. 2 AND 3),
RESPONDENTS IN APPEAL No. 76 OF 1908.*

KURUNGOT THATATHIL KUNHI PARVATHI
KETTELAMMA (THIRD DEFENDANT),
APPELLANT IN APPEAL No. 102 OF 1908,

v.

VARANAKOT ILLTOH GANAPATHI NAMBUDEI AND
OTHERS (PLAINTIFFS AND DEFENDANTS, NOS. 2, 4, 5, 6, 7, 8, 9, 12
AND 13), RESPONDENTS IN APPEAL No. 102 OF 1908.*

*Civil Procedure Code—Act VIII of 1859, s. 246—Judgment-debtor not served with
notice not necessarily a party to an investigation under—Scope of section 246
—Sections 278 to 282 of Act X of 1877 and Act XIV of 1882 (Civil Procedure
Code) discussed.*

A judgment-debtor upon whom notice has not been served cannot be regarded
as necessarily a party to an investigation under section 246 of the Code of Civil
Procedure (Act VIII of 1859).

A comparison of section 246 of Act VIII of 1859 with sections 278 to 282 of
Acts X of 1877 and XIV of 1882 clearly lead to the conclusion that under section
246 of Act VIII of 1859 the Court could only make an order releasing the
property from attachment or disallow the claim which must be one objecting to
the sale of the property in execution.

APPEALS against the decree of W. W. Phillips, District Judge of
North Malabar, in Original Suit No. 14 of 1906.

The facts of this case are fully set out in the judgment.

The Hon. Mr. T. Richmond for Appellant in Appeal No. 76
of 1908.

M. Kunjunni Nair for first respondent in the above.

T. R. Ramachandra Ayyar and T. R. Krishnaswamy Ayyar for
third respondent in the above.

* Appeals Nos. 76 and 102 of 1908.

T. R. Ramachandra Ayyar and T. R. Krishnaswamy Ayyar for
appellant, in Appeal No. 102 of 1908.

The Hon. Mr. T. Richmond for eighth respondent in the above.

J. L. Rosario and M. Kunjunni Nair for first respondent in the
above.

JUDGMENT (Appeal No. 102 of 1908).—The third defendant
has preferred this appeal against the decree of the District Court
of North Malabar, decreeing redemption of a kanom demise of the
year 1870, made in favour of one Kunhi Lakshmi Kettilamma,
the mother of the second and third defendants, by Iswaran, the
twelfth defendant's predecessor in title. The first defendant is the
brother of Kunhi Lakshmi. Exhibit A is the demise sued on and
it is executed by Iswara Vadhyam as the jenmi of the properties.
It does not appear that there was any counterpart or *kaichit* executed
by the demisee, but admittedly the demise was accepted by Kunhi
Lakshmi and possession was held under it at any rate up to the
year 1878. The twelfth defendant assigned his rights to the
plaintiff in 1899 (Exhibit C). The property originally belonged
to the Kurungot Thadam tarwad of which the first defendant is
the present manager. It is the second and third defendants' case
that it is held by them as the heirs of Kunhi Lakshmi, who would
seem to have been in possession of it on Putravakasam tenure.
The property therefore seems to belong to the children of Kunhi
Lakshmi, who are entitled to hold it as *tavashi* property with
the incidents of such property under the Marumakatayam law.
There seems to be a dispute between the second and third defend-
ants with respect to the question whether the second defendant
has any right to the property. But this dispute is immaterial for
the disposal of this case. The plaintiff alleges *inter alia* that the
property is held under the demisee by the second and third
defendants and by defendants Nos. 4 to 10 under them. The
first defendant did not put in an appearance. The second and
third defendants, while admitting the demise, deny the plaintiff's
right to redeem. They contend that the plaintiff had no *jenm*
right over the property on the date of the demise, but only a
kanom interest for an amount much smaller than the amount
acknowledged by exhibit A to have been received by Iswara
Vadhyam from Kunhi Lakshmi, that the jenm right vested in the
Kurungot tarwad till 1878, when it was sold in Court auction in
execution of a decree against the tarwad and purchased on behalf

BENSON
AND
SUNDARA
AYYAR, JJ.
KUNYIL
PARKUM
PUTHUKKAYI
KOTTAYI
KANARAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDEI.

BENSON
AND
SUNDARA
AYYAR, JJ.

KUNYIL
PARKUM
PUTHUKKATTI
KOTTAYI
KANARAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDRI.

of Kunhi Lakshmi by a benamidar (exhibit II), who executed a conveyance later on in the same year to Kunhi Lakshmi (exhibit III), and that Iswara Vadhyan's right to redeem was terminated in law on the date of the said auction sale, as Kunhi Lakshmi then became the owner of the equity of redemption and at the same time held a sub-mortgage from Iswara Vadhyan for a much larger amount than that due to him on his own mortgage. They further allege that in 1872, when the property was attached in execution of a decree against Iswara Vadhyan as his jenm, the karnavan of Kurungot tarwad put in a claim petition under section 246 of Act VIII of 1859, asserting that the jenm right belonged to his tarwad and that Iswara Vadhyan had only a kanam right. The Principal Sudder Amin's Court at Tellicherry upheld the claim and released the jenm right from attachment, and held that Iswara Vadhyan had only an *otti* right, which was directed to be sold, and that no suit having been instituted by Iswara Vadhyan within one year after the order on the claim petition, exhibit I, dated the 23rd March 1872, the plaintiff as the assignee of Iswara Vadhyan's right could not claim to redeem the demise as jenmi.

The principal questions raised in the lower Court were those covered by issues Nos. 2, 4, 5, 6, 7 and 8. Of these, the second issue refers to the plaintiff's title to redeem either on jenm or any other title that he may have. The sixth and seventh issues raised the question whether in consequence of the order, exhibit I, on the claim petition of 1872 referred to above the plaintiff is debarred from setting up his jenm title, assuming that he was the jenmi before. The lower Court held that, the order, exhibit I, not having been questioned by a regular suit within one year after it was passed, the plaintiff cannot now claim to redeem as jenmi. But it held that the plaintiff has an irredeemable *otti* right and is entitled as such to maintain this suit for redemption. The learned vakil for the appellant contends that the view of the lower Court that the plaintiff is entitled to an irredeemable mortgage cannot be sustained; and the question of the nature of the plaintiff's right over the property assuming that he cannot set up a jenm claim was argued before us at some length. Mr. Rosario for the first respondent attacks the District Judge's finding with respect to the conclusiveness of the order, exhibit I, and contends that the plaintiff is not estopped from relying on his jenm right. He

also urges that the demisee under exhibit A, Kunhi Lakshmi, and her heirs must be held, by having accepted the demise and held possession under it, to be estopped from disputing the plaintiff's jenm title.

We propose first to deal with the former of these contentions. We have come to the conclusion that the lower Court's view on the contention cannot be maintained. The claim petition was put in and the order, exhibit I, passed under section 246 of Act VIII of 1859. A decree was obtained by a third party against Iswara Vadhyan and the property was attached for the judgment-debt as Iswara Vadhyan's jenm. It is not quite clear whether notice of the petition was issued to Iswara Vadhyan, the judgment-debtor. At the heading of the order the parties are stated to be the decree-holder, the judgment-debtor and the claimant, viz., the manager of the Kurungot tarwad. The District Judge finds on the testimony of the defence first witness that notice was served on him, but we are not prepared to accept his evidence as satisfactory. His knowledge of the proceedings is very meagre. He cannot say whether the decree-holder or the claimant had any vakil, or whether witnesses were examined, but he professes to be able to remember the single fact that the judgment-debtor was present. He says in re-examination that he attended the hearing of the petition because he used to help the claimant in some of his suits. His evidence, even if accepted, does not prove that Iswara Vadhyan was present as a party to the proceedings, as he merely says that the judgment-debtor was giving instructions to the decree-holder's vakil, which he might have done even if no notice was issued to him of the claim. The order shows that the claimant and the decree-holder were represented by vakils, but it does not say that the judgment-debtor put in an appearance, nor does it say that he did not appear either in person or by vakil, a statement usually made when notice is issued to a party to appear in any cause. It seems to be reasonable to infer that no notice was issued to the judgment-debtor, especially as section 246 of Act VIII of 1859 makes express reference to "the summoning of the original defendant." The lower Court seems to have been influenced in its conclusion by its opinion that it was a case in which notice should have been given to the judgment-debtor as he was interested in the result of the proceedings. We must hold on the evidence and the probabilities of the case that notice

BENSON
AND
SUNDARA
AYYAR, JJ.

KUNYIL
PARKUM
PUTHUKKATTI
KOTTAYI
KANARAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDRI.

BENSON
AND
SUNDARA
AYYAR, JJ.

KUNYIL
PARKUM
PUTHUKKAYI
KOTTAYI
KANABAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDEI.

of the claim was not issued to the judgment-debtor, Iswara Vadhyan.

Mr. Ramachandra Aiyar contends on behalf of the appellant that the judgment-debtor must be taken to have been necessarily a party to, and to be bound by, an order made under section 246 of Act VIII of 1859, and relies on the words of the section which says that the Court shall . . . proceed to investigate the same with the like powers as if the claimant had been originally made a defendant in the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. It is urged that the claim must be regarded, on this language, as if it were a proceeding in the original suit, and that, as the judgment-debtor was a party to the original suit, he must be regarded as having been a party to the claim proceedings also. But this contention does not seem to be quite consistent with the latter part of the sentence, which expressly confers power on the Court to summon the original defendant, a provision that would be hardly necessary if the judgment-debtor was to be necessarily treated as a party. The corresponding section in the later Acts, X of 1877 and XIV of 1882, made a variation in the language used in section 246 of Act VIII of 1859 and provided that "the Court shall proceed to investigate the claim or objection with like power as regards the examination of the claimant or objector and in all other respects as if he were a party to the suit," and not "as if the claimant was a party to the original suit." The Bombay High Court in *Shivapa v. Dod Nagaya*(1) was of opinion that the later Acts merely expressed in clearer language the meaning of section 246 of the Code of 1859 (see page 118). According to that decision "the material fact for inquiry is whether the claimant held possession, and the fact of possession may be investigated in a proceeding between the decree-holder and the claimant only. The power given by the section to summon the original defendant also shows this." The Judicial Committee of the Privy Council in *Sardhari Lal v. Ambika Pershad*(2) observe "It is not suggested that there can be any person against whom an order can be passed under section 280 except the decree-holder himself." In *Netietom Perengaryprom alias Panisherry Damodren Nambudry*

(1) (1887) I.L.R., 11 Bom., 114.

(2) (1888) 15 Ind., Ap., 123.

v. Tayanbarry Parameshwaren Nambudry(1) SCOTLAND, C.J., and BITTLESTON and COLLETT, JJ., were of opinion that the judgment-debtor must be regarded as a party when a claim is upheld. But INNES, J., was inclined to take the contrary view. This decision was doubted in *Cheriyarakel alias Arakel Kunhi Kuttigali v. Vayaka Parambath Imbichi Ammah*(2) by MORGAN, C.J., and HOLLOWAY, J., and in *Moidin Kutti v. Kunhi Kutti Ali*(3) by the CHIEF JUSTICE and BENSON, J. In *Imbichi Koya v. Kakkunnat Upakki*(4) and *Mannu Lal v. Harsukh Das*(5) also it was held that the judgment-debtor is not necessarily a party to the proceedings under section 246 of the Code of 1859. In the latter case it was considered that it would be necessary to show that the judgment-debtor was summoned, and that the fact that he was a party in name would not be enough to bind him by the order made on the claim petition. Under the later Codes of 1877 and 1882 it has been held almost unanimously in a series of cases that it must be shown that notice of the claim was served on the judgment-debtor before he can be held to be bound by the order of the Court (see *Moidin Kutti v. Kunhi Kutti Ali*(3), *Krishnasami Naidu v. Somasundaram Chettiar*(6), *Vadapalli Narasimham v. Dronam Raju Seetharama Murthi*(7), and *Sadaya Pillai v. Amurtha Chari*(8), where attention is drawn to the difference between the language of section 246 of the Code of 1859 and the corresponding section of the later Codes). We are inclined to hold that the judgment-debtor cannot be regarded as necessarily a party to an investigation under section 246 of Act VIII of 1859. We are confirmed in this opinion by the conclusion we have arrived at with respect to the meaning and scope of section 246 of the Code of 1859.

The respondent contends that under section 246 the Sudder Amin's Court was entitled to inquire only into the question whether Iswara Vadhyan or Kurungot tarwad was the party in possession of the property, that the question whether Iswara was only an ottidar or whether he had a valid jenm right was beyond the scope of the section, and that therefore he was not bound to establish his jenm right within one year after the date of the

(1) (1869) 4 M.H.C.R., 472.

(3) (1902) I.L.R., 25 Mad., 721.

(6) (1880) I.L.R., 3 All., 233.

(7) (1908) I.L.R., 31 Mad., 168.

(2) (1871) 6 M.H.C.R., 416.

(4) (1878) I.L.R., 1 Mad., 391.

(6) (1907) I.L.R., 30 Mad., 835.

(8) (1910) I.M.W.N., 741.

BENSON
AND
SUNDARA
AYYAR, JJ.

KUNYIL
PARKUM
PUTHUKKAYI
KOTTAYI
KANABAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDEI.

BENSON
AND
SUNDARA
AYYAR, JJ.

KUNYIL
PARKUM
PUTHUKKAYI
KOTTAYI
KANABAN

v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDRI.

order, exhibit I. The question raised by the claimant was whether a jenm deed obtained by Iswara in 1863 from the Karnavan of the tarward was obtained under circumstances which would make it binding on the tarwad or not, the genuineness of the deed which was filed as exhibit A in the claim proceedings, but is not produced in this suit, not being contested. For the purpose of deciding this question it is necessary to examine a little closely the provisions of section 246. This claim which a person could prefer under it was one referring to or objecting to the sale of the attached property as not liable to be sold in execution of the decree. The investigation to be made by the Court was whether the property was actually or constructively in the possession of the judgment-debtor or of some other person (constructive possession being taken to include possession on one's behalf by a trustee); and the order to be passed was one releasing the property from attachment or allowing the claim referring or objecting to the sale of the property. A comparison of the section with sections 278 to 282 of the later Codes of 1877 and 1882 throws much useful light on the construction of section 246 of the Act of 1859. Section 278 enacts that if "any claim be preferred or objection made to the attachment of any property . . ." This allows a claim being made to property attached and not merely a claim referring to the sale of attached property, and the ground of the claim or objection is "that such property is not liable to such attachment, i.e., the particular attachment objected to" and not that the property in question is "not liable to be sold in execution of the decree" as in section 246. The distinction is made clearer by section 279 which says "that the claimant or objector must adduce evidence to show that at the date of the attachment he *had some interest in* or was possessed of the property attached." The investigation by the Court thus includes the question whether the claimant, whether he has possession or not, had some interest in the property at the date of the attachment. The distinction is pursued by the enactment of section 282 which lays down that "If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment it may do so subject to such mortgage." There is nothing in section 246 of the Code of 1859 corresponding to this provision. Section 283 enacts that "the party against whom an order is passed

under section 280, 281 or 282 may institute a suit to establish *the right which he claims* to the property in dispute . . ." not as in section 246 the right claimed under the section objecting to the sale of the attached property. Under section 281, no doubt, the claim is to be disallowed, if the judgment-debtor has a possessory interest in the property, but this must be taken in conjunction with sections 279 and 282, which show that the claim of a mortgagee or lien-holder not in possession must be maintained. If the judgment-debtor is not in legal or constructive possession, the property is to be released from attachment according to section 246. The corresponding section 280 adds the words "*wholly or to such extent as it thinks fit*" carrying out the opinion expressed in *Deanuth Biswas v. Issur Gine*(1) that under section 246 also part of the property attached could be released. No express provision is made in section 280 or 281 with regard to investigation of any right of the judgment-debtor in the property not accompanied by possession, either directly or through a tenant or other person paying rent. It may be that the principle laid down in *Chidambara Patter v. Ramasami Patter*(2) will allow of such investigation being made, and the rights of the judgment-debtor without possession, physical or through a tenant, being allowed to be sold; such a view would be in consonance with the provision in section 282 that a claim of mortgage or lien without possession on the part of the claimant may be recognized by the Court.

The above comparison leads clearly to the conclusion that the Court under section 246 could only make an order releasing the property from attachment or disallow the claim, which must be one objecting to the sale of the property in execution. We are not aware of any case holding that under section 246 rights of a claimant to some interest in property in the possession of the judgment-debtor could be investigated, or that the Court could raise an attachment where the judgment-debtor had a possessory interest in the property. Mr. Rosario cited several cases in which the contrary view was maintained—*Khelat Chunder Ghose v. Bhuggobutty Churn Mookerjee*(3), *Maharajah Dheraj Mahtab Chand Bahadoor v. Hurdeo Narain Sahoo*(4), *Cheriyarakel alias Arakel*

BENSON
AND
SUNDARA
AYYAR, JJ.

KUNYIL
PARKUM
PUTHUKKAYI
KOTTAYI
KANABAN

v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDRI.

(1) (1870) 14 W.R., 52.
(3) (1870) 14 W.R., 144.

(2) (1904) I.L.R., 27 Mad., 87.
(4) (1871) 16 W.R., 119.

BENSON
AND
SUNDARA
AIYAR, JJ.

KUNYIL
PARKUM
PUTHUKKATTI
KOTTAYI
KANARAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDRI.

Kunhi Kuttiali v. Vayaka Parambath Imbichi Ammah(1), *Shivapa v. Dod Nagaya*(2), see also *Dayachand Nemchand v. Hemchand Dharamchand*(3), Mr. Ramachandra Aiyar argued that the Kurungot tarwad must be treated as having been in possession of the equity of redemption, and that we must take it that the Sudder Amin found that it was in possession of it. But such a claim, if an equity of redemption, is not, as already observed, within the purview of section 246, as it would not be an objection to the sale of the property. Moreover exhibit I does not show that the claimant asserted that the tarwad was in possession of the equity of redemption. Iswara Vadhyan had purchased the jenm right. The land was in the actual possession of the Putravakasam holders, but their rights had been sold in Court auction. There is no positive evidence except exhibit A that they had attorned to Iswara, but we must take it, as between the tarwad and Iswara Vadhyan, that the tarwad had no possession, especially as there was no purapad or rent payable to the jenmi. The sale of the jenm right was sufficient in the circumstances to vest in Iswara Vadhyan such legal possession of the equity of redemption as it was capable of. It is unnecessary to refer to cases cited at the bar relating to the investigation of claims under the sections in the later Codes, which support the interpretation we place on section 246. For the abovementioned reason we hold that the order, exhibit I, was not one which Iswara Vadhyan was bound to impeach by a suit within one year or twelve years after it was passed. We also agree with the contention of the learned vakil for the first respondent that defendants Nos. 2 and 3 are estopped from contesting in this suit the plaintiff's jenm right to the property. Iswara Vadhyan purchased the jenm right from the Karnavan of the Kurungot tarwad on the 27th December 1863 (exhibit A in the claim case). The otti rights of the tavazhi of the second and third defendants had been sold in auction previously to the jenm sale and purchased by Iswara. Kunhi Lakshmi then in 1870 accepts from him the kanom demise, exhibit A, in which the property is declared by him to be his jenm. It is impossible to believe that at the time of the demise, when no one had impeached the validity of his jenm deed, Iswara Vadhyan would

(1) 6 M.H.C.R., 416.

(2) (1887) I.L.R., 11 Bom., 114 at p. 118.

(3) (1880) I.L.R., 4 Bom., 515 per Westrop, C.J., at p. 522.

have agreed to execute exhibit A if Kunhi Lakshmi, who was fully conservant with the facts, had not agreed to acknowledge him as the jenmi and agreed to hold the land under him on that footing. Kunhi Lakshmi by her conduct induced Iswara to execute exhibit A, as she would otherwise have been bound to surrender the lands to him as the auction purchaser of her tavazhi's rights. We cannot agree with the contention that any express admission of jenm right by the demisee otherwise than by the acceptance of the demise was necessary in the circumstances of the case to estop her from denying the plaintiff's jenm right.

In the view we take on the questions discussed it is unnecessary to consider the contention that the *otti* right that Iswara Vadhyan first purchased in auction was not irredeemable. The defendants did not in this suit allege that the jenm sale to Iswara was not binding on the Kurungot tarwad but relied solely on exhibit I.

In the result this appeal must be dismissed with costs. Time for payment of the mortgage money and the value of improvements is extended till the re-opening of the District Court after the summer recess.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

KANDASAMI ASARI (EIGHTH DEFENDANT), APPELLANT,

v.

SOMASKANDA ELA NIDHI, LIMITED, THROUGH ITS SECRETARIES,

CHIDAMBARAM CHETTIAR AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Hindu Law—Undivided family—Manager, position of—Alienation by Manager—
Effect of subsequent assent of co-parceners.*

The Manager of a joint Hindu family is not, in the exercise of his powers, the agent of the family in the strict sense of the term and consequently no ratification of his act by the other members of the co-parcenary is possible.

* Second Appeal No. 215 of 1908.

BENSON
AND
SUNDARA
AIYAR, JJ.

KUNYIL
PARKUM
PUTHUKKATTI
KOTTAYI
KANARAN
v.
VARANAKOT
ILLOTH
GANAPATHI
NAMBUDRI.

1910.
January 31.
February 16.

BENSON
AND
KRISHNA-
SWAMI
AYYAR, JJ.

The assent of the other members of the family to an alienation by the manager is only evidence of justifiable family necessity. Where therefore it is found that there was no such necessity, such assent is no evidence for that purpose.

KANDASAMI
ASARI
v.
SOMASKANDA
ELA NIDHI,
LTD.

As however the property vests in the undivided family, the manager with the assent of the other members may give a good title to an alienee even though the alienation is not for any family necessity. Such assent is not that of a principal to the acts of an agent but supplies the want of capacity on the part of the manager to alienate family property.

An alienation by a manager without justifiable necessity is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety. An assent by all the members at the time of alienation without taking part in it, will pass the property. An assent by some only, though evidence of necessity, will not, in the face of positive evidence of the impropriety of such alienation, suffice to pass their interests.

The subsequent assent of all the members will not, apart from any question of estoppel, validate an alienation by the manager, which is void in its inception for want of justifiable necessity.

Annamalai Chetty v. Murugesachetty, [(1903) I.L.R., 26 Mad., 544], referred to.
Unni v. Kunchi Amma, [(1891) I.L.R., 14 Mad., 26 at page 28], referred to.

SECOND APPEAL against the decree of C. G. Spencer, District Judge of Tinnevely, in Appeal Suit No. 384 of 1906, presented against the decree of V. K. Desika Chariar, District Munsif of Tinnevely, in Original Suit No. 255 of 1905.

The facts are stated in the judgment of the lower Appellate Court which is as follows:—

The suit was brought on a registered chit mortgage bond executed by Ramaswami Asari now deceased. Appellant who is eighth defendant, in the lower Court is brother of Ramaswami Asari. The suit was contested between the plaintiffs who are secretaries of the Somaskanda Ela nidhi and the eighth defendant, who applied on his own motion to be made a party to the suit.

The grounds of appeal are that plaintiffs did not allege or prove that being a member of the joint family appellant was bound by his brother's act or that he subsequently consented and so became bound. Appellant's pleader urges that plaintiff having failed to set up this case, his suit should have been dismissed.

The plaintiffs' case was that the plaint properties were the exclusive properties of the late Ramasami Asari and that he was divided from his brother. The District Munsif found this to be not a true case but he found on the third issue that the eighth defendant acquiesced in what his brother did as manager of the joint

BENSON
AND
KRISHNA-
SWAMI
AYYAR, JJ.

KANDASAMI
ASARI

v.
SOMASKANDA
ELA NIDHI,
LTD.

family. Appellant therefore takes the objection that the plaintiff has not attempted to prove that Ramasami Asari's act was binding on (him) appellant as being done for the benefit or necessity of the family. He also argues that supposing appellant made payments towards the chit, he may have done so only to save his brother's share for the benefit of himself as survivor.

It does not seem to have been at all contended hitherto that the mortgage was not binding on Ramasami Asari's share, for it is recognised law that a co-parcener can deal with his own share. Therefore under the third issue the District Munsif proceeded directly to consider whether Ramasami Asari's act would bind the appellant's interest as well.

The signatures of appellant on the reverse of exhibit C series do not prove that he made payments for which the receipts were granted. But the District Munsif was certainly right in assuming from them that appellant knew of and probably also acquiesced in the transaction especially as there was more than one isolated instance in which appellant took the receipts.

According to appellant's own case the brothers were undivided. So the argument that he may have paid to save the share of his brother will not hold water. As the properties stood in the name of Ramasami Asari, and the eighth defendant was added at his own instance, the plaintiff could not put forward the plea of acquiescence at first. But the District Munsif having found the family to be undivided there is no objection to the Court proceeding to a consideration of the question whether the transaction benefited the joint family and was ratified by the eighth defendant. On the evidence, such as there is of it and in the absence of proof to the contrary, the District Munsif's finding was justified.

The respondent has taken an objection to the finding on the second issue, but after reading the evidence I see no reason to differ from the District Munsif's view. Exhibit C series which respondent relies on to prove acquiescence themselves go some way to support the finding that the family was undivided.

The appeal is therefore dismissed with costs.

The eighth defendant appealed.

V. Purushothama Ayyar for The Hon. the Advocate-General for appellant.

Dr. S. Saminadhan for respondent.

K. Srinivasa Ayyangar for first respondent.

BENSON
AND
KRISHNA-
SWAMI
ATTAR, JJ.
—
KANDASAMI
ASARI
v.
SOMASKANDA
ELA NIDHI,
LTD.

JUDGMENT.—Ramasami Asari and the eighth defendant were brothers and members of an undivided Hindu family. Ramasami mortgaged the suit properties (which must now be taken on the findings of the Courts below to have belonged to the joint family) to the plaintiff, Nidhi. It is found by the Munsif, and that finding was apparently not disputed in appeal, that the mortgage was not for a family purpose. The facts set out in paragraph 14 of the Munsif's judgment make it abundantly clear that there was no justifiable family necessity for the alienation. The Munsif however found that the transaction was ratified by the eighth defendant and this conclusion has been accepted by the District Judge. It is argued on appeal that there could be no ratification of a transaction which was never entered into on behalf of the eighth defendant. This argument must be accepted as sound if Ramasami's alienation is rested on the footing of a contractual agency. The manager of a joint Hindu family exercising the powers of a manager is not the agent of the family in the strict sense of the term. See *Annamalai Chetty v. Murugesu Chetty*(1). No ratification is possible where the agent does not purport to act, though without authority, on behalf of a principal see *Keighley Maxsted & Co. v. Durant*(2). But the manager of a Hindu family has power to act for the family subject to certain restrictions. Alienations for a family purpose are within his competency. One mode of proving the family purpose, or justifiable family necessity as it has been called, is the assent of adult member of the family competent to contract. The family purpose may also be proved by showing the circumstances which have necessitated the alienation when those circumstances are within the purview of the rules of the Hindu law on the subject. In this case the absence of the family necessity is distinctly found. In the face of such a finding the assent of co-parceners as evidence of such necessity cannot avail. But as the property vests in the undivided family the manager with the assent of the other members may give a good title to the alienee even though the alienation is not for any family necessity.

It is not necessary that the assenting members should join in the transfer. The manager having the power to act by himself the assent of the other members cures his incapacity to act singly

(1) (1908) I.L.R., 26 Mad., 544.

(2) (1901) A.C., 240.

in certain matters or clothes him with the necessary capacity for the complete representation of the interests of the family. The assent in this case is not that of principals to the acts of an agent, but, as Mr. Mayne says, it is the supplying by the consent of the co-parceners the want of capacity on the part of the manager to alienate family property. "Such consent" he adds "may either be express or implied from their conduct at or after the time of the transaction", section 345. It has been held by the Privy Council in the case of transactions by a Hindu widow that they are only voidable, not void and that the reversioner succeeding to the estate may by his conduct ratify the transactions, and give them full validity (*Modhu Sudan Singh v. Rooke*(1) and *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*(2). Is the act of the manager similarly voidable and not void where it is in excess of his powers limited to justifiable necessity? It has invariably been accepted as a sound canon of the Hindu Law that where the alienation is not for justifiable necessity it is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety. See *Unni v. Kunchi Anna*(3). *Sheo Sankar Gir v. Ram Shewak Chowdhri*(4) and *Bahwant Rao v. Ram Krishna*(5). It has never been suggested that the alienation by the manager is only voidable where it is not for justifiable necessity. Taking it that there are two classes of alienations by the manager some valid and others invalid, what is the true position of an alienation by the manager which is subsequently assented to by the remaining members of the joint family. An assent at the time of the alienation without taking part in it is, we have already said, sufficient to pass the property. An assent by some alone, though evidence of the propriety of an alienation, will not, in the face of positive proof of its impropriety, suffice to pass their interests, for such assent does not amount to a transfer. But where all the remaining members assent to the alienation subsequent to it, does it validate the alienation apart from any question of estoppel? The decision in *Musiligadu v. Nannigadu*(6) which was referred to appears to rest upon estoppel of which there is no suggestion in this case. At page 493 the

BENSON
AND
KRISHNA-
SWAMI
ATTAR, JJ.
—
KANDASAMI
ASARI
v.
SOMASKANDA
ELA NIDHI,
LTD.

(1) (1908) I.L.R., 25 Calc., 1

(3) (1891) I.L.R., 14 Mad., 26 at p 28.

(6) (1901) 3 Bom. L.R., 682.

(2) (1907) I.L.R., 34 Calc., 329.

(4) (1897) I.L.R., 24 Calc., 77 at p 82.

(6) (1905) 15 M.L.J., 492.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

HANUMANTHAIYAN (NINTH DEFENDANT), APPELLANT,

v.

MEENATCHI NAIDU AND OTHERS (PLAINTIFF AND SECOND TO EIGHTH AND TENTH DEFENDANTS), RESPONDENTS.*

Mortgage, right of person paying off prior—Cannot claim rights of prior mortgagee unless prior debt is completely satisfied.

Where there are two mortgages on a single property and a person advances money for the payment of the first mortgage, the claim of such person to priority over the second mortgage cannot be sustained unless the first mortgage is entirely discharged.

SECOND APPEAL against the decree of J. G. Burn, Additional Subordinate Judge of Madura, in Appeal Suit No. 401 of 1908, presented against the decree of T. N. Lakshmana Row, District Munsif of Madura, in Original Suit No. 549 of 1906.

The facts are fully stated in the judgment of the lower Appellate Court, the material portion of which is as follows:—

The plaintiff (appellant) sued to recover money due to him under a mortgage deed exhibit A of which he is the assignee. He obtained a decree for sale of the hypothecated property subject to a prior mortgage under exhibit I.

Exhibit A is dated 30th April 1894 and exhibit I is 20th April 1888. The latter mortgage has been discharged, but the District Munsif has found that the discharge was effected by payments made by certain of the defendants, and that they or their representatives are entitled to stand in the place of the mortgagee under exhibit I.

It appears from the findings of the lower Court that the first defendant who is the mortgagor raised money by sale of a portion of the hypothecated property under exhibit V and by mortgages of portions of the property under exhibits IX and II. The findings are that the whole of the sale price under exhibit V, the whole of the mortgage money under exhibit IX and portion of the mortgage money under exhibit II were applied by the first

1910.
September
15.

1911.
September
11.

BENSON
AND
KRISHNA-
SWAMI
AIYAR, JJ.
—
KANDASAMI
ASARI
v.
SOMASANDA
ELA NIDHI,
LTD.

learned judges who decided the case observe "If, as a matter of fact, the defendants after their father's death assented to the possession of the land being taken by the donee on their non-payment of the rent and also assented to the plaintiff's joining after their mother's death in redeeming the land, they cannot now be permitted to contend that their father had no right to assign the land in the first instance." The question remains whether the subsequent assent of the remaining members of the family can validate the prior alienation by the manager. It has been held by the Privy Council that the subsequent assent of the presumptive reversioners can validate an alienation by a Hindu widow otherwise not justifiable. They say "It is immaterial whether the concurrence of the reversioners was given at the time the alienation was made or it was given after the execution of the deeds of alienation. *Bajrangi Singh v. Manokarnika Baksh Singh*(1). But this probably rests on the view that the alienations themselves are only voidable. If on the other hand a manager's alienation is void because it is not for justifiable necessity it is difficult to see how the subsequent assent of the remaining members of the coparcenary can validate an alienation void in its inception.

But in this case the District Judge says "the District Munsif was certainly right in assuming that appellant knew of and probably also acquiesced in the transaction especially as there was more than one isolated instance in which appellant took the receipts." If this means that there was a consent to the mortgage at the time of its execution the appellant's interest is certainly bound. But if it means the same thing as the ratification which the Judge speaks of subsequently, we think it is not sufficient to bind the eighth defendant.

We must ask the District Judge to find upon the evidence on record "whether the eighth defendant assented to the mortgage at the time of its execution." The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

(1) (1908) I.L.R., 30 All., 1.

* Second Appeal No. 625 of 1909.

ABDUR
RAHIM AND
SPENCER, JJ.

HANUMAN-
THAIYAN
v.
MEENATCHI
NAIDU.

defendant towards paying off the principal and interest due under exhibit I.

The dates of the documents exhibits IX, V and II are 4th November 1895, 11th January 1899 and 17th December 1903. Assuming the findings as to the discharge to be correct (they are disputed) I am unable to see how the persons in whose favour these documents were executed and those claiming under them are entitled to any priority over the suit document exhibit A merely because first defendant chose to apply sums received by him from them in partial discharge of the earlier debt. It is not the case of any of the claimants that the whole mortgage was discharged through monies received from him. It seems to me that no one of them would have been entitled to stand in the place of the mortgagee under exhibit I, and that it is not competent for the Court to say that because the mortgagee has discharged the prior encumbrance by means of sums received by him at different times from different persons with no common interest, that therefore all these persons taken together are entitled to represent the prior mortgagee.

For the above reasons I would disallow the priorities claimed for defendants. The appeal is allowed with costs throughout.

The ninth defendant appealed.

K. N. Aiyar for appellant.

C. V. Anantakrishnayya for first respondent.

ORDER.—Before deciding the appeal we must ask the District Judge to find on the evidence on record how much of the money borrowed under exhibits VIII and IX went towards the discharge of the mortgage under exhibit I.

The finding should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the above order the District Judge of Madura submitted the following

FINDING.—My finding is that Rs. 100 advanced under exhibit IX went towards the discharge of exhibit I.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—In this case there are two questions raised before us: (1) Where there are two mortgages on a property and a

person advances money for the payment of the first mortgage and that debt is satisfied would the lender be entitled to stand in the shoes of the first mortgagee and to claim priority if he had no interest in the mortgaged property either as purchaser of the equity of redemption or as mortgagee at the time of the advance, and (2) whether it is necessary that the first mortgage should be entirely discharged before the claim to priority over the second mortgagee can be sustained. In this case only a portion of the mortgage money due under the first mortgage was paid and the first mortgage was not entirely discharged. We think there can be no doubt on principle that before a person advancing money for the purpose of discharging the debt due under the first mortgage can establish his claim to the rights of the first mortgagee it must be shown that the first mortgage had been extinguished. Otherwise the result would be that a number of persons would be entitled to rank as first incumbrancers with reference to different sums of money advanced by them, and it would be impossible to work out the rights of the parties. This is very clearly pointed out in *Gurdeo Singh v. Chandrikah Singh* and *Chandrika Singh v. Rashbehary Singh*(1) and in Jones on 'Mortgages', para. 885b. The learned vakil for the appellant has relied on several rulings of this Court for the contrary position. The cases relied on are *Rupabai v. Audimulam*(2), *Gangadhara v. Sivarama*(3) and *Seetharama v. Venkatakrishna*(4). In *Rupabai v. Audimulam*(2) the learned Judges state at page 354 that the whole of the prior charge was released and the same appears to have been the case in *Gangadhara v. Sivarama*(3). The facts of *Seetharama v. Venkatakrishna*(4) so far as they appear from the report, are not very clear but supposing that the case is authority for the proposition contended for by the appellant it would seem that the question was not properly discussed before the learned Judges and they give no reasons in support of their view. On this point therefore the appeal fails even if the other proposition advanced on behalf of the appellant be held to be sound, as to which we do not express any decided opinion. The appeal is dismissed with costs.

(1) (1907) 5 Cal. L.J., 611 at p. 633.

(2) (1888) I.L.R., 11 Mad., 345.

(3) (1885) I.L.R., 8 Mad., 246.

(4) (1893) I.L.R., 16 Mad., 94.

ABDUR
RAHIM AND
SPENCER, JJ.

HANUMAN-
THAIYAN
v.
MEENATCHI
NAIDU.

APPELLATE CRIMINAL.

1910.
December 7.1911.
January 3.*Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.*

SELLAMUTHU SERVAIGARAN AND ANOTHER,

v.

PALLAMUTHU KARUPPAN.*

Indian Penal Code, Act XLV of 1860, s. 457.—'Intent to annoy', what amounts to.

A, with a view to support a fraudulent claim of title to a house, broke into it during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house and took forcible possession of it:

Held, that A was rightly convicted of the offence of house-breaking under section 457, Indian Penal Code.

Per BENSON, J.—That an intent to annoy under section 457 is established if annoyance in the ordinary course of events is known by the person committing the act to be the natural consequence of such act. A man must in law be held to intend the natural and ordinary consequences of his acts, irrespective of what his object was at the time of doing such acts if at such time he knows what the ordinary and natural consequences will be.

If he does an act which is illegal, it does not make it legal that he did it with some other object unless the object was such as would under the circumstances render the particular act lawful.

Per SANKARAN-NAIR, J.—That although the act complained of necessarily involved annoyance yet unless the intention of the accused was to annoy, it may be that the act cannot be said to have been committed with intent to annoy.

Emperor v. Bazid, [(1905) I.L.R., 27 All., 298], referred to.

Queen Empress v. Rayapadayachi, [(1896) I.L.R., 19 Mad., 240], referred to.

A however, in doing the act complained of intended to use criminal force to the servant in possession and therefore intended to commit an offence.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of Mahdi Husain Sahib, Sub-Divisional First-class Magistrate of Trichinopoly, in Criminal Appeal No. 62 of 1910, presented against the conviction and sentence of S. A. Visvasam Pillai, Stationary Second-class Magistrate of Trichinopoly, in Calendar Case No. 269 of 1910.

The facts of this case are fully stated in the judgment.

T. Rangachariar for petitioners.

P. R. Grant for the Public Prosecutor, in support of the conviction.

M. Govindarajulu Naidu for complainant.

* Criminal Revision Case No. 411 of 1910.

(BENSON, J.).—In this case it has been found that the accused with a view to support a fraudulent claim of title to a house, broke into it at night during the temporary absence of the owner, assaulted the owner's servant who was in charge of the house, and took forcible possession of it.

It is argued that the conviction of the accused for house-breaking by night under section 457, Indian Penal Code, cannot legally be sustained because there is no finding that the accused acted "with intent to commit an offence or to intimidate insult or annoy any person in possession of the property" within the meaning of section 441, Indian Penal Code. The Sub-Magistrate says that the accused "made a forcible entry into the house in order to establish the sale-deed," and the Sub-Divisional First-class Magistrate found that the accused "broke open the house to take possession of it by force." The vakil for the petitioners relies on the case of *Queen-Empress v. Rayapadayachi*(1) and on an unreported case (Criminal Revision Case No. 349 of 1909). In the latter case the learned Judges said "the Magistrate finds that the intention of the accused was to take possession unlawfully of the land and having found this he says that the act of the accused necessarily involved annoyance to the complainant . . . The act of the accused may have caused annoyance to the complainant, when he became aware of it, but unless the intention of the accused was to annoy (and this is not found), they cannot be found guilty under section 447, Indian Penal Code.

In the former case the learned Judges said "In our opinion the accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to a certain result. The section (441) defining criminal trespass is so worded as to show that the act must be done with intent and does not, as other sections do (e.g., section 425) embrace the case of an act done with knowledge of the likelihood of a given consequence."

In neither of these cases have the learned Judges referred to the principle in accordance with which a man is in law held to

(1) (1896) I.L.R., 19 Mad., 240.

BENSON
AND
SANKARAN-
NAIR, JJ.
—
SELLAMUTHU
SERVAIGARAN
v.
PALLAMUTHU
KARUPPAN.

BENSON
AND
SANKARAN-
NAIR, JJ.

SELLAMUTHU
SERVAIGARAN
v.
PALLAMUTHU
KARUPPAN.

intend the ordinary and natural consequences of his act, if at the time of doing the act he knows what the ordinary and natural consequences would be. In the case of *The Queen v. Hickli*(1) BLACKBURN, J., at page 375, said "I take the rule of law to be, as stated by Lord Ellenborough in *Rex v. Dixon*(2) in the shortest and clearest manner, 'It is a universal principle that when a man is charged with doing an act, that is a wrongful act, without any legal justification, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act.' And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful. That is illustrated by the same case of *Rex v. Dixon*(2). The question in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to children unwholesome bread, but without intent to do them harm. The defendant was a contractor to supply bread to a military asylum, and he supplied the children with bread which was unwholesome and deleterious, and although it was not shown or suggested that he intended to make the children suffer, yet Lord Ellenborough held that it was quite sufficient that he had done an unlawful act in giving them bread which was deleterious, and that an indictment could be sustained, as he must be taken to intend this natural consequence of his act." In *Regina v. Lovett*(3) LITTLEDALE, J., said "With respect to the intent of the defendant, a man must be taken to intend the natural consequences of what he has done. See also the remarks of Lord COLERIDGE, C.J. in *The Queen v. Martin*(4). The necessity for giving effect to this principle has been well pointed out in the case of *Emperor v. Lakshman*(5). There, the learned Judges referring to the case of *Queen-Empress v. Rayapadayachi*(6) well observed at page 560 "it cannot be disputed that mere knowledge of the possibility of annoyance resulting from an act

(1) (1868) 3 Q.B., 360.

(3) (1839) 9 C. & P., 462 at p. 466.

(5) (1902) I.L.R., 26 Bom., 558

(2) (1814) 3 M. & S. at pp. 11, 15.

(4) (1881) 8 Q.B.D., 54 at p. 58.

(6) (1896) I.L.R., 19 Mad., 240.

of trespass is not sufficient to bring the case within the definition, but, at the same time, it must be remembered that the word 'intent' cannot be read as if it were identical with 'wish' or 'desire.' There may be no wish to annoy, but if annoyance is the natural consequence of the act and if it is known to the person who does the act that such is the natural consequence, then there is an intent to annoy. Most acts in the common course of natural events and human conduct lead to a series of results, and if these results are foreseen by the person doing the acts they cannot be said to be caused unintentionally. The ultimate object may be something different, but the person intends all the intermediate results which he knows will happen in the natural course of events even though he may regret that they should happen. When it is uncertain whether a particular result will follow (as in the Madras Case in which the accused hoped to keep his conduct secret), there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result". I think that the law is correctly laid down in this passage, and again at the end of the case where the learned Judges sum up the result of the authorities in these words: "although there is no presumption that a person intends what is merely a possible result of his action or a result, which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result."

In the present case the ordinary and natural consequences of the petitioner's acts would be to annoy the owner of the house and to intimidate and annoy his servant who was holding possession for his master, and the petitioners as reasonable men, must have known that such consequences would flow from their acts. They must therefore, in my judgment, be held to have acted with intent to intimidate and annoy within the meaning of the section, and the petition must be dismissed.

SANKARAN-NAIR, J.—It is found that Karuppan Servai is the owner of the house in question, and that, during his temporary absence, the accused broke open the door of the house, assaulted his servant, prosecution witness No. 1, whom he had placed in charge

BENSON
AND
SANKARAN-
NAIR, JJ.
SELLAMUTHU
SERVAIGARAN
v.
PALLAMUTHU
KARUPPAN.

BENSON
AND
SANKARAN-
NAIR, JJ.
SELLAMUTHU
SERVAIGARAN
v.
PALLAMUTHU
KARUPPAN.

of it, and took forcible possession. The intention of the accused in effecting this forcible entry is found to have been to establish his title. On these findings it is argued on behalf of the accused that their conviction for house-breaking cannot be sustained in law as no intention "to commit an offence or to intimidate, insult or annoy any person in possession" of the house has been found. The decision in *In re Venkataramanuja Reddy and others*(1) and the cases referred to in that judgment are relied upon in support of the argument. The case above referred to shows that though the act of the accused necessarily involved annoyance to a person yet unless the intention of the accused was to annoy he is not guilty under that section. The decision in *Queen-Empress v. Rayapadayachi*(2) shows that the section defining criminal trespass is so worded that it does not include an act done with the knowledge of the likelihood of a given consequence. According to these decisions it may be that the act cannot be said to have been committed with intent to annoy the complainant.

But the further question remains whether the act was done with intent to commit an offence. Though the complainant was absent, the house was still in his possession as his servant was left in charge of the house (section 27, Indian Penal Code). On the facts found in this case, the accused could not take possession of the house except by effecting forcible entry, i.e., by breaking open the door of the house and using criminal force to the servant and he had therefore undoubtedly the intent to commit those offences. In *Emperor v. Jangi Singh*(3) and *Emperor v. Bazid*(4), the accused was able to and could, take possession of the house without using any force. The owner was absent and he had not placed any of the persons referred to in section 27 of the Indian Penal Code in possession and in the case reported in 6, Madras Law Times, page 262, it does not appear that any criminal force was used to take possession. The cases cited therefore do not apply and the petition must therefore be rejected.

(1) (1909) 6 M.L.T., 262.

(3) (1904) I.L.R., 28 All., 194.

(2) (1896) I.L.R., 19 Mad., 240.

(4) (1905) I.L.R., 27 All., 298.

PRIVY COUNCIL.

VASUDEVA MUDALIAR, AND OTHERS (DEFENDANTS),

v.

SADAGOPA MUDALIAR (PLAINTIFF).

[On appeal from the High Court of Judicature
at Madras.]

P.C.*
1912.
January 30.
February 21.

Limitation—Suit for sale on mortgage—Period of limitation changed with provision for pending suits at passing of Act—Limitation Act (XV of 1877), schedule II, articles 132, 147—Limitation Act (IX of 1908), section 31, sub-section 1—Order of His Majesty in Council holding applicable Shorter period of limitation than provided by Act subsequently passed.

The Limitation Act (IX of 1908) which came into force on 7th August of that year after providing by section 31, sub-section 1 "for a suit for sale by a mortgagee," a period of "sixty years from the date when the money secured by the mortgage became due," enacts "that no suit instituted within the said period of sixty years and pending at the date of the passing of the Act . . . shall be dismissed on the ground that a twelve years' rule of limitation is applicable."

In a suit for sale on a mortgage, dated 22nd September 1883, instituted on 23rd September 1899 the defence was limitation which the plaintiff avoided by alleging payments of interest and settlement of accounts. The first Court found that part of the claim was barred by the twelve years' period of limitation provided by article 132, schedule II of the Limitation Act, 1877. The High Court in appeal held that the suit was governed by article 147 which allowed a period of sixty years, and that no part of it was barred. On appeal to His Majesty in Council the decision of the High Court was reversed, and by an order in Council it was declared that "article 132 is the article which provided the period of limitation applicable," and the case was "remitted to the High Court to be disposed of in accordance with such declaration." So remitted the case came before the High Court on 16th August 1908 after the passing of the Limitation Act, IX of 1908, and that Court holding that section 31 of that Act applied disposed of the suit as they had previously done in favour of the plaintiff.

Held by the Judicial Committee (affirming that decision) that the suit was "pending" at the time of the passing of Act IX of 1908. The judgment remitting the case did not end the suit, nor finally determine it. It was remitted for further procedure and enquiry on allegations of fact: and at the passing of Act IX of 1908 that procedure was not concluded and the enquiry not entered upon. The suit in fact was neither adjudged upon nor ready for judgment.

APPEAL from the judgment and decree (16th December 1908) of the High Court at Madras, made in Appeal No. 164 of 1902

* Present:—Lord SHAW, Lord ROBSON, Sir JOHN EDGE and Mr. A MEER ALI,

VASUDEVA
MUDALIAR
v.
SADAGOPA
MUDALIAR.

which was remitted to that Court by an Order in Council, dated 12th August 1907.

The main question for determination in this Appeal was as to the effect to be given to the Limitation Act (IX of 1908), section 31, which came into operation on 7th August 1908, and enacted as follows:—

“(1) Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first: and no such suit in the said territories instituted within the said period of sixty years and pending at the date of passing of this Act, either in a Court of First Instance or of appeal, shall be dismissed on the ground that a twelve years’ rule of limitation is applicable.

“(2) Where in the aforesaid territories the claim of a mortgage for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of First Instance or of appeal on the ground that a twelve years’ rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act; and on such restoration, the provisions of sub-section (1) shall apply.”

The suit out of which this appeal arose was brought on 23rd September 1899 in the Court of the Subordinate Judge of Negapatam to recover the principal and interest due on a mortgage-deed, dated 22nd September 1883, by sale of the mortgaged property. The plaintiff alleged that there had been a settlement of accounts on 14th October 1889, when part of the debt was admitted to be due; that subsequent to that date payments had been made on account of interest; and that in a suit for partition between the defendants an acknowledgment had been made of their liability on the mortgage to the extent of Rs. 16,000. The defence was a denial of the settlement of accounts and payments of interest, and a plea that the suit was barred by limitation.

The plaintiff Srinivasa Pillai was the receiver appointed by the Court in a suit for partition of the family property of the mortgagees. Under the decree in the partition suit the mortgage-

VASUDEVA
MUDALIAR
v.
SADAGOPA
MUDALIAR.

deed in suit fell to the share of the respondent Sadagopa Mudaliar who was consequently brought on the record.

The Subordinate Judge held that part of the claim was barred by the twelve years’ period of limitation under article 139 of schedule II of the Limitation Act (XV of 1877). On appeal the High Court held that article 147, which allowed a period of sixty years was applicable, and that no part of the claim was barred.

On an appeal to His Majesty in Council by the defendants, their Lordships of the Judicial Committee on 22nd July 1907 held that the twelve years’ rule of limitation prescribed by article 132 was applicable: and the Order in Council above mentioned was made in accordance therewith in the following terms:—

“It is hereby ordered that this appeal be, and the same is hereby allowed, and that the decree of the High Court of Judicature at Madras, dated 13th day of March 1905 be and the same is hereby discharged. And it is hereby declared that article 132 of schedule II of the Indian Limitation Act, 1877, is the article which provides the rule of limitation applicable to the present suit. And it is hereby further ordered that the case be and the same is hereby remitted to the said High Court to be disposed of in accordance with such declaration.”

The report of the case before the Privy Council will be found in *Vasudeva Mudaliar v. Srinivasa Pillai* (1).

The appeal so remitted to the High Court came on for hearing on 14th August 1908, after the coming into force of the Limitation Act (IX of 1908) as above stated, and on 16th August 1909 was disposed of by a Divisional Bench of the High Court (BENSON and MILLER, JJ.) in favour of the respondent.

After stating the proceedings up to the remanding of the case by the Privy Council the judgment proceeded.

“If nothing further had occurred it would now be necessary for us to re-open the appeal on the footing that the twelve years’ rule of limitation in article 132 was primarily applicable, and we should have to consider the plaintiff’s pleas that by reason of acknowledgments and so forth his claim was not barred even under that rule. But in the meantime the Legislature intervened. The declaration of the Privy Council was made on 22nd July 1907, and while the case so remitted was pending in this Court, the Legislature on the 7th August 1908 passed the Indian Limitation Act, 1908.

(1) (1907) I.L.R., 30 Mad., 426.

VASUDEVA
MUDALIAR
v.
SADAGOPA
MUDALIAR.

"Section 1 of that Act directs that section 31 shall come into force at once and section 31 enacts:—"

After reading sub-section 1 of section 31 the judgment continued—

"The plaintiff contends that the latter part of this clause is applicable to the present case. We are of opinion that the contention is valid. The suit is one in the territories mentioned in the second schedule of the Act: it was instituted within sixty years from the date when the money secured by the mortgage became due: and it was pending in this Court as a Court of Appeal at the date when the Act was passed. We cannot therefore dismiss the suit (in whole or in part) on the ground that a twelve years' limitation is applicable.

"We are unable to accede to the defendant's contention that section 31 of the Act does not apply to the present case. The object of the Legislature was to obviate the hardship that would otherwise have resulted to mortgagees in consequence of the period of limitation being declared to be only twelve years instead of sixty, which was the period which had previously been authoritatively declared by this Court to be applicable in suits of the kind. We find nothing in the words of the Act or in the intention of the Legislature, to justify us in excluding the plaintiff from the benefit of section 31. That being so, the plaintiff's claim must be dealt with on the footing that it is not barred by limitation.

"This is the footing on which it has been dealt with in our former judgment of the 13th March 1905. The defendant desires to re-open the matters decided in that judgment, but we do not think that he should be allowed to do so. Their Lordships have expressed no opinions on any of the matters decided in that judgment, and we see no reason why the defendant should be allowed to re-open them. It therefore only remains for us to re-affirm that judgment in principle."

On this appeal.

D. Gruyther, K.C. and *S. A. Kiffa* for the appellants contended that the order made by the Privy Council in remitting the case was a final disposal of the matter and was not subject to future legislation. The suit was therefore not a "pending" suit on the passing of the Limitation Act (IX) of 1908, within the meaning of section 31 of that Act, which was therefore inapplicable. The High Court, it was submitted, was in error in the view taken of the effect and operation of section 31. Reference was made to *Vasudeva Mudaliar v. Srinivasa Pillai*(1); and

(1) (1907) I.L.R., 30 Mad., 426.

VASUDEVA
MUDALIAR
v.
SADAGOPA
MUDALIAR.

Limitation Act XV of 1877, schedule II, articles 132 and 147; and *Narayana Ayyar v. Venkataramana Ayyar*(1) and, *Ramachandra Rayaguru v. Modhu Padhu*(2) were cited to show that article 132, and not article 147, was the article which provided the proper period of limitation for the suit, as had been held by the Privy Council in the present case on 22nd July 1907. The High Court should, on the suit coming again before it, have reopened the hearing on the footing that the twelve years period of limitation was applicable; and should have disposed of the case on the merits in accordance with the Privy Council decision which the legislation enacted by section 31 of Act IX of 1908 was not intended to abrogate.

Sir R. Finlay, K.C. and *Kenworthy Brown* for the respondent were not called upon.

The judgment of their Lordships was delivered by

Lord SHAW.—This an appeal against the judgment of the High Court of Judicature at Madras, dated the 16th December 1908.

On the 23rd September 1899 a suit was brought in the Court of the Subordinate Judge of Negapatam, founding upon a certain mortgage of date the 22nd September 1883, and with the object of recovering the mortgage debt by sale of the mortgaged property.

That Judge held that part of the claim was of a nature to which, under article 132 of the second schedule of the Indian Limitation Act of 1877, the twelve years' rule of limitation would apply. The High Court, on appeal, held, on the other hand, that the article applicable was No. 147, the sixty years' rule of limitation.

On appeal to this Board, the latter decision was reversed and the former restored. This occurred on the 22nd July 1907. The order itself, by His Majesty in Council, was dated the 12th August 1907.

It appears that the question is one upon which there has been much diversity of opinion in India, and conflicting decisions in the High Courts of Madras, Bombay and Allahabad were referred to in this connection.

(1) (1902) I.L.R., 25 Mad., 220.

(2) (1898) I.L.R., 21 Mad., 326.

VASUDEVA
MUDALIAR
v.
SADAGOPA
MUDALIAR.

In view of the argument presented in this appeal, it is necessary to cite the exact terms of the former decision. They are these :—

“ Their Lordships will humbly advise His Majesty that it should be declared that article 132 is the article which provides the rule of limitation applicable to this case, and that the case should be remitted to the High Court to be disposed of in accordance with this declaration.”

A remit took place accordingly.

The reason for a remit is obvious. While the defendant had pleaded the limitation, the plaintiff had alleged payments of interest and settling of accounts which avoided the limitation, and a remit was required for the purpose of having, *inter alia*, enquiry and adjudication on these matters of fact.

So standing the suit in the Court of Appeal, the Indian Limitation Act of the 7th August 1908, was passed. Its 31st section is in these terms :—

“ Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of First Instance or of Appeal, shall be dismissed on the ground that a twelve years rule of limitation is applicable.

“ (2) Where in the aforesaid territories the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of First Instance or of Appeal, on the ground that a twelve years rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act; and on such restoration, the provisions of sub-section (1) shall apply.”

The question in the present appeal is simply, and in a word, whether this supervenient legislation applies to this suit. That it was meant so to apply is fairly obvious from the citation of the date the twenty-second July 1907, which is in fact the date of delivery of the previous judgment of this Board. Whether it does in fact

so apply depends, as was admitted by the learned Counsel for the appellants, solely on whether the suit was or was not a suit pending at the passing of the Act.

Their Lordships do not entertain any doubt that it was. The former judgment of the Board did not end the suit; did not finally determine it. It was remitted to the High Court of Madras for further procedure, and for enquiry upon allegations of fact; and at the date of the Statute that procedure was not concluded and the enquiry had not indeed been entered upon. The suit in fact was neither adjudged upon nor even ready for judgment. Their Lordships express their concurrence with the opinions of the learned Judges of the High Court, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

Solicitors for the respondent: *Chapman, Walker and Shephard.*

—J.V.W.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Munro
and Mr. Justice Sankaran-Nair.*

RAJA RAMACHANDRA APPA ROW BAHADUR GARU
AND OTHERS (PLAINTIFF AND LEGAL REPRESENTATIVES OF THE
DECEASED FIRST APPELLANT), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT.*

Water-cess Act (Madras) VII of 1865—Levy of cess, what is—Effect of levy not retrospective—‘Arrears’ in s. 2 of the Act means payments which become due and remain unpaid after levy.

Under Madras Act VII of 1865, Government have the right to levy at pleasure a separate cess for water. The liability to pay water cess is not incurred in each fasli by the mere fact of taking Government water but only when Government indicates its intention to charge the cess. The cess must be imposed during the fasli.

“Arrears” in section 2 of the Act means payments which have become due and remain unpaid after the levy was made. An “arrear” under the Act presupposes

* Appeal No. 107 of 1905.

VASUDEVA
MUDALIAR
v.
SADAGOPA
MUDALIAR.

1911.
March 23, 24.
April 24.

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

an engagement to pay and the mere use of water implies no such engagement. The Government cannot by the mere act of levying water-cess in a subsequent fasli indicate an intention to claim rent for previous fasli.

APPEAL against the decree of I. L. Narayana Rao Naidu, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 51 of 1903.

The facts are sufficiently stated in judgment.

K. N. Aiyar for appellants Nos. 2 to 4.

The Hon. the Advocate-General and the Government Pleader for respondent.

THE CHIEF JUSTICE.—This is a suit in which the plaintiff claims a refund of water-cess and a declaration that the lands for which the cess has been paid are not liable to water-cess. The Subordinate Judge dismissed the suit and the plaintiff appeals. The claim for a declaration was not pressed in appeal.

Water-cess on the lands in question was collected in 1895 but it was refunded on the ground that it had been illegally collected—see the order of the Tahsildar (exhibit LL), dated the 18th June 1895. This order states that the order for the refund of the tax was made by “the Collector.” The order of the officer who directed the refund on the ground that the cess had been illegally collected, is not in evidence.

Nothing appears to have been done till March 1903 when the Collector served a notice on the plaintiff to show cause why water-tax should not be levied on the land in question. Subsequently the Collector made an order directing that “single” water-tax should be charged on the land during the previous ten years and fasli 1312 (apparently taking things back to the year when the tax had been collected, and refunded under the order of the officer of Government). See exhibit AAA.

The plaintiff asks for a refund of the cess paid by him under protest for the period antecedent to this order, that is for the eleven years up to and inclusive of fasli 1312. He does not now dispute his liability to pay the tax from and after the receipt of the order of the 6th March 1903. The Government claim the right to collect the tax for eleven years as arrears of water-cess payable under Madras Act VII of 1865. The circumstances in which the tax was collected in 1895, and refunded on the ground that the collection was illegal, are not very clear. But I am quite prepared to hold, for the purposes of this case, following.

Chidambara Rao v. The Secretary of State for India(1) that the action of the officer of Government in 1895 did not bind Government in the sense that they could not thereafter “levy at pleasure on the land” a separate cess for the water. But I am not prepared to hold that the order of the Collector notwithstanding the fact that it was not repudiated by Government till eight years later was ineffective for all purposes. Assuming that what was done prior to 1895 amounted to a levy of a separate cess for water under the Act, Government have, in my opinion, not made out (and the onus is clearly on them) that whereas the officer who made the levy was the authorised agent of Government in that behalf, the officer who set aside the levy and directed the refund was not.

Government have recently levied a separate cess for the water and the question is—and this was the main question argued before us—does this levy, under the powers conferred by the Act or under the rules, which, by the Act, Government are empowered to make, operate retrospectively so as to entitle the Government to claim “arrears”?

I know of no other fiscal enactment in which such a power has been given. The cess is levied on the land. It is a charge on the land irrespective of the fact whether the owner of the land for the time being has had any benefit from the supply or use of the water or not. To create such a charge retrospectively might, especially in cases where there had been a change of ownership, in my opinion, in many cases work a hardship.

Under the Act the Government have a discretion “to levy at pleasure on the land so irrigated a separate cess for such water.” They are under no obligation to levy this separate cess. Rules have been made as to the circumstances in which and the rates at which the separate cess is to be levied. It was not suggested that the making of these rules constituted a levy of the cess. If I am right in my view that we cannot hold on the evidence that the tax continued to be “levied” from 1895 or some earlier date, onwards, there can, I think, be no question (in fact I do not think the Advocate-General contended otherwise) that the Collector’s order of the 6th March 1903 constituted the levy. We are asked by the Advocate-General to hold that the tax is payable for a

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

(1) (1908) I.L.R., 26 Mad., 86.

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

period of time before it was "levied." In my opinion, there is nothing in the Act or the rules which would warrant such a conclusion.

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

I think the word "arrears" in section 2 of the Act means payments which have become due and have remained unpaid after the levy was made. The section provides that arrears of water-cess payable under the Act shall be realised in the same manner as arrears of land revenue. Under section 3 of the Madras Revenue Recovery Act (II of 1864) the landholder pays the land revenue due on his land "according to the *Kistbandi* or other enjoyment." Section 4 provides that when this revenue is not "so paid" it is to be deemed to be an arrear of revenue. Under the Revenue Recovery Act, an arrear is kist not paid under an engagement. I think an "arrear" of water-cess under the Act of 1867 has the same meaning. The engagement may, of course, be express or implied, but I do not think the mere use of the water, at any rate, when the use was under the *bonâ fide* belief—a belief brought about by the action of the officer of the Government—that Government did not intend to charge for the use, constitutes an engagement. The case of *Harrison v. Stickney*(1) and the other authorities cited by the Advocate-General, with all respect to him, seem to me to have very little bearing on the question we have to decide. I, of course, accept the proposition that there is no rule of law which prohibits a retrospective rate—that is, a rate for the purpose of raising funds for the purpose of discharging a liability already incurred. But the contention on behalf of Government is that they have power to collect the rate for a period before the levy is made. *Raja Suraneni Venkata Parayya Rau v. The Secretary of State for India in Council*(2) does not touch this point, as in that case as I understand it, there was no claim for "arrears." In that case the right of Government to levy wet assessment and supply water was held to be a right by way of easement and not a right under the Act. As regards the rules, they would seem to contemplate two classes of cases—cases where cultivators of land registered as dry, apply for water (rule II, Standing Orders of the Board of Revenue, Vol. II, p. 3) and cases where water is taken before an application is made (Rule V). The present case obviously does not fall within Rule I. The

(1) (1898) 2 H.L., 108.

(2) (1903) I.L.R., 28 Mad., 51.

only rule which applies would seem to be Rule V under which Government have taken power to levy a penal rate.

The defence that the plaintiff did not pay under coercion was not pressed.

I would allow the appeal as regards the claim for a refund of the cess paid for the period prior to the 6th March 1903, that is, Rs. 9,391-10-4 and interest at 6 per cent. per annum from date of plaint up to date of payment on Rs. 9,118-1-8. Time for payment is six months from this date.

Respondent will pay the court fee on the claim for refund here and in the court below. In other respects the parties will pay their own costs.

MUNRO, J.—The material facts are not now in dispute and may be briefly stated. The Government is entitled under Act VII of 1865 and the rules framed thereunder to levy water-cess on the lands to which the suit relates when irrigated by Government water. For a long time the lands were so irrigated but no charge for water was made save on one occasion. The amount thus collected was in 1895 refunded by the Collector on the ground that the charge was illegal, and water continued thereafter to be supplied without charge. In 1903 the then Collector found out the mistake that was being made, and by an order dated 6th March 1903 directed that single water-rate should be charged for ten faslies ending with fasli 1311, and also for fasli 1312, in which fasli the order was passed. The amount thus held to be due was collected on the 27th May 1903, the plaintiff, appellant, paying under protest. The plaintiff then brought the suit out of which the present appeal arises to recover the amount paid and for other reliefs not now pressed.

To the charge for fasli 1312 I do not think the plaintiff is entitled to object. Water was taken in that fasli and was charged for within the fasli. The question then is whether the charge for the previous ten faslies was illegal. This will depend upon whether the charge was justified by Madras Act VII of 1865 or the rules framed thereunder.

Under section 1 of the Act whenever water from a Government source is supplied or used for purposes of irrigation, the Government, certain conditions being fulfilled, "may levy at pleasure on the land so irrigated a separate cess for such water and the Government may prescribe the rules under which and the rates at

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW

SECRETARY
OF STATE FOR
INDIA.

which such water-cess as aforesaid may be levied, and alter or amend the same from time to time." For the rules made by the Government under this section and relevant in the present case we have been referred to the second and following pages of Vol. II of the Standing Orders of the Board of Revenue, edition of 1907. The Act also provides under section 2 that arrears of water-cess may be realised in the same manner as arrears of land revenue, that is in accordance with the procedure laid down in Madras Act II of 1864.

It has been contended for the defendant that the water-cess charged for the ten faslies prior to fasli 1312 may be properly regarded as arrears of water-cess for those faslies, and is therefore recoverable under section 2 of the Act. Now an arrear of land revenue is defined in Act II of 1864 as revenue which is not paid by the date on which it falls due according to the kistbandi. Water-cess is under the rules payable according to the kistbandi, and an arrear of water-cess should, I think, be defined, *mutatis mutandis*, in the same way as arrear of land revenue. It is difficult to conceive how water-cess which was not demanded in respect of the lands in suit till fasli 1312 and which the plaintiff was given to understand was not due as above stated, can be said to have fallen due in faslies prior to 1312 so as to come under the definition of arrears for those faslies. It is contended, however, that the liability to pay water-cess was incurred in each fasli by the mere fact of taking Government water and apart from any order of the authorities demanding payment for the water. A perusal of the Act and Rules shows that this contention is untenable. Under section 1 the Government may at pleasure levy water-cess. Equally "at pleasure" it may not. Until therefore the Government indicates its intention to charge water-cess, no liability is incurred by taking water. Turning to the rules we find in Rule V, which deals with the unauthorised use of water, that the Collector has power to make a penal charge, and may also at his discretion reduce or remit the penalty, so that there is no liability until the Collector has made his order.

It is not alleged, that the Government has itself made any charge for the water taken for the lands in suit. The only charge is the charge made by the Collector by his order of the 6th March 1903. The legality of that order depends upon whether it is authorised by the rules under which the Government has delegated certain

powers. The question is whether the rules justify an order charging water-cess for faslis other than the fasli in which the order is made. One of the underlying principles of the land revenue administration is that all charges should be ascertained and recorded within the fasli to which they relate—See Board's Standing Order No. 12 which deals with the jamabandi or annual settlement. I have no doubt that the principle is meant to underlie rules for charging water-cess, and there are numerous indications in the rules that it does. On the other hand, I can find nothing in the rules which can be construed as a provision for imposing water-cess for prior faslis. The rule which according to the defendants' contention, applies to the present case is Rule V. I think, however, it would be very difficult to hold that the present is a case of unauthorised use of water. If the rules do not apply, and I think they do not, the charge was illegal, and the plaintiff is entitled to recover. Even if Rule V is held to be applicable the defendant is in no better position. Under that rule when water is taken without permission, a water-rate equal to twice the water-rate prescribed in Rule I for the particular crop irrigated is ordinarily to be levied as a penalty. One object of the penalty is, it may be reasonably presumed, to deter the person charged from taking water without permission in future years. For persistent breach of the rules or other sufficient cause the Collector may enhance the penal charge up to five times the ordinary water-rate. "Persistent breach of the rules would imply that the person charged has already been warned and possibly penalised in prior faslies and to that extent, no doubt, what has happened in prior faslies is enquired into. But the charge for persistent breach of the rules is manifestly a charge for the last breach, and not a charge for water taken in prior faslis. The manner in which the penalties are limited is also a clear indication that they are imposed in respect of the last occasion on which water has been taken without permission. Nor can it be successfully argued that the charge may be treated as good for the five faslis ending with 1312 inasmuch as for 1312 the Collector might have charged five times the ordinary water-cess. If the rule applies, the Collector might have done so, but in fact he did not; and we are only concerned with what he did. I think it is clear therefore that the Collector had no authority to pass the order of the 6th March 1903 with regard to faslis prior to 1312. I would therefore

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW

SECRETARY
OF STATE FOR
INDIA.

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.
v.
RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

allow the appeal as regards the charge for the ten faslis ending with fasli 1311, and dismiss it as regards the charge for fasli 1312 and the other reliefs not pressed. I agree with the principle on which costs are awarded by my learned colleagues.

SANKARAN-NAIR, J.—For the agrapharam village of Velupuru quit-rent was charged and inam patta issued in the year 1859 by the Inam Commissioner. In that patta the lands situate in the said agrapharam were entered as dry land. In 1868 the wet *ayacut* of the agrapharam village was fixed at 177 acres and from that date in all the accounts of the subsequent faslis it was shown that 177 acres were exempted from water-tax, that is, were lands for which water had to be supplied free from sources of irrigation belonging to Government. On the 3rd June 1892, the Deputy Collector, Mr Suriya Rao Nayudu, localised the mamool wet and passed an order declaring that the extent aforesaid was exempt from any water-tax. However on 31 acres out of this land water-cess appears to have been collected some time after. But on the 27th June 1895, the Collector passed orders refunding to the inamdar owner of the village Rs. 124-0-8 the amount of tax collected as in his opinion no cess ought to have been levied. In 1903 another Collector considered that the Deputy Collector's order, dated 1892, was passed under a wrong impression and without proper inquiry, and cancelled it and levied from the plaintiff (inamdar) the charge which, he was of opinion, ought to have been paid on the extent of land which was irrigated during the ten previous faslis and also the charge payable for fasli 1312.

The plaintiff now brings this suit for a declaration that the lands in his agrapharam village were wrongly entered in the patta given to him by the Inam Commissioner as dry lands, that they were really mamool wet lands, that is to say, lands in respect of which he is entitled to be supplied with water by the Government to carry on wet cultivation without any liability to pay water-cess; and to recover from the Secretary of State the sum of Rs. 9,391-10-4 the amount collected by the defendant from the plaintiff on account of water-cess for eleven years from faslis 1302 to 1312.

The Subordinate Judge found that the entry in the patta by the Inam Commissioner was not an error. His finding on this point is not challenged in appeal. With reference to the plaintiff's contention that the *ayacut* of wet cultivation was finally

declared after a full consideration in 1868 by the Deputy Collector and that it was afterwards acted upon by the Collector and such decision is therefore binding upon the defendant, he held that the Inam Commissioner was the proper person empowered by the Government to deal with these questions and the Collector's action in this matter "based as it was on an erroneous principle was *ultra vires*" and not therefore binding upon the defendant. Against this finding also no objection has been taken before us.

The only question therefore which has to be determined is the plaintiff's right to recover the amount levied for water-cess. This cess is levied under Act VII of 1865 which "is an Act to enable the Government to levy a separate cess for the use of water supplied for irrigation purposes in certain cases."

Section 1 of the Act declares that when water from a source belonging to Government is supplied or used for irrigating land "it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water" and it also provides that the Government may prescribe the rules under which, and the rates at which, it shall be levied. Under section 2 arrears shall be realised in the same manner as land revenue is realised. The rules therefore, so far as they are authorised by the Act, have the force of law. Under those rules a cultivator may apply for water to the head of the village who is required to submit it to the Tahsildar. In certain cases the Tahsildar has to submit them to the Public Works Department, and the Tahsildar may then pass final orders on the application. There are printed forms of applications on which orders have to be passed. In that application the applicant has to state the area for which water is wanted and whether it is required only for one year or not. If it is not stated to be for a year only, water will continue to be supplied for the succeeding years without any fresh application. There are water-rates per acre fixed for the extent for which water is supplied. Thus the applicant knows the cess he has to pay for the water that may be supplied to him. When water is taken for land without the sanction of the Tahsildar double water-rate is charged. For persistent breach of rules or for other sufficient cause a penal charge equal to five times the ordinary water-rate may be levied.

The Advocate-General contends that when water is used for the cultivation of the land a liability to pay the water-cess attaches itself to the land and that such liability is not imposed by reason

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.
v.
RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

WHITE, O.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

of the engagement between the cultivator who applies for the water and the Government as evidenced by the grant of his application in the first case and the supply of water in accordance therewith nor by the imposition of the cess under section 1, clause (b), after the Collector has satisfied himself that the conditions referred to therein exist when the water is used without such sanction of Government. If the Advocate-General is right, the Government may enforce that liability at any time and no official, unless specially authorised to do so, can waive it.

The words of the section are that "it shall be lawful for the Government to levy at pleasure on the land irrigated a separate cess." These words do not support the contention advanced that the liability attaches itself the moment water is used.

I am also satisfied that the Government cannot at any time at their pleasure impose the cess; the cess in my opinion has to be imposed within the fasli, *i.e.*, before the crop on the land has been harvested. If this view is right, that would also show that the liability arises only by the imposition and not by the use of the water, otherwise the Government would be able to recover it at any time. This appears to be the case from the words of the section itself and also from the rules. Section 1, clause (b), provides that in the circumstances therein referred to, the Collector has to satisfy himself that the irrigation is beneficial to, and sufficient for, the requirements of the crop on the land irrigated. This can only be properly done when the crop is on the land and as it appears to me that it was not contemplated that the Collector is to decide these questions by taking evidence after the year is over. Whether the irrigation is beneficial and whether it is sufficient for the requirements of the crop can only be satisfactorily settled by personal inspection. It would depend upon various circumstances about which evidence can scarcely be forthcoming afterwards. The fact that the jurisdiction of the Civil Court is ousted in this respect also supports this view. This is also consistent with the rules which require that jamabandi, *i.e.*, the annual settlement "must be completed within the fasli year at the latest" and that such annual settlement should be "conducted with a view to ascertain and record the demand of *all* the items of land revenue within the taluks." (The word "*all*" is in italics in the rule itself.) A different rule cannot apply to clause (a) of section (1). It seems to me to be clear therefore that if lands

have been cultivated with water from Government sources then it is the duty of the Government officials at the time of the Jama-bandi within the fasli and before the crop is harvested to impose the charge leviable if such water has been used without the sanction of the authorised officials.

The fact that there is another rule which provides for the persistent breach of the rules would also go to show that double water rate is to be imposed within the fasli. Under the Act therefore the Collector was not authorised to levy the water-cess for ten years.

If the plaintiff-inamdar may now be declared liable for water which was used by the cultivators how is he to apportion the liability or recover any additional rent from the tenants? It would be extremely difficult to ascertain their liabilities *inter se* and even if ascertained recovery of arrears for a comparatively long time would in some cases be impossible and in other cases difficult. If the Government demand is collected during the fasli these difficulties are avoided.

If the charge could be levied years after, if the Collector, as he claims in this case, is entitled to recover in fasli 1313, the water-cess for faslis subsequent to fasli 1302, a *bonâ fide* purchaser may be called upon to pay the cess due long before his purchase, of which he had no notice and about which there may have been previous orders (as in this case) exempting the owner from payment.

These considerations support the inference derivable from the natural meaning of the words that the liability arises from the imposition of the cess, not by the use only and that the cess has to be imposed before the expiry of the fasli year when the crop is on the land.

It also appears to me that the rules framed by the Government under the Act which have got the force of law in so far as they are authorised by the Act itself show that the plaintiff is not bound to pay this assessment. The rules which I have set forth above contemplate two classes of cases, where water is used with sanction applied for and granted and water is used without such sanction. The present case does not fall within the first class where the cess payable is ascertained nor within the second class which refers to unauthorised use of water. The Tahildar is the person to sanction the application for water, but an officer to whom

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE FOR
INDIA.

WHITE, C.J.,
MUNRO AND
SANKARAN-
NAIR, JJ.

RAJA RAMA-
CHANDRA
APPA ROW
v.
SECRETARY
OF STATE
FOR INDIA.

he is subordinate, the Deputy Collector had issued orders, under which water had to be supplied to the plaintiff and when the Tahsildar on one occasion collected a water-cess, the District Collector directed a refund. It cannot be said that there was any authorised use of water for which a 'penal' charge can be levied.

As I have already pointed out it is unnecessary to make applications for water every year once the application is granted until the order granting it is cancelled.

Every year's demand has to be ascertained within the year itself and among the objects of the Jamabandi is stated to be the careful inspection of cultivation, the consideration of all claims to remission and the collection of all kists as they fall due. If the Collector had the power to declare in 1903 that the land is liable to pay water-cess, his predecessor had also the power, it appears to me, to decide that such land is not liable to pay the cess. The Collector in 1903 may cancel the orders issued before just in the same way as the Collector who passed the order in 1895 could have cancelled it himself, as there is no law preventing him from doing so. But until the order is cancelled by himself or by a superior authority, there is no reason why those interested should not be bound thereby.

I am therefore of opinion that the claim of the Collector to impose assessment on the lands for the ten faslis in question cannot be sustained. As to the fasli 1312, as the Collector's order was in force till it was cancelled and it was alleged that no water was taken during the rest of the fasli, the claim to impose assessment during that year also cannot be sustained. The plaintiff is entitled to a refund with interest at 6 per cent. I accordingly agree to the decree suggested by my Lord Chief Justice.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara
Ayyar.

BAYYA SAO (TRANSFEREE FROM PLAINTIFF), APPELLANT,

v.

NARASINGA MAHAPATRO AND OTHERS (DEFENDANTS
Nos. 1 TO 11), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 83—Tender under s. 83 in one Court subsequent to suit by mortgagee, in another Court to enforce his mortgage invalid—Where mortgagee entitled to possession mortgagee must be put in possession before deposit under s. 83—Costs, right of mortgagee to.

Where after the institution of a suit by the mortgagee to enforce his mortgage in one Court, the mortgagor deposits the amount in another Court under section 83 of the Transfer of Property Act, the deposit is not a valid one and cannot have the effect of stopping the running of interest on the amount deposited.

Where the mortgagor proposes to take action under section 83 of the Act, he must have a valid right to redeem under his contract with the mortgagee. No deposit can be made if the mortgagee being entitled to possession is not put in possession.

Ram Sonji v. Krishnaji, [(1902) (I.L.R., 28 Bom., 312)], followed.

A mortgagee is entitled to his costs unless there are special reasons dis-entitling him to them.

APPEAL against the decree of T. T. Rangaohariar, District Judge of Ganjam in Original Suit No. 29 of 1905.

The facts are sufficiently stated in the judgment.

C. S. Venkatachariar for appellant.

The Hon. Mr. T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—The facts necessary for the decision of this appeal may be briefly stated. Defendants Nos. 1 to 11 are related to one another, but are not members of an undivided family. Defendants Nos. 1 to 3 belong to one family, defendants Nos. 4 to 7 to another and defendants Nos. 8 to 11 to a third family. The other defendants in the suit are only formal parties. The eleven defendants, who are the owners of an inam village, executed three registered usufructuary mortgage deeds in 1885 in favour of the plaintiffs, according to the terms of which the debt was to be

1911.
February
24.
March 7.

* Appeal No. 175 of 1908.

BENSON
AND
SUNDARA
AYYAR, JJ.

BAYYA SAO
v.
NARASINGA
MAHAPATRO.

discharged out of the usufruct of certain lands by the end of the harvest of the year Krodhi (1904-1905). In the years 1899-1900 further sums were borrowed under exhibits E, D, C and A. These amounts were also to be paid up at the time stipulated for the discharge of the previous bonds, and, if the defendants failed to do so, the mortgaged lands were to continue in the possession of the plaintiffs for a further period of five years. The terms of exhibits A, C, D and E are not exactly similar. Exhibits A and D provide that the lands should remain in the possession of the plaintiffs for a period of five years from the 15th Palgunna Suddha of Krodhi (the 21st March 1905), if the amounts due thereunder were not paid by that date. Exhibits C and E provide for the execution of mortgage bonds in case of non-payment before the 15th Palgunna Suddha of Krodhi (the 21st March 1905), entitling the plaintiffs to hold possession of the lands as security for their debt for a period of five years, and sets out the terms on which they were to hold them. But it is evidently understood under these documents also that the defendants would not be entitled to get possession before the end of the further period, if they failed to pay the debts before the time fixed for payment. These defendants took possession of the lands about the close of May 1905 according to the finding of the lower Court. On the 27th January 1905, the representatives of the three families sent to the plaintiff the notice, exhibit II, stating that the time fixed in the bonds of 1885 up to which the plaintiffs were entitled to be in possession of the mortgaged lands would expire with that year's paddy crop, that they were prepared to pay the amounts due under exhibits C, D and E and that the accounts with respect to the amounts due under them should be settled through mediators. It may be noticed that no reference is made in this document to the mortgage bond, exhibit A, the position taken up by the defendants apparently being that the plaintiffs had not lent the amount mentioned in that document, and nothing was therefore due to them from the defendants on it. The suit is for the recovery of possession of the lands, which the plaintiffs claim to be entitled to hold till the discharge of the debts due to them under exhibits A, C, D and E and for mesne profits from the date of dispossession. The defendants contend that they are entitled to redeem the mortgages before the expiration of five years, and that the plaintiffs are not therefore entitled to possession. They also plead

that nothing is due to the plaintiffs under exhibit A as the consideration due on that document was not paid to them by the plaintiffs. Subsequent to the institution of this suit, which was on the 2nd August 1905 the defendants put in petitions on the 25th August 1905 under section 83 of the Transfer of Property Act in the District Munsif's Court of Sompeta depositing the amounts due under exhibits C, D and E. Only the second plaintiff appeared in answer to the notice given of this petition and he declined to receive the amount deposited in Court in full satisfaction of the debt. The defendants contended that the plaintiffs were not entitled to interest on exhibits C, D and E after their refusal to receive the amount deposited.

The principal questions before the lower Court were whether interest on the bonds in favour of the plaintiffs ceased in consequence of the tender made in the District Munsif's Court, whether the bond (exhibit A) was not supported by consideration, and whether the plaintiffs were disentitled to recover possession in consequence of the defendant's alleged right to redeem notwithstanding the provision in the bonds that the plaintiffs were entitled to remain in possession of the lands for five years from the end of Krodhi (the 4th April 1905). The District Judge decided the last question in favour of the defendants, and directed that the plaintiffs should receive the amounts deposited for exhibits C, D and E from the District Munsif's Court of Sompeta. He also held that the plaintiffs were not entitled to interest after the deposit. With regard to the consideration for exhibit A, he came to the conclusion that only Rs. 100 out of the total amount of Rs. 300 was paid (on the 17th May 1903), and he gave the plaintiffs, a decree for that amount and interest, and further interest till date of payment, and directed that in case of failure by the defendants to pay the amount by the 30th December 1907, the plaintiffs should be placed in possession of the lands mortgaged under it. He held that though the suit was rightly instituted by the plaintiffs when it was brought, the parties might have amicably arranged their disputes without persisting in the litigation, and he, therefore, ordered that the defendants should pay the plaintiffs the full stamp duty paid by them on the plaint and one-half of the subsequent costs.

The decree in so far as it disallowed the plaintiff's claim for possession is not appealed against. The appellant impeaches the

BENSON
AND
SUNDARA
AYYAR, JJ.

BAYYA SAO
v.
NARASINGA
MAHAPATRO.

BENSON
AND
SUNDARA
AYYAR, JJ.

BAYYA SAO
v.
NARASINGA
MAHAPATRO.

judgment of the lower Court on three points: *first*, the finding that the Rs. 200 out of the consideration for Exhibit A was not paid; *secondly*, the finding that the tender under section 83 of the Transfer of Property Act was valid as against the plaintiffs and disentitled them to subsequent interest; *thirdly*, the order about costs.

We are of opinion that the finding of the District Judge on the question of the payment of the consideration for exhibit A is incorrect. We are therefore of opinion that the whole consideration due for exhibit A was paid by the plaintiffs.

The next question is whether the tender under section 83 of the Transfer of Property Act subsequent to the suit was valid in law so as to disentitle the plaintiffs to interest after the deposit. We have come to the conclusion that the deposit is not valid. Section 83 of the Act, no doubt, lays down that "at any time after the principal money has become payable and before a suit for redemption of the mortgaged properties is barred, the mortgagor may deposit in any Court in which he might have instituted such suit to the account of the mortgagee the amount remaining due on the mortgage." It does not say that the deposit must be made before a suit is instituted by the mortgagee to enforce his rights under the mortgage by sale, foreclosure or otherwise. But we are of opinion that it could not have been intended to make such a material departure from the ordinary rules relating to tender as would be involved in holding that, after one Court has taken cognizance of a suit for the enforcement of a mortgage, the mortgagor has the right to deposit the mortgage amount in another Court. Under sections 86 and 88, the Court in a suit for foreclosure or sale, is to direct an account to be taken of what will be due to the plaintiff for *principal and interest* on the mortgage and for his costs of the suit on a date to be fixed by the Court according to those sections. Under section 67 a mortgagee, "at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided" (*i.e.*, under section 83) has a right to obtain an order for foreclosure or sale. "A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure." These sections must be read together

with section 83. There is no doubt that the general rule is that a tender of money must be made before the creditor institutes a suit for its recovery (see Harris on 'Tender,' pp. 158 and 159, where the learned author quotes the numerous cases which show that the law on the point is quite settled). The same rule is ordinarily applicable to mortgage debts also. (See pp. 163 and 164 of the same book, and *Briggs v. Calverly* (1) per Lord KENYON, C.J., and also Coate's Law of Mortgages, volume I, p. 735.) In England a special statute VII, George II, cap. 20, is in force by which a mortgagor may tender the amount and ask for a stay of the action before the hearing. No such provision is made in section 83. It is very unlikely that it would not have been made, if it were intended that a deposit could be made after an action brought for the mortgage money. It will be noticed that according to the English statute, the mortgagor is to ask for stay of the action, that is, to take a step with respect to the mortgagee's action itself. The Indian Legislature must no doubt have been aware that according to section 83, the deposit need not be necessarily in the Court trying an action to enforce the mortgage, and it is very unlikely that some specific provision would not have been made with respect to the continuance of the mortgagee's suit, if the mortgagor could take action in another Court under section 83 of the Act, moreover, when a court having plenary power over the subject matter of a cause has already taken cognizance of it, it will not conduce to convenience that another tribunal with very restricted jurisdiction should be invested with the right to deal with it. At any rate clear words would be used to indicate such an intention. It is unnecessary to decide whether a mortgagor could, subsequent to the mortgagee's suit, deposit the mortgage amount in the very Court in which the suit is pending, although on the language of the section it might not be easy to make a distinction. But it seems to us clear that it could not have been intended to enable the mortgagor to make a deposit under the section in a different Court from that in which the mortgagee's suit is pending. It is hardly necessary to point out that according to the construction contended for by the respondent there would be nothing to prevent the mortgagor from proceeding

BENSON
AND
SUNDARA
AYYAR, JJ.

BAYYA SAO
v.
NARASINGA
MAHAPATRO.

BENSON
AND
SUNDARA
AYYAR, JJ.
BAYYA SAO
v.
NARASINGA
MAHAPATRO.

under section 83 even after a decree for sale has been passed. No case has been cited to us, nor are we aware of any, against the view we are inclined to hold, and on general principles we think the appellant's contention should prevail. We are of opinion that when a suit has once been instituted, payment into Court is regulated by order XXIV, rule 1 of the new Procedure Code corresponding to section 376 of the old Code. We do not think that the circumstance that the defendants were not aware of the institution of the suit when they made their application in the Sompeta Munsif's Court would affect the plaintiff's right to proceed with their suit and to enforce their rights as they stood on the date of the suit.

There is a further ground on which we think that the deposit in this case is not valid. The mortgagors took possession of the property in May 1905 without discharging the mortgages, although according to the provisions of exhibits A, C, D and E, the mortgagees were entitled to remain in possession of the property as security for the amounts due on these bonds. They were not justified in doing so. They were bound to restore possession to the plaintiffs and to allow them to remain in possession before making a deposit under section 83. In similar circumstances the Bombay High Court held in *Ram Sonji v. Krishnaji*(1) that the deposit was premature and invalid. In that case the mortgagor made the deposit without putting the mortgagee in possession which he was entitled to if the debt was not paid on a certain date. Chandravarkar, J., delivering the judgment of the Court observes: "The mortgagor having committed a default, the mortgagee became entitled to possession on that date. The mortgagee did not, however, get possession until the 3rd April 1898; but before that date, i.e., on the 19th March 1898, the mortgagor had deposited the mortgage amount in Court under section 83. But the mortgagor could not defeat the right of possession which had accrued to the mortgagee by making a tender of the mortgage amount on the 19th March 1898, as, according to the consent decree, the right to redeem could accrue only after the mortgagor had delivered possession to the mortgagee. The tender made on the 19th March was under the

(1) (1902) I.L.R., 26 Bom., 312.

circumstances premature and the provisions of sections 83 and 84 cannot apply to the facts of the case.

Following the Full Bench ruling in *Tani Bhagwan v. Hari Bin Bhawani*(1) and *Malhar Gopal Kulkarni v. Anandram Valad Hukumchand*(2) we reverse the decree of the lower Appellate Court."

We think, concurring with the Bombay High Court, that section 83 presupposes that the mortgagor, when he proposes to take action under section 83, has a valid right to redeem and is not attempting to exercise the right of redemption in a manner contrary to the provisions of the contract between the parties.

We are also of opinion that the order of the lower Court as to costs cannot be maintained. A mortgagee is entitled to his costs unless there are special reasons disentitling him to them.

Moreover in the view we have taken of the other questions dealt with above, the plaintiffs are clearly entitled to the whole of their costs in the lower Court. The decree of the lower Court must further be modified by directing the defendants to pay the whole amount due under exhibit A with interest on Rs. 200 from 15th August 1904 up to the date of payment in the manner calculated by the lower Court and by further directing them to pay interest on the bonds exhibits C, D and E up to the date of payment calculated in the same manner. The time for payment is extended up to the end of six months from this date. The appellant is entitled to costs of this appeal calculated on the amount awarded by us.

(1) (1887) Printed Judgment, p. 315. (2) (1889) Printed Judgment, p. 51.

BENSON
AND
SUNDARA
AYYAR, JJ.
BAYYA SAO
v.
NARASINGA
MAHAPATRO.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

BAMMIDI BAYYA NAIDU (PLAINTIFF), APPELLANT,

v.

BAMMIDI PARADESI NAIDU AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1910.
November
25.

1911.
January
24, 25.
February 15.

Res judicata: how far decree for rent in previous suit res judicata on the question of title in subsequent suit.

A, a landlord tendered patta to B, his tenant, who objected to the patta on the ground that the extent of his holding was overstated, some of the lands included in the patta not belonging to A, but to B himself. The issue was raised whether the patta tendered was proper; the Court found that it did not contain any objectionable matter and was therefore a proper patta. Decree was accordingly given for rent in favour of A.

A tendered a similar patta to B for a subsequent year and B again raised a similar objection to the extent of the holding. In a suit brought by A for the rent, B objected to the extent of the holding and it was contended first that the matter was *res judicata* by reason of the decision in the previous suit.

Per MUNRO, J.—The finding in the previous suit that the patta was proper was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the patta and the defendants cannot be allowed to put plaintiff again to proof of his title.

Per SANKARAN-NAIR, J.—A decree for rent does not necessarily require a decision as to the terms of the patta or the extent of the land for which rent has to be paid. There being no express finding in the previous suit on the question of the ownership of the land, it cannot be implied from the mere passing of the decree for rent that the question was decided for the purpose of the subsequent suit. Where a question need not be deemed to have been decided on the ground that the decree in the previous suit requires such assumption to make it a decree rightly passed, a party is not, in the absence of a clear and express finding, precluded from raising the question in a subsequent suit. The question whether A or B was owner of the land included in the patta was not *res judicata* by reason of the previous decision.

SECOND APPEAL against the decree of E. L. Vaughan, District Judge of Ganjām in Appeal Suit No. 170 of 1908, presented against the decree of Venkateswara Rao, District Munsif of Sompeta, in Original Suit No. 861 of 1907.

The facts for the purpose of this case are fully set out in the judgment.

* Second Appeal No. 640 of 1909.

The Hon. Mr. T. V. Seshagiri Ayyar for appellant.

Dr. S. Swaminadhan for second respondent.

MUNRO, J.—The plaintiff, a landholder to whom the provisions of section 3 of Madras Act VIII of 1865 apply, sues the defendants, his tenants, for rent for fasli 1316. Under section 7 of the abovementioned Act, no suit brought to enforce the terms of a tenancy, shall be sustainable unless patta and muchilika have been exchanged, or unless it be proved that the party attempting to enforce the contract had tendered such a patta or muchilika as the other party was bound to accept, or unless both parties shall have agreed to dispense with pattas and muchilikas. Under section 4 of the Act the patta must contain, among other things, the local description and extent of the land. The patta in the present suit gives the extent and boundaries of the land alleged by the plaintiff to be in the defendants' occupation. The defendants alleged that the extent of *jeroyiti* land entered in the patta was greater than the extent of such land held by them. The plaintiff contended that the matter was *res judicata* by reason of the decision in a similar suit by him against the defendants for the rent of two previous faslis. The pattas in that suit were similar to the patta in the present suit. In the former suit the plaintiff alleged tender of pattas and refusal by the defendants, but the defendants contended that the plaintiff did not tender pattas for the suit faslis and that the pattas alleged to have been tendered were improper, one of the objections taken to the propriety of the pattas being that the extent of the defendants' *jeroyiti* land was much overstated. In this state of the pleadings it was incumbent upon the plaintiff under section 7 of Act VIII of 1865 to prove the tender of such pattas as the defendants were bound to accept. An issue was accordingly framed as to the tender and propriety of the pattas, and was found in the affirmative. Had it been found in the negative, the plaintiff's suit must have been dismissed. In the present suit an issue as to the tender and propriety of patta also necessarily arises. The patta being similar to the pattas in the previous suit and no change of circumstances being alleged, I think the plaintiff's contention should have been upheld. The finding in the previous suit that the pattas were proper, i.e., that they were such as defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in

MUNRO
AND
SANKARAN-
NAIR, JJ.
—
BAYYA
NAIDU
v.
PARADESI
NAIDU.

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

respect of the land entered in the pattas, and I do not think the defendants can again be allowed to put the plaintiff to proof of his title. See *Venkatachalapati v. Krishna* (1). I would therefore allow the appeal.

As my learned brother takes the contrary view, the second appeal is dismissed with costs.

SANKARAN-NAIR, J.—This suit is brought by the plaintiff to recover rent due for fasli 1316 from the defendants who are tenants in possession of certain lands which the plaintiff says are held under him. The plaintiff states that he tendered a proper patta to the first defendant according to which the first defendant was bound to properly cultivate and raise crops in about 14 acres of land in the village of Jayakrishnapuram and pay the landlord's share. The main contention of the defendants is that the defendants hold about 5 acres of land under the plaintiff and that of the rest, about 10 acres are inam lands and 3 acres are cash rent paying lands belonging to the defendants themselves. Both the lower Courts have upheld the defendants' contention. In fact the Judge states that the plaintiff did not seriously argue before him that the patta was a proper one, or that the lands which were found by the Munsif to belong to the defendant really belonged to the plaintiff. The question that was argued before us at great length is whether the defendants are barred from raising this plea by the decision in a previous suit:—

The plaintiff sued in Original Suit No. 430 of 1906 on the file of the same Court for the rent of faslis 1314 and 1315. In that case he alleged tender of a patta which both the lower Courts say was similar to the patta which is now alleged to have been tendered. The defendants alleged in that suit that the extent of land belonging to the plaintiff had been very much overstated. On that plea, the following issue was raised in that suit:—

“Whether plaintiff tendered pattas to the first defendant and whether the pattas so tendered were proper?”

It was decided that pattas were tendered and the Court that tried that suit also held that “the terms of the pattas (exhibits E and F) do not contain any objectionable matter,” and accordingly found that issue in the affirmative. The plaintiff got a decree for the rent due for fasli 1314. His claim for the rent for fasli 1315

(1) (1890) I.L.R., 13 Mad., 287.

was dismissed as it was found that the defendant had executed a muchilika for that year to another person with the consent of the plaintiff, who was therefore held estopped from claiming that year's rent. There was no finding on the question whether these 10 acres were inam and the other 3 acres belonged to the defendant. In fact the question was not raised in that form, nor was there any clear decision that the lands belonged to the plaintiff except what may be implied from what is extracted above.

The plaintiff's contention is thus stated by the Munsif, “the defendant did not raise this question or did not so raise the question as to place the Court in a position to give a proper finding on all the matters relevant; the defendant is now barred under section 13.” In second appeal it is also contended before us that this question was really raised and decided against the defendant.

Section 11 of the new Civil Procedure Code runs thus: “No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

No question arises in this case as to the identity of parties or to the competency of the Courts. The points for determination are whether the question “that the properties now belong to the defendant” “has been directly and substantially in issue in the former suit,” and whether it has been finally decided.

To be in issue, a matter must have been put forward, or must be one which ought to have been put forward in the previous suit—see explanations 3 and 4 to the section.

It is settled by the Judicial Committee that the scope of the rule of *res judicata* as limited by the words “directly and substantially in issue” is not confined to the relief granted by the former suit or to the property which was the subject-matter therein—see *Pittapur Raja v. Buchi Sitayya* (1), in which the Judicial Committee considered the words of section 13 of the Code of Civil Procedure of 1877. It cannot therefore be contended that in Original Suit No. 430 of 1906 the only matter in issue was whether the plaintiff was entitled to the rent then

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

(1) (1885) I.L.R., 8 Mad., 219.

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

sued for and that the decision, if any, on this question, *i.e.*, whether these lands belong to the plaintiff or the defendant, cannot be *res judicata* for the sole reason that the present suit is for the rent of another year.

On the other hand, the words of the section clearly imply that the decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue—see *Sheosagar Singh v. Sitaram Singh*(1).

The rule appears to be that where the decision on a question was essential to the relief granted or the decree passed, or where it formed the groundwork of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit. If therefore the decision as to the extent of the plaintiff's property, or that the property in question belongs to the plaintiff, was essential for the decree that was passed in Original Suit No. 430 of 1906, then the question must be deemed to have been directly and substantially in issue under explanation 4 to section 11, Civil Procedure Code, even though the parties did not raise that question as they were bound to raise it. Again, whether essential or not, if the Court, in the former suit, decided that the property belonged to the plaintiff and based the judgment in favour of the plaintiff, for the rent that alone was sued for, on the ground that this property belonged to him, then also it was directly and substantially in issue.

The section also states that not only must it have been directly and substantially in issue but it must have been *heard and decided*. If as a matter of fact such a question was heard and decided, then all the conditions of *res judicata*, so far as they are material to this case, have been complied with. Even if the question was not raised it must be deemed to have been raised—see explanation (4).

We shall now consider when a question is *res judicata*, though there was no express finding on it in the previous suit. With reference to this it must be borne in mind that the section deals with two classes of cases, *viz.*, trials of suits and trials of issues. The difference is that in the case of trials of suits, the suits must either be dismissed or decreed. In the case of trials of issues,

(1) (1897) I.L.R., 24 Cal., 616 (P.C.).

the Judge records findings on the issues. In the first case the decree may render it necessary to imply a decision on a question not expressly decided. In the latter, from its very nature no implication is necessary, but we ought to have a clear decision to create the bar.

The decision of a suit involves the determination of all the questions which are necessary and essential for that decision, and those questions will therefore be deemed to have been necessarily decided, if not expressly, by implication. Thus where a certain relief is granted to the plaintiff in a suit, it is not open to the defendant in that suit to raise any plea in a subsequent suit which would interfere with the relief given in the previous suit. He cannot interfere with the scope of that prior decree so far as that matter is concerned. He was bound to raise every plea in the previous suit, and if he did not raise it he is precluded from relying upon it so far as the claim which was then allowed was concerned. Thus when the plaintiff brings a suit for possession of property against a defendant, the latter is bound to put forward every ground of defence he may have. If a decree is passed against him, it is not open to him to say afterwards that he then resisted the suit only, for instance, on the ground of his being the heir of the deceased admitted owner, and that he is entitled to put forward his claim as a devisee in a subsequent suit. So in *Sivaganga* case—*Srimut Rajah Mootoo Vijaya Ragunadha Bodha Goroosawmy Peria Odaya Tevar v. Katama Nachiar, Zamindar of Sivaganga*(1). Similarly if there is a mortgage-decree directing the sale of certain properties and their distribution in satisfaction of certain mortgage claims in the order and mode mentioned in the decree, then it is not open to any of the parties to put forward any other claim or mortgage which would interfere with such distribution—see *Sri Gopal v. Pirthi Singh*(2) whether this claim was set up in the previous suit or not. Again if a suit is brought on a bond, the decree for payment of the money is conclusive against the defendant as to its genuineness, consideration and non-payment. Section 11 says that the matter must have been decided in the previous suit. In the cases above referred to there is a decision by necessary implication. A finding in express terms is not necessary; see *Pahalwan Singh v. Maharaja*

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

(1) (1866) 11 M.I.A., 50.

(2) (1902) I.L.R., 24 All., 429.

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

Muheshur Buksh Singh Bahadur(1), *Mahabir Pershad Singh v. Macnaghten*(2).

Mr. Seshagiri Aiyar contended that under the provisions of the Rent Recovery Act, VIII of 1865, no suit for rent is maintainable against a tenant unless the patta tendered to the tenant is one he was bound to accept, and he was not bound to accept the patta unless the lands for which the rent is payable are correctly stated therein; when therefore the Court decided in Original Suit No. 436 of 1906 that rent was payable and that the tenant was bound to accept the patta then in question, it must be taken to have also impliedly decided, within the meaning of the above decisions that the lands as stated in the patta belonged to the plaintiff and were held by the defendants as tenants. But it is to be noticed that though a patta when tendered to a tenant must be one he is bound to accept, the tender of a patta is not essential to entitle a landlord to recover rent. The parties may dispense with them. A decree for rent therefore does not necessarily involve the decision that a proper patta has been tendered. *Misir Raghobardial v. Sheo Baksh Singh*(3) was a case in which a suit was first brought for a sum of Rs. 1,665 for the interest only, the principal sum not being then due. The plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the defendant denied, and an issue was raised as to the consideration of the bond. It was decided to be only Rs. 4,790. In a suit subsequently brought to recover the principal sum of Rs. 12,000 after it had fallen due in a Court of higher jurisdiction the question was raised whether the decision in the first suit with reference to consideration was binding. One of the grounds for holding that it was not binding was that the first Court was not competent to try the second suit. With reference to the issue as to consideration raised in the first suit, their Lordships of the Privy Council say "This was a collateral rather than a direct issue in the suit. The plaintiff may have succeeded without having a finding upon it, if he had proved an admission by the defendant that the sum claimed was due for interest or, etc., etc." The difference between issues 'collateral' and 'direct' as pointed out by their Lordships depends upon this;

(1) (1872) 12 B.L.R., 391 (P.C.). (2) (1889) I.L.R., 16 Calc., 682 (P.C.).
(3) (1883) I.L.R., 9 Calc., 439.

whether it was possible to pass the decree without any finding upon the particular issue. If it was not possible then it was a direct issue. The parties were bound to raise it. If they did not raise it, it will be deemed to have been raised, and even if there is no finding on it, as the final decision could not have been arrived at without a finding, the decision of that question will be necessarily implied. The fact that it was based on an admission would make no difference. In the case before us, we have a decree for rent. This does not necessarily require a decision as to the terms of the patta or the extent of the land for which the rent has to be paid. If, therefore, as a fact that question was not decided in the previous suit, we are not bound to imply that it was so decided. The cause of action in this suit for the rent for fasli 1316 is not the same cause of action as in the previous suit. The property sued for is not the same. The right litigated in this suit, i.e., the claim to recover the rent for fasli 1316, is not the same as in the previous suit. The decree dismissing this suit will not in any way interfere with the decree in the previous suit awarding to the plaintiff the rent for fasli 1314, any more than the dismissal of the claim for rent for fasli 1315 interferes with the decree for the rent of fasli 1314. If the parties had agreed to dispense with the exchange of pattas and muchilikas or the claim for rent had been admitted, a decree could have been passed without any reference to the title to the land. In these circumstances we cannot imply that there was any decision on the question now raised, i.e., whether the lands in dispute belong to the plaintiff or to the defendant.

It was contended that a determination that these lands do not belong to the plaintiff would be inconsistent with the decision in the previous case that the patta then tendered was proper, as that decision that the patta was proper necessarily implies that the lands therein belong to the plaintiff, but this is not enough. In the case reported in *Amanat Bibi v. Imdad Husain*(1), a suit was brought by the plaintiff to redeem certain property on a mortgage which was recognised as subsisting in the year 1854. The question was whether the plaintiff was barred by the decision in a prior case where a suit was brought by the same plaintiff to recover the same property on the ground that the defendant had paid the

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

(1) (1888) 15 I.A., 106.

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

arrears of Government Revenue on account of the plaintiff. That suit was dismissed on the finding that the property had been transferred to the defendant Talukdar by a deed of conditional sale which was dated in 1853, under which the purchase money was to be repaid within a period of eight months and that on the expiration of that period the sale was to become absolute. Their Lordships of the Judicial Committee construing the corresponding section of the Civil Procedure Code of 1877 held that there was no bar. They said "Now, what was the question in issue in the former suit? The question was whether the plaintiff was entitled to recover property which had been transferred by the Government to the Talukdar on repaying to the Talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the respondent's right to redemption under a mortgage-deed. *"It may be difficult to reconcile the position of the Talukdar as a mortgagor in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor."* (The italics are mine.) "But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all." It will be seen that the Talukdar's position as absolute owner in 1853 under a purchase from the mortgagor is absolutely inconsistent with the existence of that mortgage at any subsequent date, yet as the question of mortgage at right set up in the second case was not necessarily involved in the previous decision though the finding on which the judgment was really based was inconsistent with the claim set up in the latter suit, their Lordships held that the claim was not *res judicata*.

If, then, the decision or the decree in the first suit does not require us to assume the determination of the question now in issue in this subsequent suit, are we bound to imply that there was a decision as to the extent of land in the previous suit for the reason that when that Court decided that the patta was a proper one it must be taken to have decided on the extent of the land? There is no doubt that for that suit or for that year's rent the Court must be taken to have decided that question. But I am of opinion that in the absence of a finding we are not bound to imply that the matter was decided for the purpose of this suit.

I have already pointed out that the section deals with two classes of cases, viz., trials of suits and trials of issues. Eminent

Judges have lamented the application of the doctrine that the trial of an issue, which was not essential in the senses I have above pointed out, should be held to be a bar to the trial of the same question in a subsequent suit. That view was based on considerations arising from the conditions under which litigation is carried on in India. See GARTH, C.J., in *Denobundhoo Chowdhry v. Kristomonee Dossee*(1), STUART, C.J., in *Babu Lal v. Ishri Prasad Narain Singh*(2), and *Muhammad Ismail v. Chattar Singh*(3), but the section itself places the matter beyond doubt, and the Judicial Committee have laid down the doctrine in decisions which we are bound to follow. However to hold that an issue has been determined it must appear that the matter raised by the issue was alleged by one party and denied by the other, and there was a finding of the Court thereon. The explanation (2) of the section states that a matter which ought to have been alleged should be taken to have been alleged. But it does not dispense with the necessity of a finding upon the issue by the Judge in the previous suit. An issue can hardly be said to be decided unless there is a finding thereon, and when there is no such finding it seems difficult to hold that in a second suit, that question cannot be tried. The principle that to plead a bar by a finding on an issue, there must be a determination by the Court is well illustrated in the following two cases. In *Gobind Chunder Koondoo v. Taruck Chunder Bose*(4), the Full Bench of the Calcutta High Court held that a decree for rent based on a finding that the plaintiff was entitled to the land is binding upon the defendant in that suit in a subsequent suit brought by the defendant to establish his title to the same land against the other parties to the previous suit. The ground of decision was that the self-same right and title was in issue, contested between them, adjudicated upon and decided against the plaintiff in the second suit. The judgment of the Full Bench was delivered by the Chief Justice GARTH, C.J. In *Gobind Chunder Addya v. Afzul Rabbani*(5), where the question of title as between the parties to the second suit was not decided in the prior suit which was for rent and a declaration of title against another party, the Chief Justice held that, though a suit for rent would be barred,

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

(1) (1877) I.L.R., 2 Calc., 152. (2) (1878) I.L.R., 2 All., 582 at p. 585.
(3) (1881) I.L.R., 4 All., 69. (4) (1878) I.L.R., 3 Calc., 145.
(5) (1888) I.L.R., 9 Calc., 426.

MUNRO
AND
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

the same plaintiff's representative is not precluded from bringing any suit to try the title to the land on the ground that the question of title to the land in the previous suit was merely raised incidentally to the main question. Mr. Justice Field in the same judgment points out clearly the distinction. He states that the suit being only for rent and no cause of action arising out of the non-delivery of possession having been alleged or put forward, if the Court had tried the issue of title, the finding upon that issue would have the effect of *res judicata* between the parties, but inasmuch as that issue was not tried, the question raised thereby was not heard and decided and therefore the matter was not *res judicata*. His judgment shows that, if there had been any cause of action alleged arising out of the non-delivery of possession, then it is possible that a decision as to title may have been implied in the case. The learned Chief Justice has been erroneously charged with inconsistency by some text writers and Judges on account of their failure to keep the distinction which I have above pointed out clearly in view. Further the finding on the question must be clear and unambiguous. It must show that it was not merely intended to be binding between the parties only for the purpose of the suit but to be a decision finally declaring the title of the successful party. Thus their Lordships of the Privy Council decided that a suit which was brought in a Subordinate Court by a plaintiff against the widow of his deceased brother claiming his property by right of survivorship, the issue in that suit being whether, at the death of the latter, the ownership of the brothers was joint or separate was not barred by a decision of the same issue in a Munsif's Court in a prior suit brought by the widow against the same defendant. One of the grounds of decision was that a Munsif was not competent to finally decide the question. Having first so decided they added, "Having regard however to the subject matter of the suit, to the form of the issue which has been above set forth and to some expression of the learned Judge their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive." (See *Run Bahadur Singh v. Luchu Koer*(1).) I am unable to say in this case that there was any

(1) (1885) I.L.R., 11 Cal., 301.

decision in the previous suit on the issue as to the title to the land intending to bind the parties in another suit.

I will now refer to the decisions that have been cited in the course of the argument. In *Nil Madhub Sarkar v. Brojo Nath Singha*(1), a case very similar to this, it was pointed out as was also laid down clearly in the decisions in *Gobind Chunder Koondoo v. Taruck Chunder Bose and Gobind Chunder Addya v. Afzul Rabbani*(2), already referred to, that if the Court in the previous suit had determined the extent of the land and the rent annually payable, the decision would bind the parties in subsequent suits, but not where it did not appear that the Court decided any thing more than what was necessary for that suit, the rent payable to the plaintiff. In *Kailash Mondul v. Baroda Sundari Das*(3), the principle is laid down in terms which are capable of wider application. The decisions in *Woomesh Chandra Maitra v. Barada Das Maitra*(4), *Rajendranath Ghose v. Tarangini Dasi*(5), and in the same volume, page 337 (*Surjiram Marwari v. Barhamdeo Persad* (6)), support the view taken by me.

As to the cases cited for the appellant, in *Venkatachalapati v. Krishna*(7), *Natesa Gramani v. Venkatarama Reddi*(8), the question was expressly decided in the first suit. They are therefore no authorities. In *Sellappa Chettyar v. Velayutha Tevan*(9), both the suits were to enforce pattas and not for rent, and a decision that the patta is proper would necessarily involve a finding that the lands referred to in the patta belong to the plaintiff. It therefore falls within the first class of cases which I have already referred to. In *Sri Gopal v. Pirthi Singh*(10), the facts are these. On the 18th August 1888 one Sri Ram, a mortgagee, brought a suit for sale on a mortgage of the 18th August 1876 and made the holder, the prior mortgagee, party to the suit. That prior mortgagee pleaded his rights under a mortgage of the 21st July 1871 but he was the holder also of another mortgage of the 7th February 1874. He made no mention of this latter mortgage nor did he raise any question as to his rights under that mortgage. Sri Ram obtained

MUNRO
AN
SANKARAN-
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

- (1) (1894) I.L.R., 21 Cal., 236.
 (2) (1878) I.L.R., 3 Cal., 145 and I.L.R., 9 Cal., 426.
 (3) (1897) I.L.R., 24 Cal., 711. (4) (1901) I.L.R., 28 Cal., 17.
 (5) (1905) 1 C.L.J., 248. (6) 1 C.L.J., 337.
 (7) (1890) I.L.R., 13 Mad., 287.
 (8) (1907) I.L.R., 30 Mad., 510 and I.L.R., 8 Mad., 219.
 (9) (1907) I.L.R., 30 Mad., 498. (10) (1898) I.L.R., 20 All., 110.

MUNRO
AND
SANKARAN-
NAIR, JJ.
—
BAYYA
NAIDU
v.
PARADESI
NAIDU.

a decree for sale subject to his redeeming the mortgage of the 21st July 1871. Subsequently a suit was brought by the defendant mortgagee to enforce his claim on his mortgage of the 7th February 1874. It was decided by the Full Bench of the Allahabad High Court—and that decision was confirmed on appeal, see *Sri Gopal v. Pirthi Singh*(1), that he was barred from enforcing this mortgage—as he ought to have pleaded it in the previous suit. No possible objection can be taken to that decision as any decree enforcing the mortgage of February 1874 would have been absolutely inconsistent with the decree in the first suit. The decree in the first suit enabling Sri Ram to sell the property subject *only* to the mortgage of 1871 negatives, as absolutely inconsistent with it, the existence of any other mortgage right in that defendant which may be set up as against the plaintiff. But in so holding the learned Judges of the Allahabad High Court make certain observations to which with all respect to them exception can be justly taken. Their Lordships say “It is quite certain that in order to make “section 13 applicable it is not necessary that the matter of the “subsequent suit should have been heard or have been finally “decided by a Court of competent jurisdiction in the first suit when “the case is one to which explanation II applies. Indeed explanation II to section 13 of the Code would be meaningless if it were “necessary in a case which was covered by it that the matter should “have been heard and finally decided in the previous suit.” It was pointed out by my learned colleague in the course of the argument that, where the parties themselves do not raise a question but the Judge decides the suit on that question not raised by the parties, the matter would not be *res judicata* without that explanation II, which is explanation IV in the present Code, as under explanation I of the old Code (explanation III of the new Code) the matter must have been alleged and denied or admitted. It may also be pointed out that the learned Judges do not recognise the distinction between the two classes of cases, as in the first class of cases where the decision of the suit itself must be taken to imply a decision of the necessary issue, the explanation is necessary in order to show that the matter must be deemed to have been raised. I am unable therefore to accept that argument. The next case is *Jamadar Singh v. Serazuddin Ahamad Chaudhuri*(2). In that case the

(1) (1902) I.L.R., 24 All., 429.

(2) (1908) I.L.R., 35 Cal., 979.

MUNRO
AND
SANKARAN-
NAIR, JJ.
—
BAYYA
NAIDU
v.
PARADESI
NAIDU.

plaintiff brought a suit for the recovery of money which he said ought to have been taken in part payment of rent which was due by him and for which a decree had been obtained against him. This case also obviously falls within the class of cases where the decision of the suit itself is a bar, as it directly involves the decision of this question, because, as I pointed out already, a decree for rent implies the non-payment of any amount towards the payment of rent. The learned Judges make similar observations here as in *Sri Gopal v. Pirthi Singh*(1).

That the learned Judges recognize this distinction appears to be clear from another judgment of the same Bench delivered about the same time (*Maharaja Manindra Chandra Nandy v. Upendra Chandra Hazra*(2)), where the claim was held not to be *res judicata* as the decision in the previous suit did not decide the rate of rent but only decreed the amount claimed for a certain period. The next two cases *Kameswar Pershad v. Rajkumari Ruttan Koer*(3) and *Arunachalam Chetty v. Meyyappa Chetty*(4) are instances where a plaintiff was held to be barred from putting forward a claim which he ought to have advanced in a previous suit and on which there was therefore no decision. With reference to such cases we have to consider the effect of section 42 of the Civil Procedure Code of 1882. The Privy Council decision in *Kameswar Pershad v. Rajkumari Ruttan Koer*(3) was distinguished on that ground in *Ramaswami Ayyar v. Vythinatha Ayyar*(5). We have also to bear in mind that the Madras High Court and certain decisions of the other High Courts recognize a distinction for this purpose between plaintiffs and defendants, though other decisions refuse to make any such recognition. It is now well settled that a defendant in possession of an estate is bound to put forward all his pleas to resist the plaintiff's suit to recover possession. But in the case of a plaintiff this Court has, in a course of decisions, held that this principle is not applicable to a plaintiff, and he is not bound to sue on all his causes of action, that even if he fails on one title he may recover on another title (I.L.R., 26 Mad., 761). From this it follows that he is bound to put forward his whole case only with reference to his cause of action or title, on which he sues. See *Kameswar Pershad v. Rajkumari Ruttan Koer*(3),

(1) (1898) I.L.R., 20 All., 110.

(2) (1909) 9 C.L.J., 343.

(3) (1893) I.L.R., 20 Cal., 79.

(4) (1898) I.L.R., 21 Mad., 91.

(5) (1903) I.L.R., 26 Mad., 760.

MUNRO
AND
SANKARAN
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

explained at pages 772 and 773 of *Ramaswami Ayyar v. Vythinatha Ayyar*(1). No other title will be deemed to have been determined.

In other Courts, on the other hand, it has been held that he is bound to put forward all his titles, if possible. Otherwise he will be precluded from relying upon any of his titles in a subsequent suit. If this is the correct view, it follows that any title which he may have will be deemed to have been decided in the previous suit (*Guddappa v. Tirkappa*(2)) Mr. Justice SUBRAMANIA AYYAR in *Arunachalam Chetty v. Meyyappa Chetty*(3) took the view adopted by the Bombay High Court, that a plaintiff is bound to unite all the causes of action he may have against a defendant in respect of the relief or property for which he sues. From this it necessarily follows that, if he omits to sue on any cause of action, he is barred from again relying on it, either by section 42 of the Act of 1882 or by section 13. The dismissal of his suit implies therefore a rejection of any title he may have to the land. This also falls therefore within the first class of cases to which I have already referred. It may be pointed out that this case has been overruled by *Ramaswami Ayyar v. Vythinatha Ayyar*(1), and Mr. Justice SUBRAMANIA AYYAR has receded from the position he then took up in *Veerana Pillai v. Muthukumara Asary*(4). Similarly as regards *Kameswar Pershad v. Rajkumari Ruttan Koer*(5), even if the second suit was based on the same cause of action as the first suit as explained in *Ramaswami Ayyar v. Vythinatha Ayyar*(1) the second suit is clearly barred. Or if we take the view adopted by the Bombay High Court and in *Arunachalam Chetty v. Meyyappa Chetty*(3) that the Privy Council held that all causes of action must be united in the same suit if possible, then also there would be a bar, as there would be an estoppel by the decision in the suit not by a finding. There may be a difference of opinion therefore between the High Courts in deciding whether a question must be deemed to have been decided against a plaintiff, on account of his failure to make it a ground of attack. But where a question need not be deemed to have been decided on the ground that the decree in the previous suit requires such assumption to make it a decree rightly passed, I am not aware that the cases show that without a clear and express finding

(1) (1903) I.L.R., 26 Mad., 760.

(3) (1898) I.L.R., 21 Mad., 91.

(2) (1901) I.L.R., 25 Bom., 189.

(4) (1904) I.L.R., 27 Mad., 102.

(5) (1893) I.L.R., 20 Calc., 79.

a party is precluded from raising any question in a subsequent suit.

For these reasons I would dismiss the second appeal with costs.

MUNRO
AND
SANKARAN
NAIR, JJ.

BAYYA
NAIDU
v.
PARADESI
NAIDU.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Munro.

PARTHASARATHY NAICKEN *alias* SUBBIAH NAICKER
AND OTHERS (DEFENDANTS NOS. 1, 3 TO 5), APPELLANTS,

v.

LAKSHMANA NAICKER AND OTHERS (PLAINTIFF AND
SECOND DEFENDANTS), RESPONDENTS.*

1910.
April 8.
1911.
January 4.
February 9.

Adverse possession, what title affected by—Possession affects only title of persons entitled to possession—Adverse possession against mortgagor does not affect rights under a simple mortgage executed before adverse possession began.

Possession adverse to the mortgagor is not adverse to and does not affect the right of a simple mortgagee not entitled to possession when the adverse possession commenced, when such mortgage was granted prior to the commencement of such possession.

Aimadar Mandal v. Makhan Lal Day, [(1906) I.L.R., 33 Calc., 1015], followed.

The interest in immoveable property which is acquired by adverse possession can only be that interest which the person entitled to immediate possession had at the time that adverse possession began. It will attach against the whole of the interest of the person so entitled to possession notwithstanding that he has subsequent to the commencement of the adverse possession alienated the whole or any part of such interest provided possession continued uninterrupted.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 559 of 1906, presented against the decree of J. Sundaranana Row, District Munsif of Tirutturaipundi, in Original Suit No. 42 of 1905.

The facts for the purpose of this case are fully set out in the judgment.

T. Rangachariar and *C. S. Venkatachariar* for appellants.

The Hon. The Advocate-General for second respondent.

* Second Appeal No. 844 of 1907.

BENSON AND
MUNRO, JJ.PARTHASA-
BATHY
NAICKEN
v.LAKSHMANA
NAICKER.

MUNRO, J.—The suit is to recover by sale of the mortgaged property the amount remaining due under a registered simple mortgage bond executed in favour of the first plaintiff by the paternal grandfather of defendants at Original Suits Nos. 1 and 2 in 1871. It is found that in execution of a simple money decree obtained against the mortgagor after the execution of the mortgage bond the suit property was attached and sold in Court auction, that delivery was obtained by the purchaser in 1873, and that thereafter the property was held by him and those claiming under him adversely to the mortgagor, so that before the present suit was brought the mortgagor's right to the property had become extinguished. It was contended that the plaintiff's mortgage right had also become extinguished at the same time as the right of the mortgagor. The District Judge negatived the contention and the main question in this appeal, which is by defendants Nos. 1 and 3 to 5, is whether the District Judge was wrong in so doing.

It will be observed that under his mortgage the plaintiff was not entitled to possession and that the mortgage was created before adverse possession had begun to run against the mortgagor. A number of cases have been cited by the appellants in support of their contention and it will be convenient first to consider these cases and see whether they really do support the appellants. In *Anundoo Moyee Dosse v. Dhonendro Chunder Mookerjee*(1) one Sreenath Mulliell in 1841 mortgaged certain property to Mutty Lalseal, who brought a foreclosure suit and purchased the property with the sanction of the master of the Supreme Court at Calcutta. He failed to get possession and his executors sued the defendants for possession. It was found that prior to the mortgage the property had been attached in execution of a decree and that the defendants had purchased it in the sale that followed. Their Lordships of the Privy Council therefore held that the title of the defendants independently of the Regulations of Limitations, was paramount and superior to the title of the mortgagee. They added however that even if the attachment had been posterior to the mortgage, still the Regulations of Limitations would have been a conclusive bar. They pointed out that a purchaser at a Court sale who has no notice of a mortgage on the property purchased thinks he is

(1) (1871) 14 M.I.A., 101.

acquiring the absolute title to the property and that he is in possession as absolute owner. They then proceeded thus :—

“Under these circumstances they are of opinion that if the title of mortgagee to enter by reason of a default having occurred before, had accrued and if the purchaser under such a title had been in possession for twelve years, believing himself to be a *bonâ fide* owner, under a claim to the ownership of the property and not being in possession in any way as mortgagor or under the mortgagor, then in accordance with the cases . . . they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the twelve years after the commencement of his possession.” This decision is manifestly an authority for the appellant's contention but is rather against it. Their Lordships were dealing with a case in which the mortgagee had apparently a right to enter into possession of the mortgaged property on the mortgagor's default, and their conclusion is based not only on the purchaser's possession for twelve years, but also on the right of entry having accrued to the mortgagee, and I understand their Lordships to mean that time did not begin to run against the mortgagee until the right of entry had accrued. The decision is thus in accordance with the general rule that adverse possession begins to run against the true owner when the true owner has the right to immediate possession—see the definition of “adverse possession” given by MARKLEY, J., in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*(1), *Brojonath Koondoo Chowdry v. Khehut Chunder Ghose*(2) was also a case in which the mortgagee had a right of entry on the mortgagor's default. Default occurred, but the mortgagor was left in possession and sold part of the property mortgaged. The purchaser took possession. Their Lordships observed :—“It is impossible to hold that the defendant, the purchaser, was holding or supposed he was holding by the permission of the mortgagee, and, when both things concur—possession by such a holder for more than twelve years and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the Law of Limitations.” This decision no more supports the appellant's contention than the decision last quoted. The remarks at page 151 of the report also clearly apply

BENSON AND
MUNRO, JJ.PARTHASA-
BATHY
NAICKEN
v.LAKSHMANA
NAICKER.

(1) (1879) I.L.R., 4 Cal., 327.

(2) (1871) 14 M.I.A., 144.

BENSON AND
MUNRO, JJ.PARTHASA-
RATHY
NAICKEN
v.
LAKSHMANA
NAICKER.

only to mortgagees who are entitled to possession for they refer to mortgagees who allow the mortgagor to be the ostensible owner in possession. In *Ammu v. Ramakrishna Sastri*(1) the following passage occurs:—"But there are other cases in which the rights and interests of the mortgagor and mortgagee are equally invaded, "e.g. . . . when the mortgagor has remained in possession and a stranger ousts him from the lands." The mortgage in that case was a mortgage under which the mortgagee was entitled to possession, and we are not bound to assume that the learned Judges intended their remarks to apply to a mortgagee not entitled to possession under his mortgage. The words "when the mortgagor has remained in possession" are quite consistent with a case where the mortgagee though entitled to possession has not taken possession. The passage cannot therefore be regarded as an authority for the appellant's contention.

In *Nallamuttu Pillai v. Belha Naicken*(2) the mortgagee was not entitled to possession under his mortgage.

Adverse possession had however begun to run against the mortgagor before the mortgage was granted and such possession was treated as adverse to both mortgagor and mortgagee. In the present case adverse possession had not begun to run against the mortgagor when the mortgage was granted, so that the case cited is clearly distinguishable. In the case cited the fact that the mortgagee was not entitled to possession made no difference, for time had begun to run against the mortgagor when the entire interest in the property vested in him, and nothing subsequently occurred which could have the effect of interrupting the running of time. Thus both the mortgagor and the mortgagee who derived title from him were equally barred. In *Ram Lal v. Masum Ali Khan*(3) also, the property mortgaged was held adversely to the mortgagor at the date of the mortgage.

In *Sheoumber Sahoo v. Bhowaneedeen Kulwar*(4) the mortgage was a mortgage by conditional sale which was to become absolute in two years on certain terms. The suit was for possession under the mortgage, and was resisted by persons who did not claim under either the mortgagor or mortgagee, on the ground that they had been in adverse possession for twelve years. In holding that the

(1) (1879) I.L.R., 2 Mad., 226.

(3) (1903) I.L.R., 25 All., 35.

(2) (1900) I.L.R., 23 Mad., 37.

(4) 2 N.W.P.H.C.R., 223.

BENSON AND
MUNRO, JJ.PARTHASA-
RATHY
NAICKEN
v.
LAKSHMANA
NAICKER.

suit was barred, the High Court observed "where possession of the property alleged to have been mortgaged has been taken by a party who does not claim under the alleged mortgagor, and has been held by such third party adversely to the mortgagee, the mortgagee is bound to come in within twelve years to vindicate his right." The possession in that case was evidently held to be adverse to the mortgagee, but as the facts are not set out in detail we have to conjecture as to the circumstances which were considered to render the possession adverse. The case is distinguishable because the mortgagee was entitled to possession under his mortgage. Further we do not know when the defendant's possession began, a most important consideration as already pointed out. *Prannath Roy Chowdry v. Rookea Begum and others*(1) was also a case of mortgage by conditional sale and so distinguishable. The appellants rely on the following remarks at page 355, "where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows, as a consequence that the mortgagee foreclosing will be able, in a suit for possession, to make good against all occupants a title to possession." There is nothing in this to support the appellants' contention. As already indicated there are cases in which a mortgagee can be successfully met by a plea of adverse possession. *Ram Koomar Sein and others v. Prosunno Coomar Sein and others*(2) is also not in point, for there the mortgagee was entitled to sue for foreclosure and possession before the adverse possession, which was pleaded as a defence to his suit, began.

Much stress has been laid upon *Karan Singh v. Bakar Ali Khan*(3). There the mortgage was created in 1862, and was a simple mortgage, so that so far the case is on all fours with the present case. The defendant's own possession was found to have commenced in 1863, that is, after the mortgage. As however this possession did not extend over twelve years, the defendant sought to tack on the possession of the Collector which began in 1861 before the mortgage, on the ground that the possession of the Collector was possession on his behalf and adverse. Their Lordships of the Privy Council observed with reference to the rule of Limitation that it was not for the plaintiff, the mortgagee, to

(1) (1859) 7 M.I.A., 323.

(2) (1864) W.R., 375.

(3) (1883) I.L.R., 5 All., 1.

BENSON AND
MUNRO, JJ.PARTHASA-
RATHY
NAICKEN
v.
LAKSHMANA
NAICKER.

prove possession within twelve years, but that his suit might be brought within twelve years from the time when the possession of the defendant became adverse to the plaintiff. They then pointed out that the defendant had not been in possession for twelve years, and that he could not tack on the Collector's possession from 1861 to the time when in 1863, the Collector delivered possession to him, inasmuch as since the Collector did not hold for him, he did not claim through the Collector. They did not enter nor was it necessary to enter upon the question whether the defendant's possession from 1863 standing by itself should be considered adverse to the mortgagee. It is suggested that we must infer that they considered that possession adverse because they went into the question whether the defendant was entitled to tack the Collector's possession. Such an inference is not a necessary inference in the circumstances. Had the Collector's possession which began before the mortgage been adverse to the mortgagors, and had the defendant claimed through the Collector then, the mortgagee's suit would have been barred as in *Nallamuttu Pillai v. Betha Naickan*(1). This supplies a reason why it was considered necessary to consider the question of tacking.

There is nothing in *Nilakant Banerji v. Suresh Chandra Mullick* (2) which throws any light upon the present question, and the only other decision relied on is the decision of a bench of this Court in Second Appeal No. 1689 of 1909. That decision undoubtedly supports the appellants' contention. It is however mainly based upon *Prannath Roy Chowdry v. Rookea Begum and others*(3), *Ammu v. Ramakrishna Sastri*(4), *Ram Koomar Sein and others v. Prosunno Coomar Sein and others*(5), *Sheoumber Sahoo v. Bhowaneedeen Kulwar*(6) and *Karan Singh v. Bakar Ali Khan*(7), which have been dealt with above. The reasons which I have given for holding that these cases do not support the appellants' contention do not, so far as I can gather from the judgment, appear to have been present to the minds of the learned Judges who decided Second Appeal No. 1689 of 1909. It may also be observed that the precise proposition which they rejected was "that though the right of

(1) (1900) I.L.R., 23 Mad., 37.

(3) (1859) 7 M.I.A., 323.

(5) (1864) W.R., 375.

(2) (1848) I.L.R., 12 Calc., 414.

(4) (1878) I.L.R., 2 Mad., 226.

(6) 2 N.W.P. H.C.R., 223.

(7) (1883) I.L.R., 5 All., 1.

the mortgagor in the mortgaged property may be extinguished by adverse possession by a person for twelve years after the execution of the mortgage yet, in no case, would the mortgagee's remedy against the mortgaged property be lost if his right to enforce the mortgage against the mortgagor is not barred." Enough has been already said in the judgment to show that such a broad proposition cannot be successfully maintained. In *Aimadar Mandal v. Makhan Lal Day*(1), the mortgage was a simple mortgage. Possession, which began after the grant of the mortgage, was held for more than 12 years prior to the suit by a person claiming under a purchaser of the mortgaged property in execution of a decree against the mortgagor. It was held that Limitation did not begin to run against the mortgagee until he became entitled to claim possession after he purchased the property in execution of the decree which he obtained upon his mortgage. This decision was dissented from in Second Appeal No. 1689 of 1909 above referred to, but was followed by myself and *Krishnaswami Aiyar, J.*, in *Venkatachala Asari v. Subramania Chetti*(2), and I still think it is correct. It is in accordance with what I conceive to be the correct principle, viz., that the interest in immoveable property which is affected by adverse possession is the interest and that interest only which the person who was entitled to immediate possession at the time the adverse possession began, had at that time. This principle can be deduced from the language of article 144 of schedule II of the Limitation Act of 1877 itself, and the cases already cited supply instances of its application. Under article 144, limitation begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. This shows that a claim to immoveable property will not cause time to run against the true owner unless it is accompanied by possession; while the term "adverse possession" clearly implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment the adverse possession begins. As the possession is thus adverse only to the person having the right to immediate possession, it follows that only the interest which that person has in the property when the adverse possession begins can be affected by this adverse possession. If such a person has the

BENSON AND
MUNRO, JJ.PARTHASA-
RATHY
NAICKEN
v.
LAKSHMANA
NAICKER.

(1) (1906) I.L.R., 33 Calc., 1015. (2) (1909) S.A. No. 682 (unreported).

BENSON AND
MUNRO, J.J.PARTHASA-
RATHY
NAICKEN

v.

LAKSHMANA
NAICKER.

entire interest when the adverse possession begins, he cannot, by afterwards transferring the whole interest, as by sale, or by transferring a part of the interest as by mortgage, prevent the operation of prescription upon the entire interest, unless he also interrupts the possession which is adverse. If, however, while still in possession he transfers a part of his interest, the transferee will not be affected by the subsequent possession of a third party, if under his transfer he is not entitled to possession of the property. In the two cases quoted *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee*(1) and *Brojonath Koondoo Chowdry v. Khelut Chunder Ghose*(2), the mortgagees were affected by the possession of the third party, because they were entitled to possession under their mortgages. In *Nallamuttu Pillai v. Betha Naicken*(3), and *Ram Lal v. Masum Ali Khan*(4) the possession of the third party began before the mortgage, and the mortgagee was therefore affected by it. Except the decision in Second Appeal No. 1689 of 1909, no decision has been brought to notice which is clearly contrary to the views above expressed. The contention of the appellants must therefore fail.

The only other question is whether article 147 or article 132 of schedule II of the Limitation Act of 1877 applies. The Courts below have rightly followed the decision of this Court in *Srinivasa Pillai v. Vasudeva Mudaliar*(5).

I would dismiss this second appeal with costs.

BENSON, J.—I concur. The simple mortgage in favour of the first plaintiff was granted before the purchaser in Court auction got possession—when the purchaser got possession the mortgagee (plaintiff) was not entitled to possession so the purchasers' possession though adverse to the mortgagor, was not adverse to the mortgagee, for it was not inconsistent with his rights. The decision of the lower Appellate Court is therefore right and the second appeal is dismissed with costs.

(1) (1871) 14 M.I.A., 101.

(3) (1900) I.L.R., 23 Mad., 37.

(2) (1871) 14 M.I.A., 144

(4) (1903) I.L.R., 25 All., 35.

(5) Appeal No. 164 of 1902 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

THANDAYUTHAPANI KANGIAR AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

RAGUNATHA KANGIAR AND OTHERS (PLAINTIFFS, AND DEFENDANTS NOS. 128 TO 130, 27, 88, 90 AND LEGAL REPRESENTATIVES OF THE DECEASED PLAINTIFFS), RESPONDENTS.*

Hindu Law, partition—Decree for partition, preliminary—Effect of appeal against such decree—Decree effects severance, which is not affected by the subsequent appeal.

A preliminary decree directing a partition effects a severance of the joint family and the divided status is not affected by filing an appeal against such decree. Subsequent births or deaths cannot deprive any of the parties or their representatives of the shares allotted to them by such decree.

Subbaraya Mudali v. Manicka Mudali, [(1896) I.L.R., 19 Mad., 345], followed.

Sakharam Mahadev Dange v. Hari Krishna Dange, [(1881) I.L.R., 6 Bom., 113], dissented from.

Joy Narain Giri v. Girish Chunder Myer, [(1878) I.L.R., 4 Cal., 434], referred to. Such a decree like other decrees, if right at the time it was passed, cannot be varied by reason of events subsequently happening.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suits Nos. 109 to 131 of 1907, presented against the decree of V. Subramanyam Pantulu, Subordinate Judge of Tanjore, in Original Suit No. 27 of 1904.

The facts of this case are fully set out in the judgment.

S. Srinivasa Ayyangar for The Hon. the Advocate-General and *G. S. Ramachandra Ayyar* for appellants.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for eighth and ninth respondents.

M. Subrahmaniz Ayyar for tenth respondent.

K. B. Ranganadha Ayyar for respondents Nos. 2 to 7.

WALLIS, J.—The plaintiff obtained a preliminary decree for partition which was confirmed with modifications on appeal, and died while a Second Appeal was pending. His legal

1911.
January 30.
February 1,
2, 8.

* Second Appeal No. 1734 of 1908.

WALLIS
AND
SANKARAN-
NAIR, JJ.

THANDA-
YUTHAPANI
KANGIAR
v.
RAGUNATHA
KANGIAR.

representatives have petitioned to be brought on record and the petition is opposed on the ground that the plaintiff's share passed on his death by survivorship and that there is nothing for the representatives to succeed to. Whether this be so or not is a question to be decided in the appeal itself after hearing both sides. The legal representatives deny that the plaintiff's share passed by survivorship on his death, and they are entitled to be brought on the record for the purpose of contesting the point. We therefore overrule the objection and direct the legal representatives to be brought on the record.

On the main question it was held by this Court in *Subbaraya Mudali v. Manika Mudali*(1) differing from *Sakharam Mahadev Dange v. Hari Krishna Dange*(2) that a decree for partition effects a severance of the joint family, that this severance is not affected by the subsequent filing of an appeal from the decree. Our attention was however called to certain observations in *Gorakala Kanakayya v. Janardana Padhi*(3) (where the point did not arise for decision) in which *Sakharam Mahadev Dange v. Hari Krishna Dange*(2) was referred to with approval. We have accordingly reconsidered the question, but after listening to the able and exhaustive argument addressed to us by Mr. S. Srinivasa Ayyangar I see no reason to differ from the previous decision of this Court. Partition may be effected by consent and in proper cases by decree. When it is effected by decree, I can see no reason why the decree should not hold good as other decrees do, unless and until it is reversed. It is not a feature of our law or any other legal system, so far as I know, that the filing of an appeal should affect the operation of a decree; and unless the Court intervenes to stay proceedings the property may be partitioned and distributed in the shares fixed by the decree before the appeal is finally determined, possibly years before, in cases where there are a series of appeals. Where a decree for partition has been properly made and has directed the division of the property in appropriate shares, I can see no reason for altering this portion of the decree on appeal by reason of births or deaths afterwards supervening in the family. A partition by consent in certain shares when

(1) (1898) I.L.R., 19 Mad., 345.

(2) (1882) I.L.R., 6 Bom., 113.

(3) (1910) M.W.N., 841 at p. 844.

once made is not affected by subsequent births or deaths in the family, and there does not appear to be any reason why it should be otherwise when it is made by decree.

The ordinary rule admittedly is that decrees which were right at the time they were passed, are not varied by reason of events which subsequently happen, and I can see no reason why an exception should be made in the case of decrees for partition, or why partitions by decree should be put on such an unfavourable footing as compared to partitions effected by consent. Assuming alienees would not be prejudicially affected, it would still be a hardship to the parties themselves to make their rights on partition to depend on their surviving the appeal proceedings. In *Joy Narain Giri v. Girish Chunder Myti*(1) their Lordships of the Judicial Committee after construing a decree of the District Court not then under appeal as a decree for partition observe:—"That being so, their Lordships are of opinion that although the suit is not actually in terms for partition, yet that the decree does effect a partition, at all events, of rights, which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appvier v. Rama Subba Aiyar*(2) where it was held that a mere agreement to divide, effects a severance of the joint family without waiting for a partition by metes and bounds. What their Lordships appear to lay down in the passage cited is that a decree directing partition has the same effect as an agreement to divide. In the particular case the decree-holder who had obtained the decree above referred to died while an appeal was pending to the Privy Council, but the decree was nevertheless confirmed by their Lordships in a judgment which is not reported. The report deals with two consolidated appeals, one against an order in execution of the previous decree and another against the dismissal by the High Court of an appeal from a decree of the District Court dismissing a fresh suit filed by the defendant in the previous suit on the ground that the previous decree had not severed the joint family, and that consequently the property passed to him by survivorship on the death of the plaintiff in the previous suit. It does not appear to have occurred to any one in this hotly contested litigation that, assuming the first decree effected a severance, the

WALLIS
AND
SANKARAN-
NAIR, JJ.

THANDA-
YUTHAPANI
KANGIAR
v.
RAGUNATHA
KANGIAR.

(1) (1879) I.L.R., 4 Cal., 434; 5 I.A., 228.

(2) (1866) 11 M.I.A., 75.

WALLIS
AND
SANKARAN-
NAIR, JJ.
—
THANDA-
YUTHAPANI
KANGIAR
v.
RAGUNATHA
KANGIAR.

subsequent death of the plaintiff pending an appeal made any difference. And assuming the law to be correctly laid down by their Lordships, that the decree of the Court of First Instance effected a severance, there does not appear to be any reason why the subsequent filing of an appeal should be held to effect a reunion and justify the Appellate Court in making a fresh distribution of shares according to the condition of the family at the date of the decision of the appeal, and so depriving parties or their representatives of the shares originally allotted to them. In *Chidambaram Chettiar v. Gauri Nachiar*(1) which also came before the Privy Council, the District Judge tried the first issue as to whether the zamindari was partible first and in his judgment held that it was, and that, this being so, the plaintiff was admittedly entitled to partition. It was not clear if any decree or order had been drawn up on this judgment, but an appeal from the decree of the High Court affirming the final decree of the District Court, their Lordships held that the judgment of the District Judge on the first issue was equivalent to a declaratory decree and rendered the parties separate in estate, if they had not already been so, and that the subsequent death of the plaintiff before the final decree of the District Court did not make any difference or cause the suit to abate. Their Lordships no doubt observed that the defendant had not appealed from the judgment of the District Court on the first issue and appeared to have acquiesced in it but these remarks were probably due to the fact already mentioned that no decree or order directing partition was forthcoming, and it does not appear that the result would have been different if these features of the case had been absent. The ruling in *Sangili v. Mookun*(2) that the plaintiff's share must be determined with reference to the condition at the date of the final decree in the suit is opposed to both of the Privy Council decisions abovementioned, although the actual decision may possibly be supported on other grounds, as in that case the only decree passed by the lower Court was set aside. As regards *Sakharam Mahadev Dange v. Hari Krishna Dange*(3), the decision rests on the proposition that the decree of the Subordinate Judge in that case did not operate as a severance so long as it remained under appeal. For the reasons already given, I prefer

(1) (1879) I.L.R., 2 Mad., 83.

(2) (1893) I.L.R., 16 Mad., 350 at p. 353.

(3) (1882) I.L.R., 6 Bom., 113.

to follow the decision of this Court in *Subbaraya Mudali v. Manika Mudali*(1) and dismiss the second appeal with costs.

SANKARAN-NAIR, J.—I agree and I have only to add that I believe the practice in this Presidency has always been in accordance with the law as laid down in *Subbaraya Mudali v. Manika Mudali*(1).

WALLIS
AND
SANKARAN-
NAIR, JJ.
—
THANDA-
YUTHAPANI
KANGIAR
v.
RAGUNATHA
KANGIAR.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

GOLIA HANUMAPPA AND OTHERS

v.

EMPEROR.*

1911.
April 24, 25,
28.

Penal Code, Act XLV of 1860, s. 149—Existence of common object before commencement of fight not necessary to constitute offence—Criminal Procedure Code, ss. 237, 238, 423 (b)—Appellate Court has power to convict accused of an offence of which he is acquitted in cases not falling under ss. 237, 238.

To constitute an offence under section 149 the existence of a common object before the commencement of the fight is not necessary. It is enough if the common object is adopted by all the accused.

The power of an Appellate Court under section 423 (b) of the Criminal Procedure Code to alter the finding while maintaining the sentence is not confined to cases falling under sections 237 and 238 of the Code.

The finding which an Appellate Court may alter under section 423 (b) may relate either to an offence with which the accused is apparently charged in the lower Court or to one of which he might be convicted under sections 237 and 238 without a distinct charge. In cases not falling under sections 237 and 238, he cannot be convicted of an offence with which he was not charged in the lower Court. Where however he has been charged and the lower Court has recorded a finding on such charge, the Appellate Court can alter the finding.

APPEAL against the conviction and sentence passed upon the appellants by B. C. Smith, Sessions Judge of Bellary Division, in Calendar Case No. 72 of 1910.

The facts for the purpose of this case are sufficiently stated in the judgment.

Dr. S. Swaminadhan and S. Ranganadha Aiyar for appellant.

(1) (1896) I.L.R., 19 Mad., 345.

* Criminal Appeal No. 22 of 1911.

SUNDARA
ATTYAR
AND
AYLING, JJ.
—
GOLLA
HANUMAPPA
v.
EMPEROR.

The Public Prosecutor for the Crown.

JUDGMENT.—The eight accused in this case were all charged with the offence of rioting under section 148, Indian Penal Code. The second accused was further charged with culpable homicide amounting to murder under section 302; the sixth and fourth accused with causing grievous hurt with a dangerous weapon under section 326. The accused against whom there was no charge of murder or causing grievous hurt as the immediate perpetrators of those offences were, however, charged with the commission of the offences constructively under section 149 of the Code.

The facts of the case are clearly set forth in the judgment of the Sessions Judge and we consider it unnecessary to repeat them. The cause of the rioting was an encounter between prosecution witnesses Nos. 1, 3 and 4 and probably also 5 on the one side and one Narasakka, the mother of accused Nos. 6 to 8 on the other side. A case of abduction of one Narasamma against accused Nos. 2, 3 and 6 initiated by the prosecution fifth witness, her husband, was pending at the time of the encounter. One Narasappa according to the prosecution was helping the prosecution fifth witness in the abduction case. The prosecution witnesses referred to above were going from their village for sowing their fields on the morning of the day of the offence. The encounter with Narasakka took place just outside the village. Abusive words and a quarrel ensued between the prosecution party and Narasakka. According to the prosecution all the eight accused went up to the place where the quarrel was going on. A fight ensued between them and the prosecution party in which very serious injuries were inflicted on Narasanna who died in consequence. Prosecution witnesses Nos. 3 and 4 also sustained serious injuries and prosecution first witness was also injured. Some of the accused also received some injuries. The lower Court acquitted all the accused of murder. It also acquitted them of rioting holding that "what happened was a sudden fight," that is to say, apparently, that it was not proved that the accused acted in pursuance of a common object and were therefore not members of an unlawful assembly. But the Judge found that the evidence established that all the accused were guilty of causing hurt and accused Nos. 2 and 6 of causing grievous hurt. His judgment does not show what injuries each of the accused inflicted and on which of the prosecution witnesses, except with respect to the sixth accused. According

SUNDARA
ATTYAR
AND
AYLING, JJ.
—
GOLLA
HANUMAPPA
v.
EMPEROR.

to him it is not certain who dealt the fatal blow which killed Narasanna. He proceeds "Though it is not certain that the second accused dealt the fatal blow, he certainly took a leading part in the fight. I think there is no reasonable doubt too that the sixth accused was particularly active and that he caused grievous hurt to prosecution third witness." He convicted all the accused under section 325, Indian Penal Code, and the second and the sixth accused under section 326, Indian Penal Code, also. Accused Nos. 1 to 3, 4 and 6 have preferred this appeal.

The evidence as to the details of the fight and as to the accused who inflicted the fatal blow on the deceased Narasanna or caused grievous hurt to prosecution witness No. 3 is extremely discrepant and some of the witnesses for the prosecution gave different accounts on different occasions before the trial of the case in the Sessions Court. We are unable to confirm the Sessions Judge's finding that it was the sixth accused that caused grievous hurt to the third accused. Nor are we able to decide on the evidence whose act caused the death of Narasanna. We are, however, of opinion, differing from the Sessions Judge, that the evidence is sufficient to prove that all the accused were members of an unlawful assembly and were guilty of rioting and that they were all responsible for the injuries inflicted on several prosecution witnesses in the course of the fight. The cause of the quarrel as already mentioned was the deceased Narasanna's helping the prosecution fifth witness in the abduction case and acting against accused Nos. 6, 2 and 3 who were the accused in that case. All the accused espoused their cause and joined in the quarrel. We are quite unable to accept the argument of the learned counsel for the appellants that the existence of a common object before the fight began is necessary to justify the conviction of the accused of rioting. It is quite enough that accused Nos. 1, 3, 4, 5, 7 and 8 adopted the common object of accused Nos. 2, 3 and 6 to cause hurt to the prosecution party for helping Narasanna. It is also immaterial that the idea of injuring them was conceived suddenly after the accused went to the scene of offence where Narasakka had already encountered the prosecution party. We agree with Sessions Judge that the accused Nos. 1 to 3 and 6 are proved to have been present and to have taken part in the fight. We also agree that the second and sixth accused took the most prominent part in it.

SUNDARA
AYYAR
AND
AYLING, JJ.

GOLLA
HANUMAPPA
v.
EMPEROR.

With the regard to the fourth accused, he pleaded *alibi* and examined two witnesses, defence witnesses Nos. 12 and 13 and produced exhibit X to prove his plea. This is a document purporting to have been executed by the fourth accused in twelfth witness's favour for Rs. 26, the balance of consideration due from him to the witness for the purchase of a bull on the date of the offence. The witness swears that the document was executed on the date it bears. He is apparently a respectable witness paying an annual assessment of Rs. 300. Defence thirteenth witness is the stamp vendor who sold the stamp on which exhibit X was executed on the date previous to the offence. The fourth accused is a brother of the fifth accused whose presence at the quarrel we find to be proved and it is possible that he was falsely included in the charge owing to his relationship to some of the accused. Having regard to the conflict of evidence as to the presence of the fourth accused we think there is reasonable doubt regarding his complicity in the occurrence and he is therefore entitled to be acquitted.

Dr. Swaminadhan contends that it is not competent to us to convict the accused of being members of an unlawful assembly or rioting or to hold them constructively guilty of the offences of causing hurt and grievous hurt as they were acquitted of those offences by the lower Court. But in our opinion this contention is not sound. Under section 423, clause (b) of the Code of Criminal Procedure, an Appellate Court has the power to alter the finding of the lower Court maintaining the sentence. It is urged that this provision entitles the Court to convict an accused of an offence of which he is acquitted only in cases falling under sections 237 and 238 of the Code of Criminal Procedure. We see no reason to adopt this qualification of the plain words of section 423. Sections 237 and 238 of the Code of Criminal Procedure provide that in the cases to which they apply an accused person may be convicted of an offence with which he is not charged. The finding which an Appellate Court may alter under section 423 (b) may relate either to an offence with which the accused was apparently charged in the lower Court or to one of which he might be convicted without a distinct charge. In cases not falling under sections 237 and 238 of the Code of Criminal Procedure no doubt the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court but where he has been charged and the first Court has recorded a finding on the charge

there is no reason for holding that the Appellate Court cannot alter the finding. There is obviously no injustice in doing so. Our view is in accordance with the opinion of the Calcutta High Court in *Satis Chandra Das Bose v. Queen-Empress*(1) and *Queen-Empress v. Jabanulla*(2). In the result we acquit the fourth accused and direct that he be discharged and set at liberty. We alter the conviction of the other appellants by finding them guilty of offences under section 147 and under sections 325 and 326 read with section 149 of the Penal Code and confirm the sentences.

SUNDARA
AYYAR
AND
AYLING, JJ.

GOLLA
HANUMAPPA
v.
EMPEROR

ORIGINAL CRIMINAL.

Before Sir Arnold White, Chief Justice, Mr. Justice Sankaran-Nair and Mr. Justice Ayling.

KING-EMPEROR

v.

NILAKANTA AND THIRTEEN OTHERS, ACCUSED.*

1911.
September 11
to
1912.
Feb. 2, 15.

Indian Evidence Act (I of 1872), ss. 25, 114, illustration (b), 133, 157—Criminal Procedure Code, Act V of 1898, ss. 154, 155, 157, 162 and 551—Approvers' evidence, corroboration of—Admissibility of previous statements of approvers to Police Inspector—Value of such statements as corroboration—"Legally competent to investigate," meaning of—Competency of officer of Criminal Investigation Department.

Sir ARNOLD WHITE, C.J., and AYLING, J.—It is not the law either of England or India that the evidence of an accomplice must be corroborated in material particulars before it can be acted upon. Where a court is judge of fact as well as of law the court as a judge of fact is not precluded from considering the question whether the unsupported evidence of an accomplice is true or not. A court may be warranted in declining to draw the presumption of fact referred to in illustration (b) to section 114, Indian Evidence Act (I of 1872). Section 133, Indian Evidence Act, is the substantive enactment declaring the law whereas section 114 only lays down certain propositions intended to assist the courts in drawing inferences of fact.

Where the court is acting in the capacity of both judge and jury it must direct itself and the proper direction would be:—Consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the

(1) (1900) I.L.R., 27 Cal., 172. (2) (1898) I.L.R., 23 Cal., 975.

* Special Bench Case No. 1 of 1911.

WHITE, C.J., SANKARAN-NAIR AND AYLING, JJ. circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it.

KING-EMPEROR v. NILAKANTA. *In re Meunier*, [(1894) 2 Q.B., 415], approved.

Reg. v. Ramasami Padayachi, [(1878) I.L.R., 1 Mad., 394], approved.

What are the "material particulars" referred to in the Indian Evidence Act (I of 1872), illustration (b), must depend upon the nature of the charge and the facts of the particular case.

Oral testimony of independent witnesses is not necessary.

SANKARAN-NAIR, J. (*dissentiente*).—The Indian Evidence Act [sections 133 and 114, illustration (b)] embodies the rules of English law that the presumption must first be drawn that the evidence of an accomplice is unreliable and exceptional circumstances must be proved to justify its acceptance.

The question is not whether a conviction based on the uncorroborated testimony of an accomplice, is legal but whether there is a presumption that such testimony cannot be accepted without corroboration.

A person should not be convicted except under "very special circumstances" upon the uncorroborated testimony of an accomplice.

The "special circumstances" are that the grounds on which an accomplice's evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength: that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions.

In cases tried by a jury, a jury, has to be advised by the Judge of what I have above referred to.

The CHIEF JUSTICE and AYLING, J.—It cannot be laid down as a proposition of law that previous statements of an accomplice cannot be regarded as corroborative of evidence given by him at the trial *Reg. v. Malapabin Kupana* [(1874) 11 B.H.C.R., 196], dissented from.

SANKARAN-NAIR, J. (*dissentiente*).—A previous statement by the accomplice himself or a statement by another accomplice is not the corroboration required under the rule as to material particulars.

The CHIEF JUSTICE and AYLING, J.—The words "before any authority legally competent to investigate the fact" in section 157, Indian Evidence Act, are quite general and should not be restricted to police officers and to "investigations" in the technical sense in which the word is used in the Code of Criminal Procedure. The words are competent to investigate not a case but "the fact." The words "legally competent" do not mean only competent under some express provision of law.

An Inspector of the Criminal Investigation Department has power to investigate in cases to which section 156, Criminal Procedure Code, applies. As such his "local area" is the Presidency of Madras.

SANKARAN-NAIR, J. (*dissentiente*).—The police officers entitled to investigate an offence are the police officers referred to in the Code of Criminal Procedure, i.e., a station-house officer (sections 156, 157), an officer in charge of a police station [sections 154, 155, clause (1)] and police officers superior in rank to an officer in charge of a police station (section 551). An Inspector of the Criminal Investigation Department is not such an officer and his evidence is not admissible under

section 157, Indian Evidence Act, he not being "any authority legally competent to investigate the fact" under section 157, Criminal Procedure Code.

The CHIEF JUSTICE and AYLING, J.—A statement of a confessional nature made to a police officer by a witness is not a confession of an accused person within the purview of section 25, Evidence Act.

Section 25 lays down that such a statement cannot be used against the person making it while on his trial.

SANKARAN-NAIR, J. (*dissentiente*).—The statements of approvers to the Police Inspector being really confessions are inadmissible in evidence against the accused under section 25, Indian Evidence Act. A confession is not the less a confession because it is sought to be used against other persons.

Per totam curiam.—Under section 162, Criminal Procedure Code, the written record of a statement made to a police officer in the course of an investigation cannot be used as evidence but the section does not exclude oral evidence of the statement whether the statement has been taken down in writing or not.

CASE committed by A. McG. C. Tampoe, I.C.S., Sub-Divisional First-class Magistrate of Tinnevely (Preliminary Register Case Nos. 3—6 of 1911 on his file, for trial by the High Court, under the provisions of the Indian Criminal Law Amendment Act XVI of 1908.

C. F. Napier (Public Prosecutor), T. Richmond and A. Sundara Sastrigal for the Crown.

J. C. Adam for Nilakanta Brahmachari, first accused.

T. Prakasam for Sankara Krishna Iyer, second accused, Vembu Iyer *alias* Mahadeva Iyer, tenth accused and Pichumani Iyer *alias* Venkatachalam Iyer, fourteenth accused.

M. D. Devadoss and J. L. Rosario for Madathukadai Chidambaram Pillai, third accused and Bapu Pillai *alias* Ramasami Pillai, eighth accused.

B. Narasimha Rau and T. M. Krishnasamy Ayyar for Muthukumarasami Pillai, fourth accused, and Subbiah Pillai, fifth accused.

N. K. Ramasami Ayyar for Jagannadha Iyengar, sixth accused.

Hon. Mr. L. A. Govindaraghava Ayyar and L. S. Veeraraghava Ayyar for Harihara Iyer, seventh accused.

M. G. Kuppusami Ayyar for V. Desikachari, ninth accused.

S. T. Srinivasa Gopalachari and S. Muthia Mudaliar for Savadi Arunachalam Pillai, eleventh accused and Alagappa Pillai, twelfth accused.

V. Ryru Nambiar for Vandemataram Subramania Iyer, thirteenth accused.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

The charge, as originally framed, ran thus:—"That you . . . conspired to wage war against His Majesty . . . and to attempt to wage war. . . ." At the trial a preliminary objection was taken on behalf of the accused that the indictment was bad as being too vague, as it omitted to mention the names of those with whom the accused were said to have conspired, *Emperor v. Lalit Mohan Chuckerbutty*(1) and Archbold on Pleadings. The Public Prosecutor not objecting, their Lordships ordered the charge to be amended. As amended the charge was as follows:—

First count.—"That you, Nilakanta *alias* Brahmachari, Sankarakrishna Iyer, Madathukadai Chidambaram Pillai, Muthukumarasami Pillai, Subbayya Pillai, Jagannadha Iyengar, Harihara Iyer, Bapu Pillai *alias* Ramasami Pillai, V. Desikachari, Vembu Iyer *alias* Mahadeva Iyer, Savadi Arunachalam Pillai, Alagappa Pillai, Vandemataram Subramania Iyer, Pitchumani Iyer *alias* Venkatachalam Iyer—Between the first day of January 1910, and the seventeenth day of June 1911 at Tenkasi, Tuticorin, Shencottah, Punalur, Ottapidaram, and elsewhere conspired with each other and with one Vanchi Iyer and one Dharmaraja Iyer, both deceased, one Arumugam, one Somasundaram, one Ramasami Iyer, and one Madasami, not before the Court, and with diverse persons unknown, to wage war against His Majesty the King-Emperor—The King-Emperor of India and to attempt to wage war against His Majesty the King-Emperor, and further conspired to deprive His Majesty the King-Emperor, of the sovereignty of British India and further conspired to overawe by means of criminal force or the show of criminal force, the Government of India, and the Government of Madras and that you have thereby committed an offence punishable under section 121-A of the Indian Penal Code and within the cognizance of the High Court of Judicature at Madras aforesaid."

Second count.—"And you, Nilakanta *alias* Brahmachari, Sankara Krishna Iyer, Madathukadai Chidambaram Pillai, Muthukumarasami Pillai, Subbayya Pillai, Jagannadha Iyengar, Harihara Iyer, Bapu Pillai *alias* Ramasami Pillai, V. Desikachari, Vembu Iyer *alias* Mahadeva Iyer, Savadi Arunachalam Pillai, Alagappa Pillai, Vandemataram Subramania Iyer, Pitchumani

(1) (1911) I.L.R., 38 Calo., 559.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Iyer *alias* Venkatachalam Iyer stand further charged that you at the same time and the same places abetted the murder of one Robert William D'Estcourt Ashe, late Collector of the District of Tinnevely, by one Vanchi Iyer on the seventeenth day of June 1911, by engaging with each other and with the said Vanchi Iyer and one Dharmaraja Iyer, deceased, one Arumugam, one Somasundaram, one Ramasami Iyer and one Madasami, not before the Court, and with these diverse persons unknown in a conspiracy one of the objects of which was the murder of all the Europeans and that you have thereby committed offences punishable under sections 302, 109 and 111 of the Indian Penal Code and within the cognizance of the High Court of Judicature at Madras aforesaid."

The second accused, Sankara Krishna Iyer, was also separately charged with having aided and abetted the murder of Mr. Ashe, under sections 302 and 109, and 111 of the Indian Penal Code by being present along with the assassin on the railway platform at Maniyachi on 17th June, 1911. This charge was agreed to be tried in a separate trial after the trial of the above charges but has subsequently been dropped.

The following is a short outline of the facts of this case which are also exhaustively dealt with in the judgment.

On the morning of the 17th June 1911, Mr. R. W. D'E. Ashe, I.C.S., Collector of Tinnevely, while sitting in a first-class compartment of a train which was standing at Maniyachi junction, Tinnevely district, was shot dead from the platform of the station by one Vanchi Iyer. The murderer was pursued along the platform and took refuge in a latrine where he shortly afterwards committed suicide. The murder was witnessed by two boys, sons of the station-master, while a peon of Mr. Ashe and several others pursued the murderer. It was alleged by the prosecution that one Sankarakrishnan, the second accused herein accompanied Vanchi Iyer to Maniyachi junction and was present with him at the time of the murder and afterwards made his escape.

Telegraphic intimation of the tragedy was given to all the officers in the district, and in consequence of it, the Sub-Collector of Tuticorin and the Assistant Superintendent of Police went to Maniyachi at about 1-30 P.M. They found the dead body of the assassin in the latrine with a Browning automatic pistol in his hand.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

The body of Vanchi Iyer was conveyed to Tinnevely where in his coat pocket was found (among other things) a letter (exhibit EE, set out in the judgment of Sankaran-Nair, J., at p. 336). This letter gave particulars as to his name and native place and stated some reasons as the motive for the crime.

In consequence of the information contained in the letter, orders were sent to the Inspector of Police, Tenkasi, on the same day (17th) to go to Shencottah, communicate with Shencottah Police and make enquiries about Vanchi Iyer. A second party was despatched to Shencottah on the next day on receipt of further information. As a result of the searches and enquiries made by these parties, two further parties were sent out on the 19th; one to Tuticorin under the Assistant Superintendent of Police (prosecution witness No. 89), accompanied by Criminal Investigation Department Inspector Veeraraghava Aiyar (prosecution witness No. 31) and the other to Ottapidaram to make certain searches.

The Assistant Superintendent of Police and the Inspector who reached Tuticorin at about 10 P.M. on the night of the 19th went to the house of one K. V. Arumugam Pillai (prosecution witness No. 6, the first approver) at about 2 A.M., and the Assistant Superintendent told him that he was going to seal his house and put a guard over it with a view to searching it the next morning. Arumugam Pillai then made a long statement which was taken down in writing by the Inspector detailing all that he knew about Vanchi Iyer and the history of a secret society which had existed for some time previous to the crime. The house was searched the next morning and certain incriminating documents were seized. As soon as the other searches in Tuticorin were over, the Assistant Superintendent of Police and the Inspector brought Arumugam Pillai into Tinnevely and handed him over to the District Superintendent of Police. He then repeated the statement to the latter. He had also prayed the police, after he had made his statement at Tuticorin, for protection against possible violence from his associates of whom he had given information. He repeated this request before the District Superintendent as well. The police alleged that the approver was not under arrest but he himself admitted at the trial that he had been arrested by Veeraraghava Aiyar at Tuticorin. He was subsequently tendered a pardon by the District Magistrate, Tinnevely, under section 337

of the Criminal Procedure Code and in consequence of his accepting it he was examined as a prosecution witness in this case.

As a result of the search at Ottapidaram, the Deputy Superintendent of Police proceeded to Tuticorin and searched the house of one O. Somasundaram Pillai (prosecution witness No. 12, the second approver) whom he had reason to suspect of complicity in the crime. He was arrested and brought to Tinnevely on the 22nd. He was also tendered a pardon under section 337, Criminal Procedure Code, by the District Magistrate, which he accepted and was examined as a prosecution witness.

The evidence chiefly relied upon by the prosecution was that of the above two approvers and that of a third approver, one Ramasami Iyer, the statements of the first accused (exhibits AAAA and AAAA-1,) correspondence between members of the society which it was alleged showed its seditious nature and pointed to the existence of the conspiracy charged, and a quantity of papers, periodicals, books, pamphlets, photographs, etc., seized from the houses of certain members of the conspiracy, also of a more or less seditious nature.

The evidence of the first two approvers, Arumugam and Somasundaram (prosecution witnesses Nos. 6 and 12) was to the effect that they were residents of Tuticorin. They attended the lectures of V. O. Chidambaram Pillai and Subramania Siva which preceded the Tinnevely riots in 1908. They then commenced to subscribe to seditious papers from Pondicherry and to believe in, and be influenced by, the ideas advocated by such writings. In April 1910, the second accused Sankarakrishnan went to Tuticorin and informed these two witnesses that one Nilakanta Brahmachari (accused 1) had come from Pondicherry to Tenkasi to hold a meeting and asked them to attend it. Arumugam Pillai alone went as Somasundaram Pillai was prevented by work from doing so. He found Nilakanta in the house of Madathukadai Chidambaram Pillai (third accused). He was introduced by second accused to three persons there whom he did not know before. They were Nilakanta (accused 1), Madathukadai Chidambaram Pillai (accused 3) and Vandemataram Subramania Iyer (accused 13). Nilakanta took the witness aside by himself and told him that he was the contributor to the Pondicherry paper "Suryodaya" and that he had come to Tenkasi to convene a meeting, the purpose of which he proceeded to explain

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

as follows :—“ That persons such as V. O. Chidambaram Pillai and Subramania Siva had tried to do good to the country by lectures, but that Government had punished them, that Bengalis had also manufactured bombs but that too was stopped by the conviction of many persons in the Midnapore and Alipore bomb cases ; and that the Collector of Nasik and Babu Asutosh Biswas had been murdered with the result that many persons were hanged for it, that the purpose of killing the English was to obtain swaraj, and that they should drive the English out of the country.” He then proceeded to describe the meeting which they were about to hold as the beginning of a new plan for effecting what they wanted by means of a revolution similar to the Sepoy Mutiny of 1857 and that they should gather together select men in each village and town for the purpose, that he would supply them with arms that these men should start a revolution all over the country and *kill all Englishmen on the same day* when he Nilakanta should give the word. The meeting which was to bring into existence one of such bands, then commenced and after a preliminary discussion, Nilakanta told the persons present (viz., accused 2, 3, 13 and Arumugam) that they should all take an oath. Puja was offered to a picture of Kali, the goddess, by making offerings of sacred ashes and flowers to it. Some ‘kumkumum’ (red powder) was then mixed in water and each person present put a little of it into his mouth and the picture of Kali was also sprinkled with it. The red liquid was said by Nilakanta to be symbolical of the blood of the Englishmen. Then a piece of paper was taken, on which was written an oath to the effect that the lives and the property of the persons taking the oath were dedicated for the purpose of obtaining swaraj, that the secrets of the society of which they were becoming members should not be divulged and that, if any one did so, he should be killed as Goshein of Calcutta was killed and that the drinking of the kumkumum water was symbolical of their drinking the blood of the Englishmen. This was read by each of the persons present, in turn, and sealed by affixing their thumb impressions in blood from their thumbs, which had been cut previously.

They were also given new names to conceal their identity in case any correspondence about this society should fall into the hands of the authorities. Accused 1, 2, 3, 13, and the approver Arumugam took the oath in this manner.

Their evidence further was that five or six months later, Sankarakrishnan (accused 2) again went to Tuticorin to make arrangements for a similar meeting by Nilakanta there. The latter arrived a day or two later from Tenkasi. Arumugam made all the necessary arrangements for their stay and brought in recruits for the society. ‘A meeting similar to the one at Tenkasi, was held and a similar oath was taken. Accused 1, 2, 4, 5, Madasami Pillai (the absconding accused), Arumugam Pillai and Somasundaram Pillai alone were present at this meeting and all of them took the oath there.

Ramasami Aiyar (the third approver) was a native of Sundarapandiapuram. His house was searched on the 22nd of June, i.e., five days after the murder of the Collector. He was then found to be absent from the village and his whereabouts were not known although for two or three days after the date of the murder he had been in the village. The prosecution alleged that he absconded but this was contested by the defence which urged that it was his business to travel about the country and mere absence from his village proved nothing. He returned to the village at the end of July, and was at once taken by the local village magistrate before the Police, who produced him on the same day (the 1st of August) before the Stationary Sub-Magistrate of Tenkasi. He was then taken on the same day, before the District Superintendent of Police, who was then at Courtallam, and who brought him to Tinnevely the next day. On the 17th of August he was tendered a pardon by the committing Magistrate on the direction of the District Magistrate, Tinnevely, under section 337 of the Criminal Procedure Code. This he accepted and was therefore examined as a prosecution witness.

His evidence is to the effect that the society took root in Shencottah and Punalur about August 1910. He was travelling about the middle of 1910 in Travancore and Cochin, giving performances with a gramophone. He had been employed in Travancore when the railway line to Quilon was under construction and was already acquainted with Vanchi Iyer, the assassin, and Harihara Iyer (accused 7).

In his travels on this occasion he came to Alleppey, and met Harihara Iyer there. They then came together in Quilon, where the former introduced him to Bapu Pillai (accused 8) who asked him to sell him the gramophone for the use of a society in

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

which he was interested. It was agreed that he should hand over the instrument to Bapu Pillai at Punalur. He and Harihara Iyer came to Punalur a day in advance of Bapu Pillai. They were met at the station on their arrival by Vanchi Iyer who took them to Bapu Pillai's house. This was in the beginning of August 1910. He stayed a few days there and met Nilakanta, Madasami Pillai (the absconding accused), Vanchi Iyer, Sankar Krishnan (accused 2) and Jagannadha Iyengar (accused 6). The witness then went home for Avani Avittam (20th of August), after making the acquaintance of Chidambaram Pillai (accused 3) at Tenkasi.

He returned soon after to Shencottah, as he had left his gramophone in the house of Harihara Iyer there. He then went to Punalur with Nilakanta, Vanchi Iyer, Jagannadha Iyengar (accused 6), Harihara Iyer (accused 7) and two other men of Shencottah, namely, Pickumani Iyer (accused 14) and Dharmaraja Iyer, who committed suicide while under arrest in connection with this case. Sankar Krishnan (accused 2) went there before them. All of them went to the house of Bapu Pillai (accused 8) and spent some days there, during which Nilakanta delivered lectures about Arabinda Ghose, Subramania Bharati, Bepin Chandra Pal and Tilak describing them as true sons of 'Bharatha Matha' (Mother India), and adding that if every one would follow in their footsteps swaraj could soon be obtained. He further explained that swaraj meant the driving of the English out of India and ruling the country themselves. He also told them that societies similar to the gathering they were having at Punalur existed in Bombay, Baroda, Pondicherry and other places, that guns and arms were ready in Pondicherry and that they could obtain these for killing and driving the English away. When these lectures were over, a special meeting was held for the purpose of taking an oath as members of their society. Puja was offered to the goddess Kali and oath was taken in the same manner and much to the same effect as at the Tenkasi and Tuticorin meetings. No assumed names were here adopted. The persons who were alleged have taken the oath were accused 1, 2, 6 to 9, 14, Vanchi Iyer, Dharmaraja Iyer and the witness.

The third approver, and another witness Tirumalaimuthu Pillai (prosecution witness No. 27) spoke to further seditious meetings in April and May 1911, but the Public Prosecutor in the course of

the trial intimated that he did not intend to rely upon the latter witness.

Prosecution witness No. 29 Venkatarama Iyer spoke to the existence of a political society in Shencottah called the Bharatha Matha Association as early as January 1910 of which several of the members of the conspiracy were said to be members. He also spoke to a seditious meeting at Shencottah in September 1910.

A further charge was preferred against the second accused alone under section 114, Indian Penal Code, but this charge has not been tried.

The complaints in these cases were filed before the District Magistrate, Tinnevely, who transferred them to the Sub-Divisional Magistrate's Court. On his taking cognizance of them and the subsequent transfer, the Government, in the interests of peace and good order, directed in its orders—G.Os. Nos. 1289 and 1290, dated the 10th of August and the 15th of August, respectively,—that the provisions of Part I of the Criminal Law Amendment Act (XIV of 1908) should apply to the proceedings.

It was argued (*inter alia*) on behalf of the prosecution (1) that the approvers' evidence could be acted upon without any corroboration by virtue of section 133, Indian Evidence Act, and that section 114, illustration (b), did not limit the words of section 133; (2) that there was sufficient corroborative evidence in the case even if corroboration were required by the Court; (3) that the statements of the two first approvers to the Inspector Veeraraghava Aiyer could be used as corroboration of their evidence at the trial; (4) that the statements of the first accused were confessions of guilt and could be taken into consideration as against the other accused.

In defence all the accused denied having attended any seditious meetings and pleaded that the evidence of the three approvers was false. The first accused admitted his connection with Pondicherry but stated that his writings to Pondicherry papers were exclusively on philosophical and religious matters. His journeys in Tinnevely and Travancore were for religious purposes and to collect money to publish a book. If he had come in contact with persons of a seditious tendency, he was unaware of their aims and objects. He further urged that the Bharatha Matha Society was proved by the prosecution

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

evidence to have been in existence in Shencottah long before he visited Travancore and that he had nothing to do with it, that Vanchi Iyer was the leader of that society and that exhibit DDD showed that that society was responsible for the murder of Mr. Ashe. He adhered to his first statement (exhibit AAAA-1) pleading that it was not a confession but an exculpatory statement. He resiled from his second statement (exhibit AAAA--set out in the judgment of the majority of the Court at page 14) stating that he had made it in an attempt to save his skin and not of his own free will, but further pleaded that it contained no confession of guilt. As regards the oath meetings at Tenkasi and Punalur he set up *alibis*. As regards that at Tuticorin he pleaded that he was handicapped in his defence by no date being assigned to it by the prosecution. He admitted having visited Tuticorin but denied having done more there than pose as a religious teacher. He further pleaded that he had been implicated by the approvers as they had a grudge against him for his having otherwise spent the money subscribed by them for the publication of his books. He admitted that the second accused had been his companion on several journeys. He pleaded that he knew nothing of the murder of Mr. Ashe, having been in the north of India for some months previously.

On the second count, it was urged on his behalf as well as on behalf of the other accused that it was the prosecution case that his plan was for the conspirators all to rise on one and the same day and when he gave the word, and that such a plan was quite inconsistent with the facts of the actual murder which could not therefore have been committed in pursuance of such a conspiracy.

The second accused denied his alleged connection with the first accused, but admitted having met him casually in 1908, in Madras, and in 1910 in Travancore. He further denied being associated with Vanchi Iyer in the murder, pleading *alibi* for 16th to 19th June 1911.

The third accused denied that he ever knew Vanchi Iyer or that any meeting was ever held in his house at Tenkasi. He pleaded that he had been implicated in the case owing to the ill-will of an Inspector and a Sub-Inspector of Police.

The fourth accused pleaded that he had been implicated owing to a quarrel he had had with a friend of the first and second approvers.

The fifth accused pleaded that there had been life-long enmity between his family and that of the approver Arumugam.

The sixth, seventh, ninth, tenth, twelfth and fourteenth accused set up *alibis*.

The eighth accused denied that any seditious meeting was ever held in his house.

The eleventh accused denied all knowledge of the first accused or Vanchi Iyer.

The thirteenth accused denied having ever been known as "Vandemataram" Subramania Iyer and pleaded that he had been arrested in mistake for some other Subramania Iyer.

It was argued (*inter alia*) on behalf of the accused generally *--

That the evidence of the approvers required corroboration in material particulars and that such corroboration was not forthcoming.

That the statements of the approvers Arumugam and Somasundaram to the Inspector Veeraraghava Aiyar at Tuticorin could not in law be used to corroborate the evidence given by them at the trial inasmuch as (1) they were made to a person who was not an authority competent to investigate within the meaning of section 157, Evidence Act; (2) they were inadmissible under section 25, Evidence Act; and (3) they were inadmissible under section 162, Criminal Procedure Code.

That there was no connection between the conspiracy charged and the murder of Mr. Ashe and that further the one was quite inconsistent with the other.

That the second count of the charge being that the object of the conspiracy was the murder of all Europeans, proof should have been adduced that Mr. Ashe was a European.

It was argued on behalf of the second to fourteenth accused that the statements of the first accused (exhibits AAAA and AAAA-1) could not in law be used as evidence against them under section 30, Indian Evidence Act, as they did not implicate himself in the offences charged.

This case coming on for trial before the abovementioned Special Bench of this Court constituted under the provisions of

* The important points of law argued in this case were re-argued before a Full Bench of the High Court in *Muthukumarasami Pillai v. King-Emperor*, I.L.R., 35, Mad. 397

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

the said Act on the 11th, 14th, 15th, 18th to 22nd, 25th to 29th days of September, 3rd to 6th, 9th to 13th, 16th to 20th, 23rd to 27th, 30th and 31st days of October, 1st to 3rd, 6th to 10th, 13th to 17th, 20th to 24th, 27th to 30th days of November and 29th day of December 1911, 2nd to 5th, 8th to 12th, 16th to 19th, 22nd to 26th and 29th to 31st days of January and 1st and 2nd days of February 1912, and having stood over for consideration till this day, the court delivered the following

JUDGMENTS (The CHIEF JUSTICE and AYLING, J.).—In this case fourteen persons have been committed for trial to this Court under section 6 (b) of the Indian Criminal Law Amendment Act, 1908 (Act XIV of 1908). The first count of the indictment charges them with conspiracy within section 121-A of the Indian Penal Code. The conspiracy is alleged to have been entered into between January 1, 1910 and June 17, 1911 at various places mentioned in the indictment. The fourteen accused are alleged to have conspired with certain others, not now before the Court, whose names are mentioned in the indictment,—One Vanchi Iyer, who was proved in this case to have shot himself after murdering Mr. Ashe on the 17th of June 1911, one Dharmaraja Iyer, who is dead (the case for the Crown being that he committed suicide), one Arumugam, one Somasundaram and one Ramasami Iyer, who have been called as witnesses in this case, and one Madasami who has absconded.

The second count of the indictment charges the same persons with abetting the murder of Mr. Ashe by engaging in a conspiracy, one of the objects of which is set out in the indictment.

As regards the first charge the essence of the offence is the agreement to do all or any of the unlawful acts mentioned in the section. It is not necessary that any act or illegal omission should take place in pursuance of the agreement.

In this case as regards the accused other than Vembu Iyer, Savadi Arunachalam Pillai and Alagappa Pillai, accused Nos. 10, 11 and 12, we have not to consider whether on the facts proved an antecedent agreement to commit all or any of the offences mentioned in the section may reasonably be inferred. There is evidence that all the accused persons, except accused Nos. 10, 11 and 12, agreed under an oath to do certain acts which, in our opinion, undoubtedly come within the purview of section 121-A of the Indian Penal Code. In the course of the many legal

arguments which were addressed to us by counsel and vakils for the several accused in the course of this protracted trial, it was never seriously contended that the evidence adduced on behalf of the Crown, if true, did not establish an agreement to do any one of the unlawful acts mentioned in section 121-A of the Indian Penal Code.

As regards the first charge therefore—and we deal with that first—the question we have to consider is how far have the facts which the prosecution has sought to establish been proved by evidence which is legally admissible.

Although with reference to the second count it was necessary for the Crown to adduce evidence as to the circumstances in which Mr. Ashe was murdered, and it was proved that he was murdered by Vanchi, so far as the first charge is concerned the evidence as to the circumstances in which the murder was committed have very little, if any, bearing on the question whether the accused, or any of them, are guilty under section 121-A of the Indian Penal Code.

The murder of Mr. Ashe is, however, the starting point in the history of the investigation of this case.

Mr. Ashe, Collector of Tinnevely, was murdered on the platform of Maniyachi railway station in the Tinnevely district on June 17, 1911. The murderer who was identified as one Vanchi Iyer of Shencottah in Travancore territory, used an automatic revolver, and almost immediately afterwards shot himself dead with the same weapon. A paper found on his body pointed to the murder having been committed from political motives: and as, from this and other attendant circumstances, it seemed probable that he had accomplices, an investigation was started and conducted by the local police in conjunction with the officers of the Criminal Investigation Department. As a result evidence is said to have been forthcoming tending to show that Vanchi Iyer and others (including the present accused) had been engaged for some time in a conspiracy for the overthrow of British rule by means of a simultaneous massacre of all Europeans on a day to be fixed.

The treasonable conspiracy which is charged in the first count of the indictment according to the prosecution had its inception early in April 1910 and was set on foot by the first accused, Nilakanta Iyer *alias* Nilakanta Brahmachari. Nilakanta is a

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

young man of 21 years of age of good education, a native of Erukkoor near Shiyali in the Tanjore district. He had admittedly been previously engaged in journalistic work very largely, if not mainly, of a seditious nature, and his last employment had been as editor of the "Suryodya," a vernacular paper published in Pondicherry which was proscribed by Government in March 1910.

According to the prosecution the suppression of this and other seditious papers compelled the revolutionists who had their headquarters in Pondicherry to adopt other methods of spreading their propaganda; and for this purpose Nilakanta visited Tenkasi in the Tinnevely district early in April. There is evidence to show that he was no stranger to the district and by his own account he was an old friend of third accused, M. Chidambaram Pillai, a young grocer living in Tenkasi town.

It was in the latter's house that the first meeting is said to have been held on the evening of April 10th. Besides first and third accused three other men are said to have been present: second accused, a young Brahman of Kadayanallur some twelve miles from Tenkasi, thirteenth accused, another Brahman from a distant village in Ottappidaram taluk, and one K. V. Arumugam Pillai, a young Vellala clerk of Tuticorin, who, for the past two years, had been according to his own evidence taking interest in seditious politics, and who had been summoned for the purpose of the meeting by Sankarakrishna Iyer, second accused. According to Arumugam, who figures as the sixth prosecution witness in the case, Nilakanta explained his views which were briefly to the effect that the injustice of the Government and the miserable state of the country rendered it necessary that the British should be driven out and *swaraj* obtained: that previous endeavours to effect this by means of preaching, newspapers and isolated assassinations having failed, a new plan was to be tried: and that this was to take the shape of a general rising all over the country on a date to be subsequently fixed and the massacre of all white people on the same day. The other persons present assented to these views, and agreed to join the new movement. Accordingly an oath was drawn up and written on a piece of paper: each man pricked his thumb, and affixed his thumb impression in blood. The general effect of the oath was that the members should kill all white men and sacrifice

their person, property and life for the society: and that any who revealed its secrets should be murdered and go to hell. Other formalities were observed, which it is unnecessary to set forth here.

After this meeting the members dispersed, and Nilakantam appears to have gone to his own village and thence to Pondicherry in which latter place he was seen by third prosecution witness, a Cuddalore Vakil on 2nd May 1910. About the middle of June he seems to have left his native place again according to the prosecution on the same errand; and visited Cochin, Alleppey and Quilon on the West Coast, where he would appear to have been about June 20th. How he occupied his time is not known, but it would seem that he then first came into contact with Vanchi Iyer and other Brahmans of Shencottah. Vanchi at the time was employed as a clerk in the Travancore Forest Department at Punalur, a place on the railway line half-way between Shencottah and Quilon. In July he was in Shencottah, where Vanchi leased a house for five days from one Sivagaminatha Pillai (prosecution witness No. 21). From this point Nilakantam seems to have posed, and is referred to, as a "Swami," and the evidence of the prosecution witness No. 21 goes to show that while in his house he held secret interviews with Vanchi, Dharmaraja Iyer, and two young Vellalas of Shencottah, eleventh and twelfth accused. He was accompanied by second accused: and, preceded by the latter, he went across to Tuticorin about the middle of July where a second oath meeting was held of a similar character to the one at Tenkasi. Here the oath was again taken by the first and second accused and K. V. Arumugam and also by four other men whom he (Arumugam), had directly or indirectly induced to join the society. These were all Vellalars: (1) Somasundaram Pillai, a young vakil's clerk, examined as prosecution witness No 12, (2) Madasawmi Pillai of Ottappidaram, (3) and (4) fourth and fifth accused Muthusawmi *alias* Muthukumarasami Pillai and Subbayya Pillai. The latter two are both middle-aged men, one a pot-seller and the other a vakil's clerk, and both of Tuticorin. It was arranged at this meeting that K. V. Arumugam should be the distributing agent of a certain paper called "The Dharmam" published in Pondicherry, which, according to the prosecution, was the chief organ of the movement and a connecting link between the members of the conspiracy.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

From Tuticorin first accused is said to have returned with second accused to Tenkasi, and in the early part of August he was undoubtedly staying in a room of a bungalow rented from Rama Row, prosecution witness No. 22, at Courtallam, a few miles distant, being visited according to this witness by accused Nos. 2, 3, 5 and 11. From there he appears to have gone to Punalur. From this point the story is taken up by prosecution witness No. 16, Ramasami Iyer. According to the evidence this man, a gramophone performer and petty jewel merchant, was returning from the West Coast to spend the festival of *Avani Avittam* at his native place near Tenkasi. With him was seventh accused, Harihara Iyer, a young cloth merchant of Shencottah who was doing business with his brothers at Alleppey. Both men halted at Punalur and spent a day or two in a small hut belonging to Bapu Pillai (eighth accused), a native of the place. First and second accused, Madasami Pillai and sixth accused, Jagannadha Iyengar of Shencottah were all assembled there. According to prosecution witness No. 16, no sedition was talked, though he was sent to fetch copies of "India" a proscribed paper which were in the possession of third accused at Tenkasi.

Prosecution witness No. 16 went on to his village, and after the festival again visited Shencottah where he describes two meetings as having been held at the house of Dharmaraja Iyer above mentioned. Those according to Ramasami's evidence were attended by accused Nos. 1, 2, 6 and 11, Vanchi and Dharmaraja Iyer and also by the fourteenth accused Pichumani Iyer. Third accused and Madaswami both attended the second meeting only. First accused, Nilakantam, is said to have harangued the others at each meeting on the miserable economical state of India winding up with the pressing necessity of exterminating the English. After the second meeting, third accused and Madasami returned to their villages: but the rest of the party proceeded to Punalur where according to Ramasami's evidence after more exhortations from Nilakantam a third oath meeting was held, in very similar style to the others. The parties who took the oath are said to have been accused Nos. 1, 2, 6, 7, 8, 9 and 14, Vanchi, Dharmaraja Iyer and four others.

After this meeting Nilakantam returned to his native place Erukur, and does not appear to have visited Tinnevely district again, though he undoubtedly kept up a correspondence with

Arumugam, Madasami, Vanchi and seventh accused for five or six months longer.

The next incident in the story is an attempt to enrol in the society another Shencottah Brahmin, Venkatarama Iyer, prosecution witness No. 29. From the evidence of this man it appears that before the advent of Nilakantam there existed a sort of secret society at Shencottah called the Bharata Mata Association, of which he, accused Nos. 6, 7 and 14, Vanchi and Dharmaraja Iyer were members. This society was clearly of a seditious tendency, its chief object being to procure, read and discuss papers from Pondicherry, but there is nothing to indicate that its members, as such, brought themselves in any way within the reach of the law. In March and April 1910, the Pondicherry papers "India," "Suryodaya" and "Vijaya" were proscribed by Government; and this was naturally followed by the collapse of the society, which is distinctly referred to in a letter of prosecution witness No. 29, dated the 6th June 1910 (exhibit G-8). Prosecution witness No. 29, by his own account was prevented by illness from attending the meetings held by Nilakantam in July and August: but some time after the middle of September he met accused Nos. 6 and 14, Vanchi and Dharmaraja Iyer in the house of the last named. Endeavours were then made to induce the witness to join the new society and take a "Blood Oath": the object of the new society being indicated as the "beating and driving away of the English." The witness says he refused to join the new society but for the sake of the old one promised to disclose nothing. It has been suggested that the evidence of prosecution witness No. 29 was really the evidence of an accomplice, but we are not prepared to take this view.

During the rest of the year the evidence discloses no event of importance. Vanchi is said to have visited Tuticorin and Ottappidaram; and K. V. Arumugam is said to have continued to distribute the "Dharmam" and pamphlets forwarded to him.

On January 9th, 1911, Vanchi took three months' leave. Two incidents are deposed to in connection with this period. Ramasami Iyer (prosecution witness No. 16) says that while returning to his house for Sankaranthi, he stopped at Dharmaraja Iyer's house. The latter told him that Vanchi and second accused had gone to Pondicherry by first accused's orders, and that Vanchi had spoken of shooting Europeans on the way. Somasundaram Pillai

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(prosecution witness No. 12) says that he visited Madasami at Ottapidaram one day in March and there found Vanchi, whom he had not met before. A conversation ensued between the three. Vanchi after again emphasising the fact that the English rule was ruining the country and that it could only be removed if all white men were killed, went on to suggest that Mr. Ashe should be first killed as being the head of the district and an officer who had taken a leading part in suppressing the Swadesi Steam Navigation Company, and in the events of 1908. It was generally agreed between the three that Mr. Ashe should be shot, and Vanchi said that arms would be obtained apparently from Pondicherry at the proper time : but nothing definite was settled, not even who should do the deed. After this Ramasami (prosecution witness No. 16) again takes up the story and describes two meetings which took place at Shencottah in the month of Chitrai (April-May 1911) on successive evenings in the houses of the eleventh and twelfth accused. According to the evidence for the prosecution an attempt was made after the first meeting to enlist a friend of second accused (Sundaram Iyer prosecution witness No. 25), whom he had brought with him from Kadayanallur for the purpose. Sundaram Iyer by his own account took fright, and refused to join them, saying he would think it over ; at the actual meetings Vanchi is said to have taken the lead, and to have addressed the others much as Nilakantam had done, on the dual necessity of developing the resources of the country and driving out the English. Those present included accused Nos. 2, 3, 6, 7, 8, 11, 12 and 14 and Dharmaraja Iyer. The evidence however is not quite clear as to whether addresses of this character were delivered at both meetings or only at the first.

These are the last meetings of the society of which there is any evidence and the rest of the evidence which relates to the murder of Mr. Ashe and the events immediately preceding it, as we have already observed, has little or no bearing on the charge now under consideration.

The nature of the evidence by which the prosecution seek to establish their case has to some extent been indicated above. The most important witnesses are of course prosecution witnesses Nos. 6, 12 and 16, who were all three on their own showing members of the society founded by Nilakantam. If their evidence be believed there can be no doubt, as we have already said, that they

themselves and every other person who took the " blood oath " and thus pledged themselves to the society at the three chief meetings spoken to were guilty of joining in a conspiracy punishable under section 121-A, Indian Penal Code.

All the three chief witnesses referred to are approvers : that is to say persons who have accepted a pardon tendered them by the District Magistrate conditionally on their giving true evidence in this case. It need hardly be said that the evidence of such persons has to be received with caution : and the extent to which, and the conditions under which, it should be acted upon have been the subject of much argument and contention before us.

With regard to the question of corroboration of the evidence of an accomplice it has been sometimes laid down that before it can be acted on it must be corroborated in material particulars. In our opinion this is not the law either of England or of India. As regards India the substantive enactment is to be found in section 133 of the Evidence Act which expressly declares that a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. Section 114 deals with presumptions of fact, and by way of illustration of a fact which may be presumed states that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This would seem to mean that a presumption of fact may be drawn having regard to the facts of a particular case that the uncorroborated evidence of an accomplice in that case is untrue. Section 114 says in so many words that the presumption may be drawn regard being had to certain matters " in their relation to the facts of the particular case." The legislature has attempted to give further assistance by stating a case in which the Court would be warranted in declining to draw the presumption of fact referred to in illustration (b) to section 114. So far as the statute law is concerned whilst we have an express substantive enactment in section 133 we have in section 114 certain propositions intended to assist the Courts in drawing inferences of fact. Section 114 is not, like section 133, a substantive enactment declaring the law. The authorities have been so fully and so frequently discussed that we do not think any useful purpose would be served by going through them. The High Courts in this country have always professed, as a matter of practice rather than of law, to act upon the principles established in

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

England. Although the practice in strictness rests only upon the discretion of the Judge at the trial it has "obtained so much sanction from legal authority that it deserves all the reverence of law." 'Russell on Crimes,' 6th edition, volume 3, page 646. The question is, what is the practice? It is thus stated by the Lord Chief Justice of England in *Reg. v. Tate*(1), "Probably Cave, J., did not state the law too strongly when he said in *In re Meunier*(4): 'It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the jury in each case. No doubt it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground'; but I think he ought to have added, 'assuming that the jury was cautioned in accordance with the ordinary practice.'"

This is in accordance with the view indicated by Cockburn, C.J., in *Reg. v. Boyes*(2) and by Lord Coleridge, C.J. in *Reg. v. Gallagher*(3). In England, of course, the question has always arisen in connection with the directions given by the Judge to the jury. In the case before us we are Judge and jury. We have to direct ourselves. The proper direction seems to us to be—consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it. The view that a Court cannot act on the evidence of an accomplice, unless it is corroborated, would lead to the result that a Court could not act on such evidence, when that evidence stood alone, although the Court was entirely satisfied that that evidence was true. This, as it seems to us, is not the law. In *re Meunier*(4), Cave, J., observed "I know of no power to withdraw the case from the jury for want of corroborative evidence."

(1) (1908) 2 K.B., 680.

(3) (1883) 15 Cox C.C., 291.

(2) (1861) 9 Cox C.C., 32.

(4) (1894) 2 Q.B., 415 at p. 419.

If there is no power to withdraw a case from the jury on this ground, it cannot be the law that, where a Court is Judge of fact as well as of law the Court as the Judge of fact is precluded from considering the question whether the unsupported evidence of an accomplice is true or not.

Mr. Napier on behalf of the Crown contended that the well-established rule of practice was a rule of practice rendered necessary by the fact that juries were not trained to discriminate in the matter of evidence, and that the rule was not applicable where facts were found not by a jury but by the Judge. We do not think this distinction has been suggested in any of the reported cases. We prefer to put it on the grounds stated by Sir John Edge in *Queen-Empress v. Gobardhan*(1). The Chief Justice says "If jurors believe the uncorroborated evidence of an accomplice, and that evidence, if believed, establishes the guilt of a prisoner, are they to violate their oaths; and, contrary to their oaths and the uncorroborated evidence of the accomplice which they believe, to return a verdict of acquittal? In such a case, is a Judge to direct the jury to violate their oaths? There can be no difference in this respect between the duty of a Judge acting as a jury and that of a juror. A Judge would advise a jury that it would be unsafe to act upon, in other words, to believe, the uncorroborated evidence of an accomplice, as he would advise the jury not to act upon the evidence of any other witness whose evidence might, from any cause, be open to suspicion; but in either case, he would have to tell the jury that if they believed the evidence, they might legally convict the prisoner. Confusion on this question has sometimes arisen from overlooking the distinction between a caution to be given to a jury and a direction on law. The questions of fact are for the jury to find on the evidence. On questions of law the jury must accept the direction of the Judge. Similarly, a Judge when trying a case without a jury must, as a juror, come to a finding on the facts, and, as a Judge, direct himself upon the law. I do not think that it has ever been suggested that the advice of a Judge to a jury not to act upon the uncorroborated evidence of an accomplice is a direction on law."

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1887) I.L.R., 9 All., 528 at p. 554.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

In our opinion the law and practice were correctly laid down by this Court in *Reg. v. Ramasami Padayachi*(1). "Though the tainted evidence of an accomplice should be carefully scanned and received with caution and may be treated as unworthy of credit, yet, if the jury in the one case or the Court in the other, credits the evidence, a conviction proceeding upon it is not illegal." In fact to hold otherwise would be to render nugatory the express provisions of section 153 of the Evidence Act (see the judgment of Sir Bhashyam Ayyangar in *Ramasami Gounden v. Emperor*(2)).

Although in our opinion in the case before us it would be open to us to convict on the uncorroborated evidence of the informers, even if it stood alone, if we were satisfied that that evidence was true, it is of course of the utmost importance to consider whether the evidence which is relied upon by the Crown really corroborates that evidence or, in other words, whether it establishes facts which go to show that the evidence of the informers is true.

As to the character of the corroborative evidence which may lead the Court to believe that the evidence of an informer is true that must depend entirely upon the nature of the charge and the facts of the particular case. It is clear that oral testimony of independent witnesses is not necessary, but it seems impossible to lay down any hard-and-fast rule. The illustration to section 114 uses the words "in material particulars," but what are material particulars must depend upon the facts of the particular case. Section 156 of the Evidence Act, read with the illustration, has a very direct bearing upon this question. The illustration is as follows:—"A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself." As Lord Coleridge observed in *Reg. v. Gallagher*(3) with regard to the amount of corroboration it was not necessary that an informer should be corroborated in every particular, because if it were possible to give such corroborative evidence it would hardly be necessary to call the approver, but there must be a certain amount of confirmation sufficient to satisfy the jury. Numerous authorities have been cited before us

(1) (1878) I.L.R., 1 Mad., 394.

(2) (1904) I.L.R., 27 Mad., 271.

(3) (1883) 15 Cox C.C., 318.

but we do not know that they afford us much assistance. We cannot help thinking that there has been a certain amount of confusion between the question of the admissibility of evidence tendered as corroborative testimony and the weight to be attached to it. For instance the defence relied on *Reg. v. Malapabin Kapana* (1), where it was held that previous statements of an accomplice cannot be regarded as corroborative of evidence given by him at the trial. See, too, *Queen Empress v. Bepin Biswas*(2). There are also other decisions and statements in the text books to the same effect. If this is intended as a proposition of law we cannot accede to it, though as a proposition of fact, with reference to the facts of the particular case before the Court, it may have been indisputable.

In addition to the oral testimony of independent witnesses and the documentary evidence in the case which will be considered later, the Crown relies on certain facts as corroboration of the evidence of the informers. Among these are the fact that certain statements were made by the approvers Arumugam and Somasundaram to R. Veeraraghava Aiyar (prosecution witness No. 31), an Inspector of Police attached to the Criminal Investigation Department, statements which were substantially in accordance with his evidence before this Court. The witnesses themselves speak to having made these statements but that of course carries the case no further. They are also spoken to by Inspector Veeraraghava Aiyar. It was contended that the evidence as to the making of these statements was not admissible, and that, if it was, it did not corroborate the evidence of Arumugam given at the trial. The grounds on which it was argued that evidence of the statements made by Arumugam was inadmissible were as follows:—

(a) The statements did not come within the purview of section 157 of the Evidence Act since they were not made before an authority legally competent to investigate the fact to which the statement relates.

(b) The statements were confession made to a police officer and under section 25 of the Evidence Act could not be given in evidence.

(c) The statements were made to a police officer and, under section 162 of the Code of Criminal Procedure, could not be given in evidence.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1874) 11 B.H.C.R., 196.

(2) (1884) I.L.R., 10 Cal., 870.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

As regards (a) the officer to whom the statements were made is an Inspector of the Provincial Criminal Investigation Department, a department created "to assist in the investigation of crimes which are of such a special character that local officers are unable to deal with them adequately without help" (G.O. No. 913, Judicial, dated July 2, 1908).

Inspector Veeraraghava Aiyar's name was not mentioned by the Deputy Inspector-General of Police as one of the officers directing the investigation. The evidence is that when the statement was made he had been sent to Tuticorin for a specific purpose, viz., to search certain houses. Veeraraghava Aiyar stated in his evidence that he was assisting the Deputy Inspector-General and acting under his orders and that the statement was made to him when he was acting under orders. It was contended that the Inspector was not an "authority legally competent to investigate" since he was not empowered to "investigate" under the provisions of the Code of Criminal Procedure. The law of this country as enacted in section 157 of the Evidence Act differs from the law of England. The principle of the section is that consistency is a ground for belief in a witness's veracity. The words "before any authority legally competent to investigate the fact" are quite general and we see no reason why they should be restricted to police officers and to "investigations" in the technical sense in which the word is used in the Code of Criminal Procedure. The words are "competent to investigate," not a case, but "the fact." Further we do not think the words "legally competent" mean only competent under some express provision of law. The competency of the authority for the purpose of the section appears to us to be a question of fact, or at any rate a mixed question of law and fact to be determined with reference to the facts of the particular case. On the evidence we are prepared to hold that Inspector Veeraraghava Aiyar was an "authority legally competent to investigate the fact" within the meaning of section 157 of the Evidence Act. Even if this question has to be determined with reference to the provisions of the Code of Criminal Procedure we think the Inspector was legally competent to investigate. Investigation is defined (section 4(1) of the Code of Criminal Procedure) as including "all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate)

who is authorised by a Magistrate in this behalf." Section 156 empowers an officer in charge of a police station to "investigate" without the order of a Magistrate. Section 551 empowers police officers superior in rank to an officer in charge of a police station to exercise the same powers, throughout the local area to which they are appointed as may be exercised by an officer in charge of a police station within the limits of his station. There can be no question that the Inspector is a police officer superior in rank to an officer in charge of a police station. *Primâ facie* therefore he has power to investigate in cases to which section 156 applies. As a member of the Provincial Department of Criminal Investigation his "local area" is the Presidency of Madras. The fact, if it be a fact, that there is no formal order appointing him to the Presidency of Madras as his "local area" does not, in our opinion, prevent him from exercising the powers conferred by the section.

As regards (b)—the objection under section 25 of the Evidence Act as we intimated in the course of the trial, in the opinion of the majority of the Court, this objection fails. Our attention was not called to any authority upon the point, but it was argued that the words of the section were general and not restricted, as in section 26, to the party who makes the confession. As regards the 'mischief' of the two sections there seems no good reason why the suggested distinction should be drawn. No doubt Arumugam's statement to Inspector Veeraraghava Aiyar inculpated himself, but Arumugam is not now an accused person and does not stand charged before us. It is not sought to use the statement against him in any way. It is sought to use the fact that he made the statement in the circumstances in which it was made as a fact which goes to show that his evidence at the trial was true. In *Queen-Empress v. Tribhovan Manekchand* (1). WEST, J., observed "'confession' in section 25 of the Indian Evidence Act I of 1872 means, as in section 24, a 'confession made by an accused person' which it is proposed to prove against him to establish an offence." We do not think we are precluded by section 25 from admitting evidence of the statement as evidence of a fact which goes to show that the testimony of Arumugam at the trial was true. The question of the weight of this evidence is, of course, a different matter.

Evidence of the statement made by Somasundaram to the Inspector may be of less weight than the evidence of Arumugam's

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1886) I.L.R., 9 Bom., 121 at p. 134.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

statement. But, for the reasons we have stated, we think it is admissible.

As to (c), the objection that under section 162 of the Code of Criminal Procedure the evidence is inadmissible, we think this objection also fails.

The section is perhaps not very artistically drawn but its meaning, as it seems to us, is clear. It means that the written record of a statement made to a police officer in the course of an investigation shall not be used as evidence. It may be that the object of the section is easily frustrated by the police officer repeating his written record from memory and relying solely on his memory of the written record for the purpose of giving evidence. But we are not concerned with this. All we are concerned with is the construction of the section, and, as a question of construction, it seems to us that for the purposes of this section using as evidence means putting in the written record as documentary evidence in the case. It was contended that this construction would lead to hardship since although the proviso provided means, by the use of the written statement, of discrediting a witness who spoke to the facts of the case, it provided no means of discrediting a witness who was called to prove that another witness had said the same thing on a previous occasion. There may or may not be some force in this criticism, but we should not be warranted in straining the language of the section so as to avoid a possible hardship.

As pointed out in *Fanindranath Banerjee v. Emperor* (1) in section 162 of the Code of Criminal Procedure as it now stands, a distinction is drawn between the statement and the writing. The Calcutta case is no doubt not on all fours with the present case, because there was no writing, but in view of the plain language of the section, we are of opinion that oral evidence of the statement is admissible whether the police officer took it down in writing or not. As regards the case of *Rustam v. King-Emperor* (2) in which two Judges differed on this question we need only say that we agree with the judgment of Karamat Hussain, J., and the reasoning on which it is based. We think the legal objections to the admissibility of the evidence of these statements fail, and that the statements are admissible under section 157 of the

(1) (1909) I.L.R., 36 Calc., 381 at p. 385.

(2) 7 All. L.J., 468.

Evidence Act as corroborative evidence in this case. The weight of the evidence is of course, another question. We consider this later on.

As corroborating the evidence of the two informers Arumugam and Somasundaram, the Crown also relies on the statements made by Nilakantam, the first accused, which were recorded as confessions (exhibits AAAA and AAAA-1) in the case as being confessions which under section 30 of the Evidence Act may be taken into consideration against the persons who have been tried jointly with Nilakantam. The first statement (exhibit AAAA-1) was made to the Sub-Divisional Magistrate on July 12 and the second statement on July 14, 1911. The first statement purports to give an account of Nilakantam's life since 1903 up to the time of his arrest. The second statement (exhibit AAAA) is in these terms:—

Q.—You asked this Court on the 12th at the close of your statement before it, for permission to come up before it again in two days' time to say something more about yourself. Do you wish to say anything?

A.—Yes, I do. I want entirely to unburden my mind. If any persons are to be punished for what I say, I should be the first among them, but I believe I am innocent. When I was in Tenkasi in May 1910, I sent Sankara Krishna to bring Vande Mataram Subramania Iyer from Ettiyapuram, and K. B. Arumugam Pillai from Tuticorin. They came and in Chidambaram Pillai's house we formed a society, and undertook by an oath that each of us would devote his life and property to the cause of the country. We offered puja to the mother Kali, and then we wrote the conditions of our vow on a piece of paper, which we signed. We then cut our thumbs, and put our thumb marks on the paper in our blood. This was to create some awe in the minds of the members.

Q.—Did Chidambaram Pillai sign it too?

A.—Yes he also signed. I have something more to say about Tuticorin. I went there as I have said before from Tenkasi. Sankara Krishna came there in advance of me. We formed a similar society there. We took a similar vow, and signed a paper, and put our thumb-impressions in blood. Myself, Sankara Krishna, Arumugam Pillai, Madasami Pillai of Ottapidaram, one Sakaralingam of Tuticorin, Somasundaram Pillai of Tuticorin

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

signed. We did not clearly state what the purpose of the society was. I myself was not clear about it. I did not teach anything to these people. Then I went to Courtallam, where I met Veerabhadra Sarma, who gave me definite views about the reformation of the country. I did not start any society either with Vanchi or with the Shencottah people, nor did I teach against Government any hostile views to the Shencottah people. I went to my native place, and never mentioned anything about the society to any of my acquaintances either in Tinnevely or in other places. I do not know what these people did after I went to Madras. This is all true, and I have not hidden anything.

At the trial Nilakantam made a statement to the Court. With reference to the two statements made to the Magistrate he said "The next day after I reached Tinnevely, i.e., the 12th July I made a voluntary statement before the Committing Magistrate. The events recorded in that statement as well as my statement before the Deputy Commissioner at Calcutta are perfectly true. But, a day after that, i.e., the 14th of July, I was compelled to make another statement before Mr. Tampce in consequence of a threatening piece of information I received from a responsible police officer. I was given to understand that Arumugam had made a statement to the effect that two oath meetings were held at Tenkasi and at Tuticorin when I had been to these places, and that the only way for my escape was by my turning an approver by corroborating Arumugam's evidence and by implicating myself with some others who are not charged in this case in a similar meeting at a different place, and thereby throwing off my responsibility in the Tenkasi and the Tuticorin affair. Besides, I was kept separate from the rest of the prisoners from the very day I was taken to Tinnevely and consequently I was unable to understand what the case was about, and how many were arrested, and in what connections. I was naturally in a state of fear and bewilderment from the time I heard of Arumugam's statement and believed what all was said to me. I went thus far in my second statement marked Exhibit AAAA and beyond that I was unable to say anything and I stopped. I deeply regret my weakness in attempting to say a falsehood for the purpose of saving my skin. The detailed incidents relating to the cause of my statement of the 14th of July, and

the foolish manner in which I gave way to the threatening and inducement are all so very painful and shameful for me to relate that I do not want to record them here. But, I merely declare that the information contained in my statement of the 14th of July are all false and that I did not make the statement of my own free will."

There is not a shred of evidence to show, and we see no reason to think, that the second statement was made under pressure from the Police. It may no doubt be said that reading the two statements and the retraction together it was Neelakantam's intention to implicate himself and the others whose names he mentions in the second statement in the charge on which he has been jointly tried with them.

Mr. Napier contended that if these statements had been made to a police officer they would have been inadmissible under section 25 of the Indian Evidence Act as against the person making them, and that if they would have been inadmissible under section 25 as amounting to a "confession," they can be "taken into consideration," as amounting to a "confession," under section 30. We should hesitate before adopting the view which has been taken in some of the reported cases (See, for instance, *Empress of India v. Ganraj*(1) and *Queen-Empress v. Jagrup*(2), that the confession before it can be taken into consideration under section 30 must be sufficient, if it stood alone, to justify the conviction of the party making it. It seems to us that the question of the admissibility of these statements under section 30 as against the persons who have been tried jointly with Neelakantam, is so doubtful, and their value against such persons, even if they are admissible, is so slight that as against these persons we ought to exclude them from consideration.

As we have already stated, evidence of the statements made by Arumugam and Somasundaram to Inspector Veeraraghava Aiyar is in our opinion admissible. A point of the utmost importance in judging of the truth of the evidence of these two witnesses is the circumstances in which their first statements were made.

The murder of Mr. Ashe occurred on June 17th: and the investigation practically commenced on the following day, when Vanchi's house at Shencottah was searched as well as those of

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1879) I.L.R., 2 All., 444.

(2) (1885) I.L.R., 7 All., 646.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

accused Nos. 6, 7 and 11, and some letters seized mostly addressed to Vanchi. Some of these were signed by or contained references to Arumugam; and on the evening of the 19th, immediately after the arrival of the Deputy Inspector-General of the Criminal Investigation Department (Mr. Thomas) a party was despatched to Tuticorin with a view to the search of his house. This party was in charge of Mr. Johnson (prosecution witness No. 89), Assistant Superintendent of Police, a Gazetted Officer of some three years' service, and of Veeraraghava Aiyar (prosecution witness No. 31) an Inspector of the Criminal Investigation Department who had just arrived with Mr. Thomas. These officers with their men surrounded Arumugam's house about two hours after midnight and sealed it with a view to search after daybreak. Arumugam was awakened, told that his house would be searched in connection with the murder and asked if he knew anything about it. He then offered to tell all he knew and his statement was thereupon taken and recorded in the Inspector's note-book. We have dealt with the question of the legal admissibility of this statement. As summarised by prosecution witness No. 31, it was to substantially the same effect as prosecution witness No. 6's deposition in this Court: and it is extremely difficult to believe that it was either invented by the witness or dictated by the Police—both of which suggestions have been advanced on behalf of the defence. One guarantee against the possibility of the story having been dictated by the Police is afforded by the presence of Mr. Johnson, who appears to have been passing in and out of the hall where the examination was going on. It is difficult to believe that any "tutoring" can have taken place without Mr. Johnson's knowledge. But possibly a stronger guarantee is provided by the fact, which is beyond doubt, that the statement was not what the Police wanted. They were investigating the murder of Mr. Ashe and anxious to discover traces of the immediate accomplices of the crime. Arumugam's statement had reference to a secret society which might well be the basis of another case, but which was in no way connected with the murder except in the single fact that Vanchi was said to have been a member of the society. Vanchi was in fact barely mentioned either in this statement to the Inspector or in the statement (exhibit CCCC) recorded by the Magistrate, Mr. Cox, four days later under section 164, Criminal Procedure Code. The

information furnished was in fact so useless to the police, that no action appears to have been taken on it, till Somasundaram's statement given on the 21st, which included his interview with Vanchi at Madasami's house, supplied some suggestion of a link between the society and the murder.

So much for the general purport of the information; but the individuals implicated are no less remarkable. The principal persons implicated in Arumugam's statement are accused Nos. 1, 2, 3, 4, 5 and 13, Somasundaram and Madasami. Vanchi and seventh accused are just referred to. Now, Inspector Veeraraghava Aiyer swears that he had never heard of any of the first-named eight persons: and there is no reason to doubt him. He admits that he had met first accused some years before: but under another name. It has been ingenuously suggested that the search-party came down to Tuticorin primed with the contents of the letters seized in the Shencottah searches, and prompted Arumugam to give a statement to fit in with them. Few, if any, of the letters seized could at that time have borne much significance; and it is difficult to believe that any police, however unscrupulous, could at this early stage of their investigation have subordinated everything else to building up an entirely false case upon them. Of the persons named by prosecution witness No. 6, Somasundaram and accused Nos. 4, 5 and 13 are not referred to in the letters seized, and third accused only incidentally and innocently at one passage. On the other hand, accused Nos. 6, 10 and 14, Dharmaraja Iyer, prosecution witness No. 16 and prosecution witness No. 29 who are all implicated in some degree or other in the letters are not even referred to by prosecution witness No. 6. Obviously it is impossible to hold that the statement was framed to fit in with the letters.

It was suggested that the interval which elapsed between the arrival of the search party at Tuticorin and the sealing of Arumugam's house afforded an opportunity to some subordinate Police officer to interview and "coach" Arumugam. We do not think the delay was unreasonable in the circumstances and we attach no importance to this suggestion.

The alternative suggestion is put forward that the statement was concocted by Arumugam (prosecution witness No. 6) either by himself or in consultation with Madasami and Somasundaram to save themselves from prosecution for complicity with Vanchi. It

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

seems to us that if Arumugam had contemplated such a plan before the advent of the police he would certainly have destroyed the highly seditious literature (*e.g.*, exhibits T-9 and T-10) found in his house on search and would have cast his story in a form more calculated to minimise his own share in the society. The last consideration applies still more forcibly to the story told next day by Somasundaram. Moreover, on this hypothesis, the names given as those of the conspirators are equally inexplicable. In the case of accused No. 5 there are some allegations of enmity which will be dealt with later. But accused Nos. 2, 3 and 13 were by their own account entire strangers to Arumugam; and he had no grievance against first or seventh accused. It is suggested that some of the Shencottah accused may have borne a grudge against Neelakantam for misappropriating money advanced to him by them in connection with a book he wished to publish. But this motive has certainly no bearing on either Arumugam or Somasundaram nor so far as is shown on Madasami. In view of the circumstances in which the statement was made we find it impossible to accept the defence theory that it was "tutored" or "concocted" even if the statements to the Inspector are discarded and only those recorded by Mr. Cox are considered.

The evidence of the third approver Ramasami stands on a somewhat different footing. This man absconded after the murder, and in spite of warrant and proclamation was only arrested on August 1st. However little basis there may be on the evidence for the defence suggestion that he was not really absconding but was being "primed" by the Tenkasi Police Inspector there can be no question that his evidence lacks some of the factors which make for credibility in the case of prosecution witnesses Nos. 6 and 12.

It may be stated at once that the impression left in our minds by the three approver-witnesses was favourable to the general truth of their story. None of the three appeared to be a person of education or of particularly sharp intellect; and each was subjected to the most rigorous and searching cross-examination at the hands of one after another of the ten learned counsel and vakils appearing for the defence, for periods extending over two or three days. The defence had the further advantage of being able to compare their statements in this Court not only with those recorded by the committing Magistrate but also with earlier statements recorded under section 164, Criminal Procedure Code, by

the Magistrate, and (in the case of Arumugam and Somasundaram, prosecution witnesses Nos. 6 and 12) with their statements to the police at an early stage. In such circumstances and in view of the lapse of time between their examination and the events to which they were speaking it would be extraordinary if a certain degree of confusion and contradiction were not exhibited from time to time: but we have no hesitation in saying that the prolonged cross-examination did not succeed in breaking down the evidence of any of the three approvers. Much of the cross-examination was directed to the dates of the various incidents.

As regards the dates none of them was able to speak with any distinctness. This is a matter of considerable importance in view of the defence set up, and will be dealt with later: but in the present connection it is sufficient to remark that the vagueness and confusion exhibited by the witnesses in some instances on questions of dates appear to us in no way unnatural or such as to suggest the falsity of their story. In some instances as regards the drinking of Kunkumam water at the time of taking the oath and the writing of the real names of the members on the oath paper the discrepancy merely consists in the omission of one witness to refer to a detail spoken to by another. Prosecution witness No. 12 (who is still a bachelor) states that it was written on the oath paper at Tuticorin that members should not get married. Prosecution witness No. 6 who actually got married six months later ignores such a rule. It is pointed out that accused Nos. 4 and 5 were both married men at the time; but a natural explanation is that the prohibition of marriage was a mere counsel of perfection which as prosecution witness No. 12 himself admits was not pressed on the notice of married men and which no member scrupled to disregard when it suited him. As regards the question of assumed names, prosecution witnesses Nos. 6 and 12 agree that at both Tenkasi and Tuticorin meetings assumed names were given to the conspirators and also to certain places. Much stress is laid by the defence on the fact that nothing of the kind is said to have been done at Punalur and that the use of these assumed names in the various letters exhibited is of the most fitful nature. That the assumed names undoubtedly *are* used in certain passages is a most important point (which will be dealt with later) but it seems most probable that this substitution of names was simply an idea of Nilakantam's which his less intelligent followers adopted

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

very partially and which he did not take the trouble to introduce at his last meeting. On one point, the person referred to by an assumed name in exhibit X, the evidence of prosecution witness No. 12 is certainly hopelessly confused; but it would be unfair to attach undue importance to a single lapse of this nature in the course of so protracted and searching a test. We do not consider that there is anything in the evidence of the witnesses inconsistent with its substantial truth.

In reference to the question of corroborative evidence, regard must be had to the nature of the offence, and to the ease or difficulty which may be expected to be experienced in obtaining independent corroboration. Obviously in the case of a secret conspiracy of this kind the difficulty must be very great. It is practically impossible for any one to speak to the exact nature of the conspiracy, or the identity of the conspirators with any degree of certainty, without being himself to some extent an accomplice. Incriminating correspondence too is so easily destroyed, that it is only by good fortune that any patently inculpatory document can be expected to be discovered especially in a case like this where the news of the murder of Mr. Ashe by Vanchi should have given the alarm to every man, who may have been in treasonable relations with him. It is in evidence that Arumugam had destroyed his correspondence at the end of 1910, and again on one subsequent occasion; while Vanchi on the other hand had evidently made away with all his *later* correspondence, the latest letter found being one dated 4th January 1911. The letters found in Madasami's house again are all dated from January to April 1911, though it is clear from exhibits G-15 and G-16 that he had been receiving letters from Vanchi in October 1910. The seventh accused again appears from letters on record to have maintained an active correspondence with Vanchi and Madasami but no letters from either were found on search of his house either at Alleppey or Shencottah.

Nevertheless there is on record a mass of evidence oral and documentary tending to corroborate the evidence of the approvers as to the existence and nature of the conspiracy organised by the first accused, Nilakantam. There is the evidence of prosecution witnesses Nos. 21 and 22 as to Nilakantam's stay in their houses at Shencottah and Courtallam and in particular to the secret interviews granted by him at the former place. There is the evidence of prosecution witness No. 29 as to the "lecture"

delivered by Nilakantam in prosecution witness No. 21's house. As he was not present, he cannot speak to what took place: but it is difficult to avoid the inference that it was in consequence of the teaching inculcated by Nilakantam at this and other meetings that Vanchi and Dharmaraja, who were present, subsequently endeavoured to induce this witness to transfer his allegiance to the new and more dangerous society formed "to drive out the English." As regards Tuticorin, there is the evidence of prosecution witnesses Nos. 8, 9 and 10, who depose that Nilakantam visited Tuticorin and stayed with the second accused in a house engaged for him by Arumugam. Prosecution witnesses Nos. 8 and 9 were both taken to visit him by Arumugam, who states that he hoped to enlist them as members, but Nilakantam did not approve of them. The evidence of prosecution witness No. 9 is consistent with Nilakantam's visit being, as is now suggested, of a harmless nature: but prosecution witness No. 8 speaks to having been sent away, when Somasundaram and fourth and fifth accused arrived. Prosecution witness No. 10 deposes to visits from the same three persons as well as Madasami.

As regards the Tenkasi meeting there is, not unnaturally, very little corroboration. Arumugam was an entire stranger to Tenkasi, and except for a visit to some eating house to which he was conducted by the second accused spent all the time he was there in the third accused's house. In such circumstances, it would be strange if he were in a position to give information of such a nature as to enable corroborative evidence to be procured more than a year afterwards. There is however the evidence of his employer (prosecution witness No. 7) to show that he borrowed a rupee for the purpose of going to Tenkasi and that of prosecution witness No. 8 as to second accused's visit to call him.

The corroborative evidence of two witnesses (prosecution witnesses Nos. 25 and 27) as to the Chittrai meetings will be discussed separately.

Passing to the documentary evidence we have in all about 50 letters found on search in the houses of various persons implicated in the alleged conspiracy but mostly in that of Vanchi. In no single instance is the genuineness of the letter impugned. It is unnecessary to discuss here their effect as regards individuals: but one or two considerations call for notice. The first is the extraordinary degree of intimacy evidenced by certain of the

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

letters between persons so widely separated by caste, occupation and residence as Vanchi and the seventh accused on the one side and Madasami and Arumugam on the other. Vanchi and the seventh accused are Brahmans of Shencottah working at Punalur and Alleppey respectively. Madasami and Arumugam are Vellalars of Ottappidaram and Tuticorin. Yet we have Madasami writing to Vanchi on 4th October 1916 in exhibit G-15 and signing himself your "affectionate youngster of the caste (jati) of Bharata" and again exhibit G-21, 9 days later referring to himself as Vanchi's "dear brother" and "affectionate youngster." We have the seventh accused in exhibit GG-1 and GG-2 writing to Madasami as "your affectionate F and B" (friend and brother), referring to Arumugam and begging them both to come to a wedding at Shencottah after which the seventh accused proposes to visit Ottappidaram. We have the seventh accused writing to Arumugam as "yours brotherly" in exhibits T-3 and T-7 and proposing to visit him. These expressions in the letters support the case for the prosecution and have special importance with reference to the statement of prosecution witness No. 16 that the members of the society had laid aside all caste distinctions and ate together as brothers.

The explanation offered by the defence is of the most inadequate nature and unsupported by a particle of evidence. The seventh accused states that in 85th Andu (1909-1910) Madasami came to Alleppey to buy a mast post, and as he was staying in the shop of a customer of the accused for 15 days they became acquainted and subsequently corresponded. If this were true, it should be susceptible of easy proof: and no attempt has been made to prove it. But even if true, it does not in any way explain the intimacy indicated by the letters above referred to. The seventh accused further states that he met Arumugam in Vanchi's house in Shencottah about the end of 1910, and was invited to his marriage. How they came to be such friends or what Arumugam was doing in Vanchi's house is not explained. No evidence is adduced as to Arumugam having been to Shencottah and Arumugam denies that he ever went to Shencottah or met the seventh accused.

The letters themselves primarily relate to a variety of topics mostly of an innocent nature; but they contain numerous passages for which no alternative explanation has been or apparently can be offered except the community of interest due to Nilakanta's

secret society. A few instances may be quoted. Exhibits G-20 and G-26 are letters written by Madasami to Vanchi. Each is signed "Ramamurti," but while exhibit G-26 is headed "Ottappidaram," exhibit G-20 is headed "Azhagai." From internal evidence there cannot be the slightest doubt that "Ramamurti" and "Azhagai" are used to signify "Madasami" and "Ottappidaram"; and these are the substituted names which according to the approvers were settled for use in correspondence. No other explanation of their use is suggested by the defence. In exhibit DD a letter written by Vanchi to the eighth accused there are two references to Azhagai obviously as indicating Ottappidaram. Other instances of the unexplained use of alternative names might be given and there are frequent references to the distribution of the "Dharmam" by Arumugam. Too much stress need not be laid on the constant occurrence of such phrases as "mother Bharatha help" which may indicate certain political views, not necessarily seditious: but there are numerous passages clearly indicative of close connection. In exhibit G-15, for instance, we find Madasami asking Vanchi for the address of Ramasami Iyer, prosecution witness No. 16, and mentioning the death of the third accused's father. Now the third accused disclaims all knowledge of Madasami; and apart from the conspiracy, there is no reason why Madasami should ever have heard of either of these men.

It is not necessary here to consider how far the letters afford evidence of the complicity of individual accused: but it will be clear from what has been stated that they afford strong corroborative evidence of the existence of a conspiracy.

A large number of pamphlets and newspapers found in the houses of the accused have been put in evidence. We only propose to refer to the two pamphlets marked exhibits T-9 and T-10. They purport to be issued from the Faringhee Destroyer Press. They are of a violently seditious nature. One passage in T-9 runs—"Cherish rancour in your minds. Swear in the presence of God that you will remove this sinner of a Faringhee out of our country and firmly establish *swaraj* therein! Take an oath that as long as the Faringhee exercises authority in our land of Baharata you will regard life as worthless. Beat the white English Faringhee you get hold of even as you beat a dog, and kill him with a knife, a stick, a stone or even by the hand given by God! Merely kill the policeman or official who, helping

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

the Faringhee, teases the people—any people whatsoever! Because, Lord Vysa himself has stated that the white empire would be ruined between the years Nandana and Ananda (1892 and 1914). According to these words the Swadeshi war has begun in our country. A violent war should take place within the year Ananda. Death may occur either in the sixth or in the hundredth year! Regarding this worthless life as a trifle, we shall make Swaraj and our name shine in the country by killing the white Faringhees and then go to the paradise of heroes." The evidence is that 10 copies of each pamphlet were sent to Arumugam by post addressed in the handwriting of Nagasami Iyer who was conducting the "Dharma" paper in Pondicherry, that Arumugam distributed them and discussed them with the accused Nos. 4 and 5 and Somasundaram and that the accused Nos. 4 and 5 expressed their general approval of the pamphlet marked exhibit T-9. Assuming this is not evidence under section 10 of the Indian Evidence Act against individuals other than the accused Nos. 4 and 5, it is in our opinion evidence as regards the nature of the conspiracy.

A few general remarks may not be out of place here regarding the nature of the defence set up by the various accused and the evidence adduced to rebut the prosecution case. The fourteen accused have been separately defended and the case of each must be separately dealt with. There is however a broad distinction between the defence of the first accused and that of the others. The first accused, Nilakantam, while denying that he was guilty of conspiracy or of forming seditious societies in the manner alleged admits his presence in Travancore and Tinnevely at or about the times referred to by the prosecution and more or less close association with Vanchi and with certain of the other accused. He admits having visited the third accused and stayed in his house though at a different time from that fixed by the prosecution. He admits having visited Tuticorin in July 1910 and having stayed with Arumugam. He admits having stopped in the houses of prosecution witnesses Nos. 21 and 22 and having twice visited Punalur though here again he fixes a slightly different time from that shown in the prosecution evidence. He admits close and constant association with the second accused from the middle of June till the middle of August when he returned to his home and he admits having associated at different times

during this period with Vanchi, Dharmaraja Iyer, the approver Ramasami and the accused Nos. 3, 6, 7 and 8. The other accused, on the other hand, either deny or minimise their acquaintance both with Nilkantam and Vanchi. Thus the second accused states that he only met Nilakantam on a single occasion for a few hours between Cochin and Alleppey and had only one short meeting with Vanchi. The third accused says he never knew Vanchi or Madasami and does not refer to any acquaintance with Nilakantam. The seventh accused only admits a single meeting with Nilakantam at Alleppey and the sixth and eighth accused as well as all the others confess to no acquaintance with Nilakantam. All represent themselves as loyal subjects and deny having ever taken part in seditious conspiracy.

The evidence of the 76 witnesses examined for the defence has been almost entirely devoted to attempting to prove the various *alibis* set up by the accused in connection with the different incidents in the prosecution story. There are in all 19 such *alibis*—all entirely distinct. Most of these will be most conveniently dealt with when considering the case against the individual accused, but there is one which from its general importance may be first disposed of. This is the *alibi* set up by Nilakantam for the Punalur blood oath meeting. This has been much relied on not only by counsel for the first accused but by those representing all the other accused: and indeed if we could accept the defence evidence as showing that at the time Nilakantam is represented as presiding at the Punalur meeting he was actually in his own village in Tanjore, there would practically be an end to the prosecution case in so far as the alleged proceedings in Travancore Territory is considered. A good deal of evidence has been adduced to prove this, which however on careful consideration we feel compelled to reject as untrustworthy.

We have spoken of the Punalur blood-oath meeting but the *alibi*, if accepted, would cover, not only all the proceedings at Punalur but also the meetings at Dharmaraja Iyer's house at Shencottah which are said to have preceded it. The exact dates of all these occurrences have been hotly contested and in our opinion it is impossible to fix them with any accuracy. An examination of Ramasami's evidence shows that he is quite unable to speak with certainty of the period he spent at this or that place: and as already stated such inability, in the absence of some

WHITE, C.J.
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR.
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

circumstance calculated to fix the fact or date in his mind is entirely natural. The one point on which he is clear is that he spent *Avaniavittam* (August 20th) in his own village, Sundarapandiapuram: a day or two after which he says he went to Shencottah and after spending four days there, he and the rest of the conspirators went on to Punalur where the blood-oath meeting was held on the second or third day after arrival. Every endeavour has been made by the defence in the course of a very prolonged cross-examination to induce him to extend the various periods, so as to put the blood-oath meeting as late as possible. As a result, counsel for the defence give us a calculation by which the blood-oath meeting would fall on the 30th or 31st August: while the learned Public Prosecutor adopting the earlier statements of the witness made in examination-in-chief places it on the 28th as the most probable date, with the possibility of one day's variance on either side. The difference is not great and we may say at once that we cannot find any solid ground for holding that the meeting was later than August 28th. The importance of the date is in connection with an endeavour of the defence to show that the date of the meeting is inconsistent, not only with their *alibi* evidence, but also with certain prosecution exhibits which show that Nilakantam was undoubtedly at his village on September 3rd. These are exhibits G-1 and QQQQ. The former is a letter written by Nilakantam from Erukkur on September 3rd to the eighth accused at Punalur and exhibit QQQQ and connected documents show that a telegraphic money order for Rs. 25 was sent by Dharmaraja Iyer on September 2nd from Shencottah to Nilakantam and paid to the latter at Erukkur on September 3rd.

Now Ramasami first said that he left Punalur with some others by the morning train on the day after the blood-oath meeting, but subsequently remembered that it was on the second day. He left Nilakantam there: but Nilakantam had no reason to delay, and if he started by the midday train even on the second day, he could have reached Erukkur on the evening of the third day after the meeting. This, on the prosecution calculation, would have been on the 31st August: and according to the defence on the 2nd or 3rd of September at latest. It is only the very latest date that is irreconcilable with exhibits G-1 and QQQQ. There is nothing in exhibit G-1 incompatible with a very recent arrival and although it may be somewhat singular that his friends at

Shencottah should be wiring money to him a day or two after his departure, it cannot be said to amount to a grave improbability, and the improbability, such as it is, decreases with every day that is added to the interval. It is even possible that Nilakantam might have left on the understanding that Dharmaraja would raise the money as soon as he got back to Shencottah and telegraph it so as to meet Nilakantam on arrival at Erukkur. We do not think it can be said that exhibits G-1 and QQQQ are really inconsistent with Ramasami's evidence.

It remains to deal with the defence evidence which is directed to show that Nilakantam returned to his village on August 24th after breaking his journey for two days at Kumbakonam and therefore could not have been in the neighbourhood of Punalur or Shencottah after August 21st. The chief witness is his own father, defence witness No. 13: but there is also the evidence of defence witnesses Nos. 12, 14, 16 and 19 and of prosecution witness No. 36, an uncle of Nilakantam's who was called by the prosecution to prove the hand-writing of exhibit G-1, but who is essentially a defence witness.

Defence witness No. 13 deposes that hearing that his son had been seen at Courtallam and being anxious for him to return home in time for his (witness') daughter's marriage, he went to Courtallam, found Nilakantam there, and persuaded him to return home. The witness reached his village on August 21st, and Nilakantam who had remained a few days longer arrived on August 24th. The marriage was postponed and ultimately took place on September 14th, but great reliance is placed on a post card (exhibit 93) said to have been written by this witness on August 26th, to his son-in-law (defence witness No. 19) announcing Nilakantam's return.

Of the other witnesses, prosecution witness No. 36 fixes Nilakantam's return by memory as 7 or 10 days before the date of exhibit QQQQ or 10 days before Shravanam (6th September). Defence witnesses Nos. 14 and 16 speak to seeing him at Erukkur on August 25th and 26th. Defence witness No. 12 says Nilakantam spent a day with him at Kumbakonam about August 22nd. Defence witness No. 19 simply speaks to the receipt of exhibit 93.

It is instructive in this connection to turn to accused's earliest statement, exhibit AAAA-1, which was recorded by Mr. Tampoe

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

on July 12th, and to which he still adheres. In this he fixes the date of his return exactly as prosecuting witness No. 36 does as 7 or 10 days before receipt of the money; but there all correspondence ends. There is absolutely no mention of the proposed marriage, of his father's visit, or of his own visit to Kumbakonam—omissions in strong contrast to the manner in which the most unimportant happenings about the same time are set forth in detail. Nor is there anything in exhibit AAAA-1 consistent with the statement on which so much stress is now laid, regarding his intention to proceed to the north of India or to devote years to penance and study. No witness is examined to speak to this somewhat improbable visit of defence witness No. 13 to Courtallam: and prosecuting witness No. 22, the one witness who must have seen him, had he really spent five days with his son there, has been asked no question about it.

The evidence regarding the date originally fixed for the marriage and its postponement is hopelessly confused. Prosecution witness No. 36 says that Nilakantam had *not* returned on the date originally fixed for the ceremony—a point on which he could hardly have made a mistake. Exhibit 93 purporting to have been written only two days beforehand contains no reference to any postponement, and simply says that no date has been fixed. Exhibit 94, dated 5th September, is to the same effect. Defence witness No. 13 at one point states that the marriage was never definitely fixed for the 28th August: at another, that it was decided on the 24th to change the date. As against this, we have the evidence of defence witness No. 16 that on the 27th he was engaged in procuring flowers for the wedding, which the vendor was considerate enough to take back on the 28th when it was found they would not be wanted. The evidence of defence witness No. 14, an old friend of the family, who professes to remember the date on which he lent Nilakantam Rs. 25, carries no weight. The post card, exhibit 93, is, as has been shown, inconsistent in terms with the oral evidence, and refers to a visit not to Courtallam but to Quilon. The only guarantee that it was in existence on the date it bears is afforded by the post-marks: and these should present no special difficulty, especially when it is remembered that Nilakantam's uncle, prosecution witness No. 36, is himself the Branch Postmaster of Erukkur. There remains only the evidence of defence witness No. 12, the value of which depends entirely on

his ability to fix the date when Nilakantam came to him. In examination-in-chief he professed his inability to fix it more accurately than "about the end of August" and adhered to this when cross-examined. But in re-examination after an adjournment of the Court, he was able to make the definite statement that it was the 22nd or 23rd August. Such a statement must be regarded with grave suspicion. It may be that Nilakantam really did stay with the witness on his way home: but no reliance can be placed on the date fixed by the witness. We are unable to accept the *alibi* evidence in this connection.

Other *alibis* were set up for the purpose of meeting the case for the prosecution with regard to alleged presence of certain of the accused, viz., accused Nos. 2, 3, 6, 7, 8, 10, 11, 12 and 14 at the meetings said to have been held at the houses of the eleventh and twelfth accused which have been referred to as the Chitrai meetings. For the reasons which we state hereafter in dealing with the cases of the eleventh and twelfth accused we think the evidence of the prosecution with regard to these alleged meetings ought to be disregarded and we accordingly leave it out of consideration.

We now proceed to consider the case of the different accused individually, with reference to the first count of the indictment, and the evidence against each. Against the first accused, Nilakantam, the evidence is overwhelming. He is implicated by all the three approvers whose evidence shows him to have been the originator and leader of the conspiracy from its inception till his departure at the end of August 1910. Although only one letter of his, exhibit G-1, is on record, it is clear from passages in the other exhibits that for the next six months he maintained correspondence with Madasami, Arumugam, Vanchi and the seventh accused. There are numerous references to him in the letters which have been put in evidence sometimes by his proper name, but more frequently as the "Swami" a designation which there can be no doubt was intended to apply to him. The oral corroborative evidence of prosecution witnesses Nos. 8, 9, 10, 21, 22 and 29 all implicates him. Lastly there is a statement, exhibit AAAA, already referred to. Whatever view may be taken of it, whether or not it may be considered against the other accused, there can be no question of its admissibility against Nilakantam himself. As already stated we do not find the slightest ground for doubting that it was freely and voluntarily made: and we may add that

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.

KING-
EMPEROR
v.
NILAKANTA.

when questioned by the committing Magistrate Nilakantam so far from repudiating practically affirmed it. He stated, "I have already made a statement before this Court. I have nothing more to give."

There is no reason why full weight should not be given to this statement as against the person making it: and it will be seen that as far as the Tenkasi and Tuticorin meetings are concerned he only just stops short of a complete confession. He admits having convened the meetings in question, and having with the other persons present taken a "blood-oath" in the manner described by Arumugam and Somasundaram. As regards the Tenkasi meeting he names the same persons as are spoken to by the approvers; but in the case of the Tuticorin meeting he substitutes one "Sankaralingam" for the accused Nos. 4 and 5, agreeing as to the others. It is only as regards the object of the oath and of the society that he becomes vague. He represents that the purpose of the society was not stated, and he himself was not clear about it; and that the oath was merely to devote their lives and property to the cause of the country. It is impossible to believe that meetings were convened in this fashion and "blood-oaths taken" as he says "to create awe in the minds of the members" with no more definite object: and we see no reason to doubt the evidence of the approvers as to what the object really was. As regards the Punalur meeting, there is no admission, except that contained in the earlier statement made two days before and practically reiterated before this Court to the effect that he had a perfectly innocent meeting in Bapu Pillai's house with Vanchi, Dharmaraja Iyer, approver Ramasami, seventh accused and others between August 15th and 19th. The denial of this meeting as contrasted with the admission of the others is probably to be explained by Nilakantam's anxiety to admit no treasonable dealings with Vanchi which might suggest complicity in the murder committed by the latter. If it be accepted as established that oath meetings as described by the approvers were held under the presidency of the first accused at Tenkasi and Tuticorin, there need be no hesitation in accepting Ramasami's evidence coupled with the unretracted admissions of the first accused and those made by him in this Court as to the occurrences at Punalur.

In this Court he has made a very long statement largely devoted to showing that his visit to Travancore and Tinnevely in

June—August 1910 was of a perfectly innocent character, that his chief interest at this time lay in the publication of certain essays in book form and that in February 1911 he had a violent quarrel with Vanchi at Pondicherry, broke off all relations with the extremists there, and soon after left for Benares, where he was staying at the time of the murder. There is no evidence of the quarrel with Vanchi; but there seems to be no doubt from an article published in the Dharmam early in March 1911 (exhibit 5) that Nilakantam had shortly before quarrelled with the Pondicherry people responsible for that paper: and it seems likely that from that time forward his connection with the seditious movement may have ceased.

What we are concerned with, however, is his earlier conduct, more particularly in the period from April to August 1910 inclusive. And here there is a remarkable lack of evidence in support of his statements. He now represents that he left his home in June with the object of spending some years in study and meditation in the Nilgiris with his friend, the second accused: and that finding this impracticable he drifted down to Shencottah where he spent his time writing and reading moral essays to the friends whom he made there and in inducing them to advance money for their publication. That he was either contemplating or engaged in some literary work about this time is pretty certain: and it is most probable that the sums remitted to him after August by either the seventh accused or Dharmaraja Iyer were in connection therewith. What the character of the work was there is little or nothing to show: and even if it was purely innocent, this is in no way inconsistent with the writer having been engaged at the same time with the treasonable conspiracy charged against him. That his occupation during his absence from home was of the innocent character claimed by him, no attempt has been made to show. No witness from Shencottah, Punalur or Courtallam has been examined by him, though one witness who would have carried considerable weight was cited. This is Mr. Veerabadra Sarma, Editor of an English Weekly paper published in Trivendram. Nilakantam says he had long talks with this gentleman at Courtallam, was converted to his moderate and sensible views and actually travelled as far as Punalur in his company. The evidence of such a witness might have been of much value to the defence; but though cited he was not put into the box.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

The defence in fact, apart from that of a number of witnesses who speak to his journey towards the north in March 1911, was devoted to proving *alibis*. One of these, relating to the Punalur meeting, has already been dealt with. The others relate to the Tenkasi meeting on April 10th and to an encounter at Pondicherry deposed to by prosecution witness No. 3, a Cuddalore vakil, as occurring on May 2nd, 1910. Neither calls for much remark. Both depend on the evidence of Nilakantam's own father, defence witness No. 13, who says Nilakantam remained at Erukkur from Panguini 25th till Vykasi 15th. This would be from about April 7th to May 28th. On April 12th, he is said to have accompanied his father to a festival at Vaidisvarankoyil about 10 miles from Erukkur. The witness is so obviously and closely interested in saving his son from the present charge that it is impossible to place any reliance on such testimony. The only other witness examined is defence witness No. 17, who says he met defence witness No. 13 at the festival and was told Nilakantam was there too. This witness goes to the same festival every month; and appears to have absolutely nothing whereby to fix his memory to the particular month when this occurred. We see no reason to doubt the truth of the evidence given by Chakravarti prosecution witness No. 3, with reference to his interviews with this accused in May 1910 and the views expounded to this witness by the first accused and we are of opinion that this evidence is relevant as against the first accused.

On a survey of the whole evidence we have no hesitation in pronouncing the first accused guilty on the first charge.

We now pass to the case against the second accused, Sankara Krishna Iyer, which except that he has made no inculpatory admissions is nearly as strong as against Nilakantam. The same approvers speak to him and the same witnesses corroborate them; and if their evidence is believed there is no doubt that he was throughout the period of Nilakantam's activity in the south of the Peninsula, Nilakantam's trusted henchman. In the face of this evidence the defence set up is somewhat remarkable. It consists in a total denial of every one of the incidents with which he is connected in the prosecution story. He specifically denies having ever met either of the three approvers, and he limits his acquaintance with Vanchi and Nilakantam to the single occasion of a visit which he paid to the West Coast in June 1910 in search of

employment. He gives a very detailed account of this visit, but gives no account whatever of his movements or whereabouts for the succeeding twelve months.

Such a story naturally leads to wonder as to how, if it were true, he came to be implicated, as he has been, in this case. The only suggestion put forward is that in consequence of a letter of his, exhibit G12, found in Vanchi's house and of three others, exhibits G-9, G-10 and G-11, in which he is referred to, the Police suspected him to be an accomplice of Vanchi's, and "tutored" all the witnesses who were absolute strangers to him to give this false evidence against him. The flimsiness of the ground for so atrocious a concoction is obvious. All the three letters relate to a period a year before the murder; and, to take no higher ground, it is impossible to believe that the Police at the outset of the case should have elected to abandon all attempt at tracing the real accomplice and decided to build up a case on such remote data.

Taken in conjunction with the other evidence now forthcoming, the letters referred to are of importance as affording some corroboration of the evidence of the approvers; but read by themselves in the early days of the investigation they could have conveyed very little—merely that a year prior to the murder, the second accused was travelling with the editor of the recently suppressed "Suryodaya" and had had an interview with Vanchi on some important matter which was not to be disclosed.

Sankarakrishnan now states that he left his home secretly to visit his brother-in-law, defence witness No. 29, who lives near Cochin in the hope of obtaining an employment in that neighbourhood. Knowing that Vanchi, who was living in his (accused's) wife's village, had friends on the West Coast, he wrote to him (exhibit G12), with a view to obtaining letters of introduction. Vanchi met him as requested at Punalur railway station and gave him a letter to the seventh accused at Alleppey. The second accused visited defence witness No. 29, but failed to obtain work and returned home, spending a few hours in the company of Nilakantam whom he met on the journey. Defence witness No. 29 supports this story as far as the visit to himself is concerned. There is no reason to doubt his veracity: for even the second accused, as now seems probable, had other objects in the journey, it is quite likely that these were cloaked by a pretended quest for

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

employment. But it is very difficult to reconcile accused's version with the tenor of the four letters. The reason assigned for such secrecy the fear lest his parents should prevent him from going to the West Coast is very improbable. There is nothing in exhibit G12 suggestive of the intention now alleged, and it is most improbable that Vanchi could have written a letter to any one during the short time the train stopped at the small station of Punalur.

The remainder of the defence evidence, leaving out such portions as are not relevant to the present charge, is in support of an *alibi* set up by the second accused for the Tenkasi meeting. Defence witnesses Nos. 23, 24, 26, and 27 are examined to prove that the second accused's nuptial marriage took place at Krishnapuram (near Kadayanallur) on Punguni 29th (April 8th) which would certainly be inconsistent with his having gone to Tuticorin the next day or been present at the Tenkasi meeting on the 10th. The weak point of the evidence is that there is absolutely nothing to fix the date of the ceremony except the witnesses' memory. It is impossible to feel any confidence in this (*vide* cross-examination of defence witnesses Nos. 26 and 27). The other two witnesses (defence witnesses Nos. 23 and 24) are close relations who may be more likely to remember; but who are obviously interested in saving their young relative. Indeed the evidence of defence witness No. 23 regarding the Police proceedings is chiefly instructive as showing the lengths to which he is prepared to go in support of the defence. The Public Prosecutor pointed out the improbability of a nuptial marriage being fixed for the day preceding the new moon—as would be the case here (April 9th being new moon day). We do not consider that an *alibi* has been made out for this meeting; and for the others, none has been even attempted. We consider that the guilt of the second accused on the first charge is established.

The chief evidence against third accused M. Chidambaram Pillai is that of approver Arumugam who deposes that the Tenkasi oath meeting was held in his house and that he (accused) was present and took the oath. There is also the evidence of approver Ramasami who says that it was third accused who gave him certain "India" newspapers to be taken to Punalur for the first accused's reference, and that he (third accused) was present at the second of the two meetings held in Dharmaraja Iyer's house after

Avani Avitam. There is the independent evidence of prosecution witness No. 22 to the effect that third accused was one of the persons who visited first accused during his stay at Courtallum. Lastly there is independent evidence to show that he was in the company of Vanchi on June 12th and 13th which the defence have been at great pains to rebut. It is unnecessary to discuss this, as, apart from going to show that accused's denial of Vanchi's acquaintance is false, it is irrelevant in regard to the present charge.

We see no reason to doubt the truth of the evidence above referred to: or why that of Arumugam (prosecution witness No. 6) should not be accepted and acted on. It has been argued that Arumugam's present evidence is not altogether borne out by Inspector Veeraraghava Aiyer's account of what Arumugam originally told him. The witness now deposes that after his arrival he was taken to a room apart, where first accused explained his views to him and the necessity of resorting to the "new plan" of universal massacre of all Europeans on a fixed date. They then returned to the others, and first accused in the presence of all spoke to the same effect. All agreed: and they then took an oath by affixing their thumb-impressions in blood to a paper on which it was written the object of the society, "killing all white men" being specifically stated. According to Veeraraghava Aiyer's account Arumugam, after describing to him first accused's private discourse and proposals, simply stated that they all took oath by affixing their thumb-impressions to a paper on which it was written that whoever joined the society must not reveal its secrets on pain of going to hell.

In our opinion the difference, such as it is, possesses no significance. There is nothing in the Inspector's evidence with reference to the statement made to him by Arumugam which is incompatible with the evidence given by Arumugam in this Court and we see no reason to think that the fuller statement made before us is the result of a desire to "improve" his evidence. Some allowance must be made for the circumstances in which the first statement was taken. We may remark that in Arumugam's second statement (exhibit CCCCC), dated four days later the full knowledge and complicity of each of the persons present is clearly indicated. Neither as indicating that Arumugam has intentionally varied or "improved" his story, nor as throwing doubt on the complicity of this accused, do we find this point important.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Accused in his statement denies that any meeting was held in his house or that he ever attended one at Shencottah. He denies all acquaintance with Vanchi or Madasami (but says nothing about Nilakantam) and described himself as a loyal subject taking no interest in politics. Lastly he says that he has been included in this case at the instigation of the Tenkasi Police Inspector, who bore him ill-will for not giving evidence properly in a criminal case in which the Inspector was interested. The evidence as to the suggested ground for ill-will is very unsatisfactory, and, apart from this it is very difficult to believe that a subordinate officer like a Taluk Police Inspector could have exercised the influence which the defence would ascribe to him outside his own range in a case closely watched by so many superior officers as the present one. Apart from this, the enmity alleged is by no means satisfactorily established. The accused's statement as to his indifference to politics is difficult to reconcile with the literature found in his house on search (*vide* exhibit Z). Endeavours to show by defence witnesses that it was impossible to hold a meeting as described in third accused's house owing either to its size and arrangement or in consequence of his father's illness, failed. It only remains in our opinion to consider the evidence adduced to show that in consequence of the death of accused's father on August 25th, 1910, he could not have attended the second meeting in Dharmaraja Iyer's house. All that we find to be established is that the father died at some time on August 25th. It would therefore be most improbable that accused should have attended any meeting on that or a later date. But from Ramasami's evidence it seems clear that the two meetings were not later than the 23rd and 24th, respectively. Shencottah is within six miles of Tenkasi; and in view of the lingering nature of his father's malady (diabetes) there is no improbability in accused (who is not an only son) having spent a couple of hours there the day before his death. We cannot rely on the interested oral evidence intended to show that for a week before he died accused's father was *in extremis* with accused in constant attendance: and it is significant that neither the native physician nor the Civil Apothecary who are said to have attended him have been placed in the box.

It is a circumstance not without value as indicating the *bond-fides* of the approver Ramasami that he only speaks to third

accused's presence at one of the meetings held about this time. The natural inclinations of a false witness would have been to implicate him in the blood oath meeting at Punalur. Ramasami is positive that third accused was not there, though he gave no explanation for his absence. The explanation is now supplied by the defence evidence. Of course, the defence suggest that the ingenious Police Inspector was aware of the date of the death and primed the witness so as to avoid it. Had such been the case the witness would certainly have been prepared with an explanation of third accused's absence: but it is much more likely that the date of the Punalur meeting would have been shifted backwards so as to permit of the implication of this man, whom above all others, according to his own defence, the Inspector was anxious to bring to trouble.

A similar feature may be here noted in connection with the eleventh accused (whose absence from all these meetings is unexplained as far as the prosecution goes). The defence makes it clear that he was busy at the time over his own marriage and in his case it can hardly be suggested that the Inspector knew of the difficulty, or provided for it.

We consider that the guilt of the third accused on the first count is established.

We now pass to the fourth and fifth accused who both belong to Tuticorin and according to the evidence of both approvers Arumugam and Somasundram, were present at the meeting held there by Nilakantam and took the blood oath for the extermination of the English. That Nilakantam came to Tuticorin, preceded by second accused, and there put up for a week in a house engaged for him by Arumugam is proved by independent evidence: as also that he was visited while there by these two accused with Madasami and the approvers. Of what took place at the meeting there is naturally no independent evidence, and it would have been open to the learned *vakil* for these accused to contend, as Mr. Adam did for the first accused, that it was of an innocent nature. We do not think such a contention could have been sustained in the light of all the evidence adduced; but, as a matter of fact, it has never been set up, the plea of these accused being that they never visited Nilakantam at all and that the evidence against them is false. The motive assigned by fifth accused Subbayya Pillai is enmity between himself and the approver Arumugam and also

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

prosecution witness No. 8, one of the corroborating witnesses. We have considered the evidence of this alleged enmity, and do not find anything established which would provide a sufficient motive for the malicious inclusion of the fifth accused, or would materially affect the credit of the witnesses in question.

The fourth accused has set up the plea that the man originally named by Arumugam to Inspector Veeraraghava Aiyer was a different man altogether, one Muthukumarasami Pillai, his own (accused's) name being Muthusami. No personal motive is suggested on the part either of the witnesses or the police. All that the defence put forward is the theory that the police finding some difficulty in tracing the man originally named by Arumugam, persuaded him to identify somebody else : and, for no special reason beyond what the defence vakil calls his client's "misfortune" lit upon him. We can find no basis whatever for such a suggestion. If (and we understand this to be the defence theory) the police were so unscrupulous, and the witnesses so amenable the opportunity would certainly have been taken to implicate some person whom there was some motive to get into trouble and not a harmless stranger like accused. The fact seems to be that, as explained by the prosecution, fourth accused is sometimes referred to by one name and sometimes by another, a state of affairs to which several undoubted parallels can be found in this very case. There is nothing at any stage of the case to suggest that the police were conscious of an error, or substitution, or were endeavouring to conceal or misrepresent anything regarding this man : and all the witnesses make it quite clear that the man they saw is the individual in the dock.

We accept the evidence as establishing the guilt of these two accused and we accordingly convict them on the first charge.

We shall next deal with the case of the sixth accused Jaganadha Aiyangar of Shencottah. According to the approver Ramasami this man was present at his first visit to Punalur, at the meetings at Shencottah after Avani Avittam and at the blood-oath meeting at Punalur. He is further stated to have been present, when Ramasami conversed with Dharmaraja Iyer in January 1911 (which, in itself, has not much significance) and at the Chittrai meetings. The evidence of prosecution witness No. 29 shows that he was a member of the old Bharatha Matha Association and that he was one of those who were present, when endeavours

were made to induce the witness to take a "blood-oath" and join a new society for beating and driving away the English. This latter incident has been chiefly impugned on the strength of an *alibi* set up by another person alleged to have been present (fourteenth accused) which will be dealt with in considering his case. We may say here that neither on that ground nor on any other that has been indicated do we find any reason for rejecting the evidence of prosecution witness No. 29 which corroborates the evidence of the approver both as to the existence and objects of the conspiracy and as to the sixth accused's complicity in it. It is not suggested that the society which prosecution witness No. 29 was urged to join was other than the one established by Nilakantam. The chief documentary evidence relating to him is anterior in date to the conspiracy ; but shows him to have been a very intimate friend and devoted admirer of Vanchi (*vide* exhibit G-3). In so far as his political views are relevant as showing the likelihood of his joining such a conspiracy as that formed by Nilakantam, we may refer to the expressions used in the last named letter and to the discovery in his house of an old number of the India paper preserved for nearly two years and containing a most pernicious article on the assassination of Sir William Hutt Curzon Wyllie (exhibit MMMM).

No attempt has been made to rebut or explain the evidence of Ramasami (prosecution witness No. 16) against this accused. No witness has been cited by this accused ; and no motive has been suggested for his implication in a false case, no attempt has been made to show that he could not have been present at any of the meetings or that his character or position was such as to render it unlikely that he would join the conspiracy. His defence statement consists in a simple denial of everything and protestation of loyalty. We find him guilty on the first count.

The case of the seventh accused Harihara Iyer must be next considered. This man was undoubtedly, as shown by the letters exhibited (*i.e.*, exhibits G-9 to G-11), a close friend of Vanchi prior to June 1910 and according to prosecution witness No. 29 he was a member of the Bharatha Matha Association spoken to by prosecution witness No. 29. It is clear from exhibit G-9, one of his own letters, that he met Nilakantam for the first time in June 1910 and was very much impressed by him. He refers to him as looking like the first-born son of mother Bharatha. It is equally clear that he

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

was one of the persons who subsequently supplied Nilakantam with funds: according to approver Ramasami who seems to have been a sort of hanger-on of his, he was present at each of the meetings held in August, including the blood-oath meeting at Punalur. It is subsequent to that time that we have the letters which have been noticed above indicating such an extraordinary degree of intimacy with Madasami and Arumugam. It has been suggested that this intimacy may be accounted for by co-membership of the comparatively innocent Bharatha Matha Association spoken of by prosecution witness No. 29 as existing in Shencottah. There is nothing to indicate that either Madasami or Arumugam belonged to this society: which, so far as the evidence indicates, was confined to young Brahmans of Shencottah. And it is significant that, so far as we can see there is nothing to indicate that the seventh accused ever knew either Madasami or Arumugam until Nilakantam is said to have brought them together in the links of his conspiracy. It seems to us the reasonable explanation for this extraordinary intimacy is joint participation in Nilakantam's conspiracy, and it furnishes strong corroboration of the approver's evidence against this accused.

The defence evidence is mainly directed to proving an *alibi* for a meeting of the Bharatha Matha Society held about the latter part of February 1910 at which accused is said by prosecution witness No. 29 to have been present, and to showing that although accused was in Shencottah in the latter part of August 1910, he was so ill that he could not have possibly attended the meetings.

The February meeting is of very minor importance. Its date is very roughly fixed by prosecution witness No. 29 and as pointed out by the learned Public Prosecutor it might well have taken place in the interval between February 18th and 24th when accused, according to entries in the apparently genuine account books of his firm was undoubtedly absent from his place of business, Alleppey. To account for this gap, there is only the oral evidence of defence witness No. 53 and prosecution witness No. 51 (another Shencottah man and a former partner of Dharmaraja Iyer's called solely to prove the hand-writing of Dharmaraja Iyer). It may be that accused really made this pilgrimage to Kaladi as stated, but there was time for him to first go to and return from Shencottah and a possible motive for so doing is supplied by the fact that his mother was of the party and that some one is likely to have gone to Shencottah to fetch her.

To return to the much more important subject of the August meetings—there is no trustworthy evidence that the accused was ill at all the time, much less so ill that he could not have attended these meetings. Three friends and relations say that he returned from the West Coast suffering from sore eyes, emaciation, etc., and was confined to his bed; but in a letter to Vanchi (exhibit G-13) written on 8th August just before starting for home, seventh accused says not a word suggestive of ill-health, and appears to contemplate a stay at Punalur with Vanchi (exactly what according to the prosecution took place). We regard this evidence of ill-health so as to disable him from taking part in the August meetings as worthless and we find the seventh accused guilty on the first count.

The case against the eighth accused, Bapu Pillai, is very similar to that against the seventh accused, except that there is no evidence to show that he belonged to the Bharatha Matha Society or attended the Shencottah meeting. In addition to the testimony of Ramasami we have the evidence furnished by the letters. Exhibit G-1 is a letter to him from Nilakantam, dated 3rd September 1910, it contains no phrase or sentence of an incriminating nature, but strongly suggests recent and intimate acquaintance and refers to Dharmaraja Iyer and Vanchi as mutual friends. Exhibit G-20 is a letter from Madasami to Vanchi about December 1910, it is signed "Ramamurthi" and headed "Azhagai," refers in mysterious terms to the "Tuticorin friend" and "Sri Ni" (Arumugam and the first accused) and enquires after the health of "our mother" and M.R.Ry. Bapu Pillai Avargal, eighth accused. In our opinion this letter has reference to the common intention of the conspirators and is admissible against the eighth accused under section 10 of the Evidence Act. Exhibit DD is a letter by Vanchi to eighth accused himself, dated 1st November 1910. It is addressed to him as the writer's younger brother, refers to Madasami as the "elder brother" whom the writer has just been to "Azhagai" to see. It refers to the "Swami" and "our friend Harihara Iyer," the seventh accused. Exhibit G-27 is another letter from Arumugam to Vanchi "his beloved brother," dated 19th December 1910, enquiring for "our friend M.R.Ry. Pillai Avargal." Arumugam says this refers to eighth accused, whom he had never met but of whom he had heard from Vanchi in November as being a member of the society. Eighth accused offers no explanation of his intimacy with Vanchi and Nilakantam or how Madasami and

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Arumugam from the opposite side of the country came to know and take an interest in him, or what was meant by "Azhagai" in a letter addressed to him. He simply denies everything in evidence against him and calls no witnesses. We consider the evidence sufficient for his conviction on the first count.

The case of the next man, ninth accused Desikachari, stands on a different footing. There is absolutely nothing to corroborate or support the statement of approver Ramasami that he was one of those who took the oath at Punalur. Even Ramasami says he never saw him on any other occasions and when they met at Punalur he learnt his (accused's) name from others. Under these circumstances we do not consider that the case against this man reaches that degree of reasonable certainty which would justify a conviction: and we direct his acquittal on the first count.

The case against the tenth accused, Vembu Aiyar, may be summarily disposed of. Apart from the evidence of prosecution witness No. 27 which is not relied on by the prosecution, not a single witness speaks to this man's presence at any of the meetings or incidents which go to make up the prosecution case. There are four letters written to or by him (exhibits G-4, J-2, P & LL). The letters undoubtedly indicate considerable intimacy between this accused, seventh accused and Vanchi; but as all three are Brahmans from the same village who might naturally be expected to be close friends, no special inference can be drawn from this fact. There is nothing against the tenth accused which goes beyond suspicion, and he must be acquitted on the first charge.

As regards the eleventh accused, Chavadi Arunachellam Pillai, there is no doubt a considerable body of evidence against him. It is not, however, the case for the Crown that he was present at the meeting at Punalur when the blood-oath was taken.

As regards this accused the prosecution mainly rely on the evidence as to what took place at what have been termed the Chittrai meetings, two meetings which are alleged to have been held at Shencottah on two successive days, one at the house of this accused and the other at the house of Alagappa Pillai, the twelfth accused, at both of which this accused was alleged to be present. These meetings are spoken to by Ramasami and, according to his evidence in cross-examination, Vanchi made a violently seditious speech at one or both of these meetings. The twenty-fifth prosecution witness, Sundaram Iyer, spoke to the presence of this

accused at his own house when the alleged meeting took place and to his attempting to persuade the witness to join the society.

Neither of these witnesses attempted to fix the date of the Chittrai meetings with any precision, but a witness was put into the box (the twenty-seventh prosecution witness), one Tirumalaimuthu Pillai who gave the date of the meeting at Alagappa Pillai's house as May 1st. He professed to be able to do this after refreshing his memory by referring to his diary. This diary was not put in evidence by the prosecution but it was put in by the defence. At a late stage in the case, after evidence had been given for the purpose of showing that the eleventh accused was not in Shencottah on May 1st, that Ramasami was at Alleppy on that date, and that Pichumani (the fourteenth accused) was at Tanjore, Mr. Napier discarded the witness Tirumalaimuthu Pillai altogether and said that he placed no reliance on his evidence. He contended that there was evidence to establish the holding of the Chittrai meetings and the presence of the eleventh accused thereat, but suggested that these meetings took place at a later date. On behalf of the defence it was contended they could not have been held after May 2nd. We need not discuss the evidence as to this. Also we need express no opinion as to whether the evidence adduced on behalf of the Crown establishes that these meetings at Shencottah were in fact held.

The defence must be taken to have disproved the original case of the Crown that the meetings took place on the dates to which Tirumalaimuthu Pillai spoke. In view of the evidence which the defence were able to put before the Court, Mr. Napier had to abandon one of his own witnesses and suggest a later date for the Chittrai meetings. This being so, and in view of the fact that the evidence as to these meetings was the strongest part of the case against this accused, we do not think we ought to convict him. He is accordingly acquitted on this charge.

As regards the twelfth accused, Alagappa Pillai, he was not implicated by Sundaram (prosecution witness No. 25) in the same way Chavadi Arunachallam was, and the observations we have just made in connection with the case of the eleventh accused as regards the Chittrai meetings are applicable to this accused. We would accordingly acquit him on the first charge.

As regards the thirteenth accused, Vandematharam Subramaniam, he was not arrested till a comparatively late date, some

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

time after the police were in possession of the information given to them by Arumugam. We think however the delay can be satisfactorily accounted for. The case against this accused is that he took the oath at the Tenkasi meeting and the case rests on the evidence of Arumugam. The incident spoken to by A. Arumugam (eleventh prosecution witness) in connection with books brought by the accused to Tuticorin for sale, although no doubt susceptible of explanation, may perhaps be said to throw some doubt on the identity of this accused with the man, who, according to K. V. Arumugam's evidence, took the oath at Tenkasi. We give him the benefit of the doubt and acquit him on the first charge.

There remains only the fourteenth accused, Pichumani Iyer of Shencottah, the case against whom is somewhat similar to that against the sixth accused. According to the approver Ramasami, he participated in the blood-oath meeting at Punalur, and was present at the Shencottah meetings which preceded it, and also when Ramasami visited Dharmaraja Iyer in January 1911. Ramasami also said he was present at the Chittrai meetings, but, for the reasons we have already stated, we do not take this portion of the evidence into consideration against this accused. The evidence of prosecution witness No. 29 is of the utmost importance. He deposes that the fourteenth accused was another member of the Shencottah Baratha Matha Association and was present at two meetings about February 1910. This is of little importance; but he goes on to depose that the fourteenth accused was present at the meeting in the following autumn when endeavours were made to get him to join the new society, and took an active part, the accused assuring the witness that he (fourteenth accused) had taken the blood oath and saying that he (witness) might also do so. Accused states that he and Vanchi were simply neighbours and family friends, and that he took no part in seditious proceedings. He assigns no special reason for his unjust implication in the case: and has endeavoured to rebut the prosecution case by evidence of *alibi*. He and the tenth accused are brothers and both appear to be in the habit of going out to service as cooks in Brahman eating-houses. There seems to be no reason to doubt that he was employed in this capacity in Madura by defence witness No. 71 from 1st January till 22nd May 1910 and again from 20th January 1911 up to his arrest on 21st June. It also seems clear that he was similarly employed in Tanjore

by defence witness No. 72 in the autumn of 1910, quitting that service on November 16th. According to the defence, he joined duty on August 15th (so as to cover the Shencottah and Punalur meetings): but, as will be shown, there are good reasons to believe it was nearly a month later.

The evidence relating to accused's employment in Madura may be first dealt with. It was originally adduced chiefly to rebut the evidence of the accused's presence at the two meetings held in Chittrai 1911. These meetings, as already explained, must be excluded from consideration and the only other meetings covered by this *alibi* are those of the Baratha Matha Society held about February 1910. It cannot be said that anything treasonable took place at these, so that the value of this *alibi* evidence is simply in its bearing on the general credibility of prosecution witness No. 29. The backbone of the *alibi* such as it is, is a rough ledger (exhibit 186) produced by defence witness No. 71 containing accounts of a few individuals including his cook, the fourteenth accused.

According to defence witness No. 71 himself the entries in this account are written up in the most casual manner. He himself is unable to write well, and he says he used to get any customer or servant to write entries in the book as occasions arose. None of the writers is called as a witness and we feel considerable doubt as to whether such a book can properly be regarded as a book of account maintained in the ordinary course of business. Certainly the existence of an entry relating to the fourteenth accused under any given date in some unknown person's handwriting is the very poorest evidence of accused's presence at Madura on that day; and the few entries in accused's own hand do not relate to the period (February 1910) with which we are concerned. Defence witness No. 71 has endeavoured to complete the *alibi* by deposing that accused was never absent from work during the whole of his employment except on one or two specified occasions: but we cannot place the slightest reliance on this evidence. The witness prevaricated a good deal and it is clear (1) that he cannot speak from memory, but only from the entries in his account book and (2) that if a substitute were available he might easily give the cook a few days' leave without entering it at all. In other words, as proving that the fourteenth accused could not have been present at the meetings, the evidence of defence witness No. 71 and his account book is worthless.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

As regards the Tanjore *alibi* defence witness No. 72 deposes that the fourteenth accused presented himself at the end of *Adi* (about August 15th), and asked for work saying he had previously served under defence witness No. 71 in Madura. Defence witness No. 72 being in want of a cook employed him straight away: and a couple of days later advanced him Rs. 7 to be sent to his home. This is sought to be connected with a money order, for the same amount which from exhibits 180, 181 and 187 appears to have been sent by some one in Tanjore to the tenth accused in Shencottah on August 18th. The money orders for that month have been destroyed and it is now impossible to say who sent it: but we are certainly not prepared to hold that it was the fourteenth accused, or to place the slightest reliance on the evidence of defence witness No. 72 and another hotel-keeper defence witness No. 73 as to accused's participation in a ceremony of *Avani Avittam* day. There are much better grounds for holding that the fourteenth accused only came to Tanjore about the 12th September 1910.

Exhibit 176 is a money order for Rs. 5 sent to the fourteenth accused at Shencottah by some one in Tanjore on September 9th. The name of the sender is unknown, as the order is signed by one "S. Rajam for remitter." The money order was redirected from Shencottah to Tanjore on September 12th as it was found the payee had left the former place, and payment was ultimately made to the fourteenth accused at Tanjore on September 15th. Now this record undoubtedly shows that the fourteenth accused was in Tanjore on September 15th, but it also goes strongly to show that he had only arrived there three or four days earlier, and not in the middle of August. The defence explains that this remittance was probably made by some other eating-house keeper who wished to secure his services and did not know he was already in Tanjore. If so, it should have been quite easy to substantiate the fact by evidence: for the fourteenth accused received the money and must have known from whom it came. The fact that the same day he despatched Rs. 3 of it to his mother at Shencottah strongly suggests that he was entitled to keep it. It seems most probable that the money was sent by defence witness No. 72 himself as is usual, for an advance after securing the accused's services by letter and that the accused left Shencottah about September 10th without waiting for it. This is entirely consistent with approver Ramasami's evidence.

It remains only to consider the bearing of this evidence on that of prosecution witness No. 29 regarding the meeting which he fixes roughly at September 21st. Of course, if we could place any reliance on the statement of defence witness No. 72 that accused never quitted work for a day while in his service this would constitute a good *alibi* whether the service commenced on August 15th or about September 12th. But this we cannot do in view of the manner in which he has in our opinion antedated accused's employment to help the defence. It is not very likely that accused would have gone back to Shencottah simply in connection with the conspiracy: but the readiness with which a Brahman will undertake a long journey in connection with some family ceremony is notorious: and there is nothing improbable in his having returned home for such a purpose within a very short time after having left Shencottah and attending any meeting which happened to be going on while he was there. It is instructive in this connection to note the evidence of prosecution witness No. 46, Vanchi's own father, who is certainly not ill-disposed towards the accused, and who says that the tenth and fourteenth accused while employed at Tanjore and other places would return to Shencottah at times for a day or two. Even if the date of the meeting be fixed, strictly on September 21st, it would be impossible to say that the improbability of such a visit was such as to seriously impair the credibility of prosecution witness No. 29's evidence: but this witness like most of the others is hazy about dates and it may have been much later. Prosecution witness No. 29 is clear that it was after he wrote a certain letter dated 14th September: but there is nothing to enable him to speak with certainty as to how long after. The later the date of the meeting, the less becomes the improbability of accused's having been in Shencottah on a flying visit when it occurred.

We have dealt at some length with this *alibi* evidence, because considerable reliance is placed on it by the defence, but in our opinion it does not meet the prosecution case.

We consider that the charge is made out against the fourteenth accused, Pichumani Iyer, and we convict him on the first count.

Second count.—We now pass to the consideration of the second count in the indictment, the charge of abetting the murder of Mr. Ashe by conspiracy. The conspiracy is described in the indictment as "a conspiracy, one of the objects of which was the

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

murder of all Europeans." The object of the conspiracy as stated by the witnesses called on behalf of the Crown was (in examination-in-chief) "That people should be collected in all the villages and that all the white people should be killed on the same day and that a similar mutiny to the one which took place in 1857 should be organized." In examination-in-chief, "We should kill all white men. The affairs of the society should not be revealed. We must sacrifice our person, property and life for this society. Whoever reveals the affairs of this society will go to hell and he will be killed just as Gossain was killed, murdered. Just as we drink the red powder solution now it is the white men's blood."

(In cross-examination).—Q.—From what you told us I gather that the object of your association was to collect people to rise against the Government on a stated day and drive Europeans out of India by killing them all. Is that so or not?

A.—That is so.

Q.—Who was to fix the day?

A.—Nilakanta.

Q.—And was he to communicate the day to the various members of the society?

A.—He said he would intimate the dates

(In cross-examination).—"He (Nilakanta) said that a new idea has come about, that is to effect a revolution, that is, people should be collected in the several villages, that we should effect a mutiny like the Sepoy Mutiny of 1857."

(In examination-in-chief).—"To establish *swaraj* in India the whites should be driven out of India. They should be killed wherever we meet them; if anybody should reveal the secret societies and the members connected therewith, he should be killed just as Gossain was shot and killed and he should go to hell."

A.—"Nilakanta said he would fix a time and announce it."

Q.—And when he announced it, what was to happen?

A.—He said "more persons should be collected and at the time which I fix and announce all in a body should kill the whites at the same time."

(In cross-examination).—Q.—Did he tell you that the plan with Nilakanta was to give the word and when the word was given that everybody was to rise on the same day?

A.—Yes

(In examination-in-chief).—"That the English are ruining our country very much. Through them several diseases are spreading in the country. They are oppressing the people by imposing several taxes. In this manner as they are bringing much trouble to the people they should be driven out from India. That the weapons necessary to drive them out were being prepared in Pondicherry"

(In examination-in-chief).—Q. What was the new means?

A.—People should be collected in towns and villages for secret societies and a revolution like that of 1857 should be effected

The effect of the evidence as to the nature and objects of the conspiracy is that the conspiracy was a plan for a general rising to take place on a day to be fixed by Nilakantam for the purpose of killing all white men and driving them out of India.

The new idea to which Nilakantam refers is contrasted with the old plan of "members standing near and shooting" as in the case of the Nasik Collector and Asutosh Biswas and Nilakantam apparently suggested that the "new idea" should be substituted for the old plan.

Arumugam stated in his evidence that he knew nothing about the murder of Mr. Ashe. Speaking of a conversation between Muthukumarasamy Pillai, Subbayya Pillai, himself and K. V. Arumugam which took place after the murder of Mr. Ashe, Somasundaram said it never struck him one of his society had committed the murder. No doubt, he also said speaking of the murder of Mr. Ashe "We had already intended to kill him God himself has worked and he had been killed." But this intention would seem to have reference to the conversations which were spoken to by Somasundaram between himself, Madasami and Vanchi on one occasion and between himself, Arumugam and accused Nos. 4 and 5 on other occasions—all much later in date than the oath meetings which cannot be relied upon as showing the nature and objects of the conspiracy organized by Nilakantam.

The document found upon the body of Vanchi (EE) suggests that the murder of Mr. Ashe was in pursuance of a conspiracy (of which there is no evidence) entirely distinct in its nature and object from the conspiracy which has been proved in this case.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Mr. Napier contended that though the act done (the murder of Mr. Ashe) was different from the act abetted, it was a probable consequence of the conspiracy which constituted the alleged abetment, and was committed in pursuance of that conspiracy. It may be that the murder of Mr. Ashe was a probable consequence of the conspiracy proved in the sense that Vanchi's mind had been inflamed and his criminal propensities aroused by the pernicious influences exercised by the members of the conspiracy, but that is not enough. We must be satisfied that, although the members of the conspiracy which is charged in the indictment and which has been proved to have existed did not conspire to murder Mr. Ashe, Mr. Ashe was murdered "in pursuance" of that conspiracy within the meaning of section 111 of the Indian Penal Code. On the evidence we are unable to take this view.

As regards the second count of the indictment all the accused are acquitted.

As regards the first count we acquit Desikachari (the ninth accused), Vembu Aiyar (the tenth accused), Chavadi Arunachalam Pillai (the eleventh accused), Alagappa Pillai (the twelfth accused), Vandemataram Subramania Iyer (the thirteenth accused). We convict Nilakanta *alias* Brahmachari (the first accused), Sankara Krishna Iyer (the second accused), Madathukadai Chidambaram Pillai (the third accused), Muthukumarasamy Pillai (the fourth accused), Subbayya Pillai (the fifth accused), Jagannadha Iyengar (the sixth accused), Harihara Iyer (the seventh accused), Bapu Pillai (the eighth accused), and Pichumani Iyer (the fourteenth accused).

* SANKARAN-NAIR, J. — The accused, 14 in number whose names, occupations, etc., are given below are charged with having entered into a conspiracy to wage war against the King-Emperor:—

No.	Name of the accused.	Caste.	Age.	Occupation.	Whether knows English or not.
1	Nilakanta <i>alias</i> Brahmachari.	Brahman ...	YRS. 21	Journalist ...	Yes.
2	Sankara Krishna Iyer ...	Do. ...	22	Cultivation ...	Yes
3	Madathukadai Chidambaram Pillai.	Non-Brahmin, Vellala.	24	Grocer ...	No.

* See the end of the judgment for a table of contents.

No.	Name of the accused.	Caste.	Age.	Occupation.	Whether knows English or not.
4	Muthukumarasami Pillai.	Non-Brahmin, Vellala.	YRS. 45	Pot-seller ...	No.
5	Subbayya Pillai ...	Do.	43	Vakil's gumastah.	No.
6	Jagannadha Iyengar ...	Brahman ...	25	Cook ...	No.
7	Harihara Iyer ...	Do. ...	21	Merchant ...	Yes.
8	Bapu Pillai <i>alias</i> Ramasami Pillai.	Non-Brahmin, Vellala.	24	Cultivation ...	No.
9	V. Desikachari ...	Brahman ...	30	Merchant ...	Yes.
10	Vembu Iyer <i>alias</i> Mahadeva Iyer.	Do. ...	23	Cook ...	Yes.
11	Savadi Arunachalam Pillai.	Non-Brahmin, Vellala.	20	Cultivation ...	Yes.
12	Alagappa Pillai ...	Do.	18	Do. ...	Yes.
13	Vandemataram Subramania Iyer.	Brahman ...	26	Schoolmaster.	Yes.
14	Pichumani Iyer <i>alias</i> Venkatachalam Iyer.	Do. ...	26	Cook ...	No.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

1. The case is that they with certain others conspired to rise against the British Government on a certain day to be fixed by the first accused and on that day to massacre simultaneously all the white men and to expel the British Government. It is also alleged that the murder of Mr. Ashe was due to this conspiracy. They are accordingly charged for the first offence under section 121-A and for the second offence under sections 302, 109 and 111, Indian Penal Code. In the charge it is stated that the accused became members of the conspiracy on various dates between the 1st January 1910 and 17th June 1911, the day of the murder. But the date when the first conspiracy was entered into is now ascertained to be the 10th April 1910.

2. The evidence in the case refers to various meetings held between January 1910 and June 1911. There is a mass of correspondence between the alleged conspirators themselves who are not less than twenty in number. There is a mass of newspapers, pamphlets, leaflets, filed in the case and the oral evidence is voluminous.

3. The terms *swadeshi* and *swaraj* have been very often used by the witnesses and they will be used in the course of this

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

judgment. According to the evidence, *swadeshi* articles meant "articles manufactured in India by Indians." Generally the term is applied to native industry or enterprise. *Swaraj* literally means "own Government" or "self-Government." Arumugam Pillai, the principal witness in this case, states that he meant by *swaraj* not the driving of Europeans but "that India should be governed by Indians." Other witnesses say that *swaraj* implies the exclusion of white men. Whether it means self-Government to the exclusion of British sovereignty or under it must be determined by the context.

4. I shall first state the prosecution case about this conspiracy. Nilakantam, the first accused, left Pondicherry towards the end of March or the beginning of April 1910. He proceeded at first to Tenkasi with Sankarakrishnan, the second accused, and sent Sankarakrishnan to bring Arumugam Pillai, the approver (prosecution witness No. 6) from Tuticorin. Arumugam Pillai, the approver (prosecution witness No. 6) 19 years old, is an accountant getting a pay of Rs. 7 in the firm of S.M.S., Tuticorin. The account that we have of the *meeting at Tenkasi* is given by him. Sankarakrishnan, the second accused, met Arumugam Pillai, when the latter and the prosecution eighth witness were talking together in one of the streets of Tuticorin. The second accused enquired for Arumugam Pillai who was known to Nilakantam as a contributor to "Suryodaya" published at Pondicherry and prosecution witness No. 8 pointed at Arumugam to the second accused as the man he was in search of and the two together went to the house of Arumugam Pillai. Sankarakrishnan then told him that Nilakantam who had published the "Suryodaya" had come to the district, that a meeting was going to take place and that Arumugam and his party were required to be present at the meeting. Arumugam agreed to go to that meeting. Sankarakrishnan went to Tenkasi the same night. The next night, Arumugam followed him and there at the house of the third accused Chidambaram Pillai met with Sankarakrishna Iyer, Nilakantam, the first accused, Chidambaram Pillai, the third accused, himself and Subramania Iyer, the thirteenth accused. There was first a general conversation about *swadeshi* matters. Nilakantam soon took him to a separate room and introduced himself as editor and correspondent of "Suryodaya." He then pointed out to him how patriots have been working for the cause of India; that many of them edited newspapers and

published books but were convicted; that the Bengalis therefore took to manufacturing bombs in the interests of the country and murdered certain Europeans—they too were arrested and convicted; that now, they have a new idea, that is, to carry on a revolution like that of 1857; that people should be collected in all villages and they should be prepared to rise in rebellion on a stated day and massacre the Europeans and India was to attain *swaraj*. Nilakanta agreed to fix a day for the revolution. The witness Arumugam Pillai agreed to what Nilakanta said. Accordingly they joined the other persons who were there and they took an oath. What happened may be described in his own words:—

"There was a picture of Kali there. There was red powder, sacred ashes and flowers kept on the floor there. We five sat in a line, Nilakanta was a little aside and wrote on a paper. We put that red powder into water and made a solution of it and each of us drank it separately saying that that was the white man's blood." As to what is contained in that paper this is what he said "on the top Vande Mataram was written, we should kill all white men. The affairs of this society should not be revealed. We must sacrifice our person, property and life for this society. Whoever reveals the affairs of this society will go to hell, and he will be killed just as Gossain was killed, murdered. Just as we drink the red powder solution now it is the white man's blood."

5. Then that they might carry on secret correspondence among themselves, other names were given to them. And Arumugam states that these new names in lieu of their proper names were written below. Against each of these five names each man cut his finger and impressed his thumb on the paper. Arumugam Pillai was also asked to enlist recruits and to distribute the "Dharma" paper published at Pondicherry for the purpose of enlisting the sympathy of the readers and getting recruits.

6. Nilakanta went back to Pondicherry and then a short while afterwards went again on a tour to the west coast. It is proved that Sankarakrishna Iyer who was then at Tenkasi proceeded to meet him and there is no doubt that he did it in consultation with Vanchi Iyer (see exhibit G12) who is proved to have murdered Mr. Ashe. From there he proceeded to Alleppey in the native state of Travancore where they met Harihara Iyer, the seventh

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

accused, and they both went to Cochin. Hariharan sent Sankarakrishnan to Ernakulam and he himself returned to Alleppey on or about the 1st of June, where he met Nilakanta and Sankarakrishnan. All of them proceeded to Punalur. These facts are proved by documentary evidence, see exhibits G9, G10 and G11. From Punalur they appear to have gone to *Shencottah*, also in the same native state where, it is alleged that Nilakanta held a meeting at the house of prosecution twenty-first witness, Sivagaminatha Pillai. The only evidence that we have of what they talked about at that place is that of this witness, who states that Vanchi told him they were discussing *swadeshi* matters. From there, according to the prosecution, Nilakanta went to *Tuticorin*. Arumugam Pillai who had been already enlisted as a member of the conspiracy at Tenkasi, was there. Somasundaram, the other approver, prosecution twelfth witness, and Madasami, who is now absconding, were Arumugam's particular friends whose sympathies he had already enlisted. There, at a *meeting* Nilakanta is alleged to have enlisted the fourth and the fifth accused as members. He was accompanied by Sankarakrishnan. Nilakanta is stated to have been at Tuticorin about the end of July.

7. The story is next taken up by Ramasami Iyer, the prosecution sixteenth witness. Ramasami Iyer says that he and Hariharan, the seventh accused, left Alleppey about the 10th of August, met Bapu Pillai, the eighth accused, at Quilon, negotiated with him for the purchase of his gramophone and from there Hariharan and he went away to Punalur where they met Vanchi Iyer, the assassin, and lived in his house. They met there Nilakanta, the first accused, Sankarakrishnan, the second accused, Madasami, now absconding, and Jagannatha, the sixth accused. The next day Bapu Pillai also returned from Quilon and came to Vanchi's residence. Nilakanta then said that the paper "India" should be fetched from Tenkasi Chidambaram Pillai. Hariharan and the witness left for that purpose. Hariharan stayed at Shencottah, Ramasami and Madasami went to Tenkasi, where they went to Chidambaram Pillai's concubine's house. Madasami obtained "India" from Chidambaram Pillai and handed it to Ramasami to take it to Punalur. Ramasami accordingly took it to Shencottah, gave "India" to Hariharan and then went back home for *Avani Avittam*. *Avani Avittam* fell on the 20th of August. Then, two days after *Avani Avittam*, Ramasami and

Hariharan went to *Shencottah* where they lived in Dharmaraja Iyer's house. He met there Nilakanta, the first accused, Sankarakrishnan, the second accused, Vanchi Iyer, the assassin, Jagannadha Iyengar, the sixth accused, Pichumani, the fourteenth accused, Savadi Pillai, the eleventh accused, and one Subramanian Pillai; he stayed there two days and he states that, on the two days he lived there, after meals in the nights, Nilakanta delivered addresses to them. In his examination-in-chief, the witness says "Nilakanta told them that it was their duty to see that native industries were fostered, that trade should be developed and that English goods should not be purchased at all, but they should purchase only goods of Indian manufacture." Ramasami added in cross-examination that Nilakanta also said that we should obtain *Swaraj*; "and for that purpose the English people should be killed."

8. From Shencottah some of them went farther. Dharmaraja Iyer, Vanchi Iyer, the first, sixth and the fourteenth accused and the witness first went to *Punalur* where they met the eighth accused Bappu Pillai, and Venkatrama Iyer and the ninth accused, Desikachari. Hariharan, the seventh accused, is also stated to have come afterwards. Nilakanta delivered addresses there also speaking about the attaining of *Swaraj*. He told them that machines and looms should be established and that the English were ruining the country very much, that diseases were spreading in the country, people were being oppressed with severe taxes and for that reason they must be driven out of India. He said the weapons necessary for driving them out of the country were being prepared at Pondicherry and finally they took an oath which was in many respects like that already taken at Tuticorin and at Tenkasi. Certain differences will be referred to later. The men who took the oath were the accused Nos. 1, 2, 6, 7, 8, 9, 14 and Vanchi Iyer, Dharmaraja Iyer, Subramaniam Pillai, Venkatrama Iyer, two others and the witness. Nilakanta seems to have insisted upon them, after the taking of the oath, of the necessity of erecting oil-mills and of manufacturing of soaps, candles, etc., and asked them all to contribute money for that purpose. After that he seems to have left the place for Pondicherry, concerned himself only with the publication of the book and gone away to Northern India early in 1911. His movements will be referred to later.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

9. On behalf of the prosecution, we have also the evidence of two other meetings held at the houses of the eleventh and twelfth accused at the end of April and early days in May 1911. Here however Nilakantam was not present, no oath was taken and no society was formed but at one of these meetings at the house of the twelfth accused Alagappa Pillai, the necessity of fostering home industries and of driving out the English is alleged to have been insisted upon.

10. These are the various meetings mainly relied on by the prosecution for the purpose of proving the conspiracy. There are three—at Tenkasi, Tuticorin and Punalur at which societies were formed and oaths taken binding the members to secrecy and to take steps to drive out the English. In one place they seem to have suggested that the English should be expelled without any oath being taken. On other occasions, only *Swadeshi* was talked of.

11. On the 17th June, Mr. Ashe was murdered by Vanchi Iyer. When his house was searched, certain letters were discovered which showed that Arumugam Pillai, prosecution witness No. 6, the approver, was in communication with him and when the Police Inspector therefore proceeded to search his house, he is alleged to have disclosed this conspiracy and given all information about the meetings at Tenkasi and Tuticorin. On information supplied by him, Somasundaram, the other approver, prosecution witness No. 12, was arrested, when he disclosed to the Police Inspector all he knew. The name of the third approver was referred to in the correspondence discovered, and when he was arrested later, he gave all information about the meetings in Travancore.

Before I deal with the evidence of conspiracy, it is desirable to state a few facts leading up to it; and, as the Public Prosecutor dwelt at some length on "the extraordinary way in which the town of Pondicherry seems to permeate this case," before referring to the rest of the evidence, I shall first refer to the events at Pondicherry.

Pondicherry.

12. In Pondicherry, a French town, there were certain persons whose aim was to thoroughly discredit the British Government. Some of them pointed out in newspapers, published by them in Tamil and circulated in British India, the economic evils arising out of the British administration; they also referred to the offensive conduct of the English officials. Besides publishing

the newspapers, there were also sympathetic lives of certain leaders of Indian agitation like Tilak, Aravinda Ghose and Chidambaram Pillai. Pamphlets advocating *Swadeshi*, boycott of everything foreign, were published; union among the Indian classes was advocated and also revolutionary leaflets advocating assassination and expulsion of the English from India. In these publications, all the benefits of the British rule were denied and the evils were portrayed in flowing colours. Exhibit GGGG, for instance, dated the 23rd February 1909, is a pictorial presentation of a ship loaded with wheat to England with fat officials speaking to three famine-stricken ryots depicted as mere skeletons with the following explanation:—

English official: "You people, we give you protection, security and peace in this country."

People: "Sir, you gave sufficient peace, but you take away the food."

This kind of teaching is enforced on various occasions. Over and over again, it is pointed out that "owing to the wealth of India which is our motherland being taken away by foreigners every year in crores immeasurable, poverty and disease have been increasing and many people dying of famine and meeting with untimely death from plague and other frightful diseases"; and to enforce this, it is pointed out "8 crores of persons always remain hungry and depart this life in our country, our land of Bharata, which is said to be the paradise on earth, not having sufficient food for the stomach and famine has begun to settle permanently in our country. The plague also has taken a foothold in our country." "Every week not less than 40 thousands of our people are dying of this disease. As for malarial fever, it has been causing the death of not less than 15 lakhs a year for the last ten years and more." And then that there might be no doubt about the facts it is added "all these figures have been taken only from the white faringhees who are our enemies." It is repeatedly pointed out that so long as the major portion of the crops is exported, the country cannot be free from these evils. One leaflet states "all the higher appointments are given only to faringhees. It is only occasionally that he gives one or half of these appointments, those which carry no powers, to natives, taking care to select such persons as would deal with the people cruelly just as the throwing bones to dogs."

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Again it is in another place stated "all the industries of the country are ruined by Englishmen, the shipping trade of the various places (mentioned) were also ruined and if a 'blackman' starts a ship in trade, he is sentenced to six years' rigorous imprisonment, as the great man Chidambaram Pillai."

The Englishmen "have vowed not to impart to our people industrial education." "Railways are really constructed to carry away food crops and for military purposes. Confidential reports are written that if people do not die like this, they will increase very much. Revenues are collected by making people raise loans at exorbitant interest.

As to the administration of justice, it is said in exhibit UUUUU that people are suddenly deported. It is written there "the 9 gems Sriman Aswini Kumar Dutt and others and Sriman Tilak and other great men who are the patriots of our country have not yet come in our midst. They are lying in prison. Would we have the mind to rejoice at the dry bones of the new reforms while even the elementary rights of man are in difficulty? What security is there to life and property in our country if our people be thus exiled from the country?" England is stated as a very wealthy country, the income per head per annum amounting to more than Rs. 695, yet the State there feeds more than 9 lakhs of paupers. The income per annum per head in India is stated to be Rs. 9½ to 21, yet all the money is spent for the army, for European officers and for pensions. The cry always is "in India there is no poor person at all, the Indians have a superfluity of wealth, they are keeping treasures hidden and exhibiting poverty"—see exhibits UUUUU—1 and HHHH.

Punitive Police is established for no cause whatever—see exhibit HHHH; and Police oppression is insisted on in these publications. They point out that these students who have received very good English education are treated disgracefully, though they might be as capable as Englishmen. The use of bombs is said to be the result of the British rule—see exhibit KKKK. The treatment of Indians in South Africa is referred to. The education imparted in English schools is condemned, because those who enter those schools do not know the greatness which the land attained of yore, the lowness enveloping it in these days, and it is added, they do not know the state to which it will come hereafter—see exhibit BBBB.

The Government is charged with playing one race against the other. It opposes the Hindus and the Muhammadans to each as co-wives with the threat that Government which is the husband would, if one of the wives showed a temper, go to the company of the other wife and enjoy himself with her.

The Hindu religion is said to be persecuted; putting down Sati and the Widow Remarriage Act are given as instances.

The man who was appointed a guardian to Sankaracharya was a faringhee who eats cow's flesh and has come to root out the Hindu religion through the Christian Missionaries. As a remedy for all these things, it is said, that independence is absolutely necessary—exhibit EEEE.

In answer to the argument that the English rule alone prevents the various classes of the country from breaking out into sanguinary strife, it is pointed out that the English said the same thing about the Americans before they won their independence. It is reported that the Englishmen then said that the colonists residing in the different parts differed from each other greatly in quality, in conduct, in observances, in religion and in private interests. If only they were left free (without the English Government), war extending from one end to the other of the Continent of America would arise. Extracts supporting these views from historians are referred to. These pamphlets invent or discover a golden part; they tell the people that this is a holy land with sacred shrines and with sacred rivers whose names are recited to impress them in their memory. They tell the readers that it is a land in which the Gods live and labour for their good, and then exhort them to see that such a land is prosperous and Dharma flourishes there. The readers are told briefly that Dharma is trampled under foot and that for Dharma, Swaraj or self-Government is indispensable. "The two are connected as means to an end. Swaraj without Dharma is despicable and so Dharma without Swaraj is powerless. The sword of material power *swaraj*, should always be drawn for our object, our safety in the other world, *Swadharma*. The command of God is to obtain *Swaraj*, for that is the chief key for the protection of *Dharma*. He who does not intend to acquire *Swaraj*, he who sits silent in slavery, he is an atheist and a hater of religion."

Then the poet Saint Ramadoss is quoted as saying to the Mahrattas "Die for your Dharma, kill the enemies of your

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
V.
NILAKANTA.

Dharma before you are dying in this way, fight and take back your kingdom."

It is possible that the very violence of these teachings might have proved their antidote, but for the fact that it is mixed up with a teaching of a very different kind. Over and over again economic questions are discussed with a good deal of ability. It is proved that English competition has destroyed Indian industries. It is explained that the Indians have no means of reviving their industries and that the English trade is favoured. *Swadeshi* and *boycott* is repeatedly insisted on for the protection of the Indian industries and for the progress of the country. And, above all, various writings like the *Vandemataram* songs, *Aril Oru Pangu* make passionate appeals for union between the followers of different religions, like the Hindus, Muhammadans and Christians, between the various castes amongst the Hindus, tell them that they are all brothers, children of the same mother, and ask them to live with one another as brothers. India is personified and deified and over and over again in the newspapers and pamphlets people are called upon to worship her and love her as a common mother. All this is done not only in powerful prose, but in verses of power and feeling. There is evidence that Tamil songs were sung at one of the seditious meetings that will be referred to later and there is little doubt these songs must have been sung at others as well and they are bound to have produced an immense effect.

The necessity for the sacrifice of oneself to the country's good is always insisted upon. The people are told that they must expect prosecutions. "The patriot must bear with patience and courage the prosecutions which resemble waves which he may meet with by his doing the great virtuous action of service to the country. Even if perchance he should meet with trouble, he should consider all that a pleasure. When cattle die the *Pulayan* (pariah or low caste man) covets them. Giving up the false attachment to this body which is not liked even by such a *Pulaya* (carcass-eater) and doing at all times with a strong faith the duty of his strong faith, the duty of service to the country, undaunted even if hardships occur by crores, is the paramount duty imposed by God on every Indian. This itself is the paramount duty of an Indian"—see exhibit AAA. That this life should be regarded as a trifle is referred to also in other places. To encourage the people, an old religious

prophecy is invented. Veda Vyasa is said to have declared that the Empire of the white men will be ruined before Ananda (i.e., 1914) and for that reason the great sages and men who have attained supernatural powers are standing behind and guiding in this precious task.

Aravinda Ghose who is proved to be living at Pondicherry is stated to have declared in reply to a *Karmayogin* correspondent that 5,000 years of the Kaliyuga have expired, that a new epoch has commenced and in the next four or five years there will be "great deluge, change, revolution, great revolution, great persons falling, low persons rising, change, change, change everywhere, change in the Government, change in our people, new methods, new ideas in all"—see exhibit BBB.

As a specimen of the verses inciting to independence, the following translation may be referred to (exhibit OOOO). It does not of course convey the force of the original:—

"When will subside this thirst for liberty?

When will perish our love for servitude?

Oh! when will snap our mother's manacles?

And when will our troubles cease and become null?

Oh! Thou! that came once for the Bharata war,

Thou, Protector of Aryans' lives!

Is it not Thy mercy to assist us with victory?

Is it proper Thy devotees still suffer?

Are famines and epidemics (reserved) for Thy true servants?

To whom else is all greatness in this world?

Canst Thou give up those who have taken shelter under Thee?

And can the Mother cast her child away?

Is not Thy duty to say—'Fear not.'

Oh! Arya! Hast Thou forgotten Thy virtue?

Oh! Thou, Destroyer of the evil Rakshasas (demons)!

Oh! Gem of warriors, Oh! Best of Aryans!"

All this and more appear from the various newspapers, pamphlets, lives, leaflets, discovered during the search of the houses of the accused persons except one, and that was found with Nilakanta. I am not prepared to hold any one of the accused responsible for the opinions expressed in the papers found in his house; they are only useful to show their wide distribution. It is impossible to say whether the editors of the newspapers at Pondicherry were responsible for the opinions expressed in the leaflets or pamphlets. The newspapers generally point out the economic evils attendant on

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
V.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

British administration and the oppressive character of such an administration. It is the leaflets that are revolutionary.

It is to this hot bed of treason against the British Government that Arumugam and Somasundram, disgusted with what was taking place in Tinnevely and Tuticorin, turned, as will be presently pointed out, for guidance and for help. Arumugam states that not only did he receive those papers, but began to contribute articles to one of them, "Suryodaya."

The prosecution case is that it was from Pondicherry that Nilakantam was sent out or at any rate that he proceeded to the southern districts of the Madras Presidency and to the Native State of Travancore to preach sedition and treason against the British Government and to form these revolutionary societies of which the other accused are alleged to be members. It is only right to say that in March 1911 the Pondicherry newspapers asserted that he was an impostor and did not go out on their behalf. Nilakantam was on the staff of the "India" newspaper, published originally in Madras and afterwards removed to Pondicherry in October 1908. He was also sub-editor of another paper "Vijaya"—see exhibit ZZZ. He was editor or sub-editor of "Suryodaya" and he had something to do with the "Dharma," paper as he undertook, it appears clearly from the documentary evidence, to send it to some of the accused in the case. He professed to be a *sanyasi*. The first place to which he proceeded was, as I have stated already, Tenkasi. With reference to the use he made of religion in his lectures there, Arumugam, prosecution witness No. 6, says "I took it at that time all that he preached was sedition in the shape of philosophy."

"Q.—Did he preach any philosophy to you apart from sedition?"

A.—All his words appeared to me to be philosophy and appeared to me also proper.

Q.—Can you answer my question?

A.—Whether it was philosophy or sedition, all sedition he preached appeared to me to be philosophy.

Q.—You mean he might have preached pure philosophy to you without any sedition in it—which you were willing to take as sedition?

A.—It is like this, all that he talked was sedition and it appeared to me to be philosophy."

The word used for philosophy was *vedantism*.

At Tuticorin three months after what he did was the same.

"Q.—What directions did he give you with regard to the people who were to be brought?"

A.—He said that he wanted only *vedantis*. He would speak about the ephemeral nature of the body, that they would not mind their person also. He said that such persons were most fit for revolution business. He also said that if there were good patriots they could also be joined.

Q.—He spoke about people of this class being brought, did he say anything also about anybody besides the direction about *vedantis*?

A.—He only spoke about the ephemeral nature of the body.

Q.—Did he give any directions as to the thing to be done about these *vedantis*?

A.—He said that *vedantis* should be brought and made to take part in the meeting—that is the character he adopted.

How he set about his business is instructive to note. That appears from the evidence of one of the prosecution witnesses, prosecution witness No. 8,—according to whom people were invited to go to him on the ground that he was a yogi and that he was learned in the *vedanta*. And, when these witnesses went to him, this is what took place. Prosecution witness No. 8 says "I had a sandal-paste mark and also a red powder on my forehead. He asked me why I had kept them. I said 'It is the swami, i.e., Nilakantam that should say everything, I cannot say.' He said it is the mark of swami. It is always kept there for that purpose and the powder is the symbol of Sakti. Those marks should be placed considering Siva and Sakti. He must always be prayed to. And the days should not be wasted in vain. Always you must be devoted to *Easwara*." Of course, there is nothing wrong in this and with this witness he did not proceed further, but the teaching about the ephemeral nature of the body is consistent with the teaching in the leaflets above alluded to. Its effect upon some of the accused appears from the documentary evidence as well. Hariharan, the seventh accused, writes in exhibit G-11 that he feels that "action" is useless. There is no doubt that Vanchi, the assassin, came under the same influence also (exhibit G-14) and when I refer to the murder of Mr. Ashe I shall set out the evidence on this point in greater detail. The admitted evidence

WHITE, C.J.
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NATH
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

in the case shows that after he left Madras, say about March 1911, he proceeded to Northern India and gave out that he was interested in religious and social matters (see the evidence of defence witnesses Nos. 1, 3 and 6). Mr. Govindaraghava Ayyar referred to the authority of Max Muller on the point that *vedantism* could not possibly have any pernicious effect. No higher authority can be referred to, and I entertain if I may express an opinion, no doubt he is right, but, as the Public Prosecutor pointed out, this is not the question; it only shows that the noblest religious principles may be used for such treasonable purposes.

All this, it is certain, would not have led to the murder of Mr. Ashe, nor, in all probability, to the treasonable conspiracy now in question but for the contemporaneous *swadeshi* and boycott agitation in Tinnevely and its consequences.

Tinnevely.

13. It appears from Arumugam Pillai's evidence that his attention was first drawn to *swadeshi* questions by Mr. G. Subramania Aiyar when he delivered lectures in 1907 at Tuticorin to collect funds for the National Fund and the Industrial Association at Madras. This is an industrial and non-political association intended to help young men to receive education in technical subjects and to take steps for the industrial development of the country. Arumugam states that Subramania Aiyar's lecture drew his attention to the fact that foreign goods must be boycotted and that *swadeshi* goods must be purchased to help native industries. After Subramania Aiyar left the place he came under the influence of Subramania Siva and Chidambaram Pillai. Subramania Siva received his education in Travancore, assumed the garb of a *sanyasi* and was tramping through the country as an itinerant preacher lecturing on *swadeshi* and *boycott*, among other subjects. He came to Tuticorin where he delivered a series of lectures in 1908; some of them were attended by the two approver-witnesses Arumugam Pillai and Somasundaram. For these lectures he was tried and convicted (see *Chidambaram Pillai v. Emperor* (1)).

At Tuticorin Subramania Siva came under the influence of Chidambaram Pillai whose name appears so often in these proceedings. Chidambaram Pillai was a second-grade Pleader of Tuticorin who had given up his practice to deliver lectures to his countrymen pointing out to them the benefits which would accrue by

(1) (1909) I.L.R., 32 Mad., 3.

supporting *swadeshi* enterprise. He was mainly instrumental in starting the Swadeshi Steam Navigation Company, Limited, in October 1906 and he was also connected with several *swadeshi* concerns in Tuticorin. The Navigation Company attracted to itself a good deal of the traffic between Tuticorin and Colombo till then in the hands of the British India Steam Navigation Company. He thus became, perhaps naturally, a violent opponent of the British India Steam Navigation Company and certain other English companies in Tuticorin. He delivered a series of lectures in which he advised mainly a *boycott* of English goods, English Courts and in fact everything appertaining to the governing race. He also was tried and convicted along with Subramania Siva. The substance of his lectures is fully set out in the judgment of the High Court upholding his conviction by the Sessions Judge of Tinnevely. According to that judgment he pointed out three ways "to regain our lost position" (1) refuse to buy foreign goods, (2) refuse to appeal to the authorities on any occasion and (3) refuse the education by Government Schools; and afterwards he said "you must avoid the courts both civil and criminal; they must do this if they want to obtain *swaraj*." His speeches were also concerned with the *boycott* of the Madura Company and the strike at the Coral mills. He was found dissuading the mill-hands from continuing the strike; "go back to work," was his advice, "but demand more pay." The judgment on this point concluded thus:—"the absolute *swaraj*" is to be arrived at by means of the *boycott* and abstention from all recourse to the authorities, *swaraj* through *boycott* is the burden of the speeches and the *swaraj* aimed at clearly involves the departure of all foreigners from India.

"It may be that Chidambaram Pillai's own object was to some extent commercial; he was interested to a great extent in the Swadeshi Steam Navigation Company and other industrial enterprises and he may have discovered by the 19th February 1908 that ordinary commercial competition was not likely to be effectual against such powerful and long established rivals as the British India Steam Navigation Company and the Coral mills and that his best chance of success was to secure the adhesion of his countrymen to his concerns by appeals to patriotic motives.

"To succeed, it was necessary to instil into their minds an aversion from everything foreign and it may be that some such object as this inclined him to the adoption of the political

WHITE, C.J.,
SANKARAN-
NATH
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J., programme of the 'absolute *swaraj*'. That he did adopt that programme, his speeches leave no room for doubt. He cannot be acquitted of disloyalty merely because he deprecated violence; and his exhortations not to create disturbances and his acquiescence in the request of the authorities as to closing the meeting early are in our opinion due to a natural desire that the course of the meetings should not be interrupted" *Chidambaram Pillai v. Emperor*(1).

I shall now complete the narrative of what took place in Tinnevely after the 4th March, the latest date referred to in the judgment. We have to go a little further back. It appears that under the influence of the speeches delivered by Chidambaram Pillai on the 27th of February 1908 there was a strike of the mill-hands of the Coral Mills Company, a European Company. On account of that strike, public meetings were forbidden by the Divisional Magistrate, Mr. Bracken, who thought that the mill-hands had been induced to strike without any real grievance of their own and that serious mischiefs would probably ensue if the speeches were continued. This order was set aside by the District Magistrate and two public meetings were accordingly reconvened on the 1st of March. An increase of wages was given and the mill-hands returned to work on the 7th of March. They continued to work till the 12th of March; on that day Subramania Siva and Chidambaram Pillai were arrested in Tinnevely under the orders of the District Magistrate which were afterwards set aside by the High Court. There was a riot at Tinnevely on the 13th and it was found by the High Court that the arrest was the immediate cause of the outbreak, though there is very little doubt that it would not have occasioned a riot had it not been for the excited state of public feeling in Tinnevely and Tuticorin, brought about by the seditious speeches of these two men. It is in evidence in this case that four (4) Indians were shot dead at that disturbance under the orders of the Collector, Mr. Wynoh, and that the approvers thought that they were unjustly shot and killed (see page 339 of the printed evidence).

At Tuticorin also on the morning of the 13th, the people were excited and all the bazaars were shut. Accordingly at about 2 P.M., the Joint Magistrate *Mr. Ashe* issued an order prohibiting

the meeting which was intended to be held in the evening at 5 P.M. In the evening however there was an assembly of about 4,000 people in the Pettai where the address was advertised to be delivered. Mr. Ashe proceeded to the scene of disturbance and the Deputy Superintendent ordered the meeting to disperse and, on their failure to do so, one round of ball was ordered to be fired in the air. The people did not disperse but threw stones on the police and a round of buck-shot was fired on the mob and the police charged out. The Deputy Superintendent had called on the mob in Tamil to disperse. The police had to fire some more shots on the crowd. A large number of persons was arrested for rioting but the Magistrate who tried the case found that it had not been proved that they had any information or notice prohibiting the meeting and they were not charged therefore on that account. But he held that those who threw stones were guilty of rioting and those who remained in the mob must also be deemed guilty of rioting, because violence was used by many of the members of the mob. The Magistrate held "that as no buck-shot was fired until after the mob was ordered to disperse and a warning shot had been fired in the air, this must have been heard by everybody for a long distance all round and anybody who remained in the crowd afterwards did so at his peril. The burden of proving that he did not hear the warning shot or did get away is on the accused. There must have been plenty of time to run away and their presence within buck shot sound is *prima facie* evidence of their guilt," and he accordingly convicted those of the accused who were proved to have been there. (See exhibit 135.) It is the prosecution case that the brother of one of the accused was one of the convicted persons in this case. That after this the mill-hands returned to work for the wages that were paid to them before the 7th March not claiming even the increased wages allowed to them on that day need excite no surprise. It was also found in the riot case that the coolies made no distinction between official and non-official foreigners. The learned Judges say at page 30 (*Chidambaram Pillai v. Emperor* (1)) "there is much force in the observation of the Additional Sessions Judge that 'to the mind of the average mofussil cooly there is no distinction between official and non-official foreigners. The non-officials are to them merely

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1909) I.L.R., 32 Mad., 3 at pp. 43 to 46.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

the kinsmen of the officials and the departure of the one at once involves the departure of the others.' This want of confidence in the officials on account of their assumed partiality towards non-officials even in their official dealings may possibly account for a good deal of what followed. Arumugam Pillai states in his evidence in this case that he associated Chidambaram Pillai and Subramania Siva with swadeshi matters as distinct from politics and Nilakanta with politics. He also states that he thought that the officials were doing unjust acts and the Englishmen must be driven out and swaraj obtained. He also says that he talked with men like Madasami about the unjust convictions and about the unjust laws, though they did not discuss any definite plan. I have already shown that the seditionists at Pondicherry were pressing forward every grievance real and imaginary and they were not slow to avail themselves of this opportunity. In the "Janma Bhumi" they gave expression to and perhaps clarified the South Indian Tamil feeling. The following are the translations of some of the extracts read in evidence (exhibits OOOO-1 and OOOO-2).

Collector Mr. Wynch's address to Chidambaram Pillai.

(Just like the Brahmin overlord of Nanda (the Pariah saint) rebuked Nanda for spreading Siva worship in the country, so Mr. Wynch reproves Chidambaram Pillai as follows) :—

1. You have spread the desire for liberty throughout the land and started the conflagration, and I will put you in the jail and torment you there and establish my strength.
2. You collected crowds and shouted *Vandemataram* and abused us and you have steered ships and produced wealth for us to run away.
3. You spoke truths to the timid people and you transgressed the law, you mockingly said that dying with poverty in the country is peace.
4. You made men of slaves and dispelled (their) wretchedness and you redeemed those that were content with poverty and gave them hopes.
5. You incited those who were content with servitude as a profession and thirsted for glory. You showed the way to learn all sorts of industries and drove away lassitude.
6. You induced this desire for *swaraj* everywhere and you sowed the seeds (of discontent). Can the tiny rabbit do the work of the lordly lion and thrive for ever more?

7. I will teach order and sense by firing (on the mob?) and will kill and stab. Who is there to obstruct? I will put you in prison and wreak vengeance.

Chidambaram Pillai's reply to Mr. Wynch :—

1. We will no longer be serfs to foreigners in our own land—fear we will not hereafter—will this injustice be tolerated in any land? Will the Almighty tolerate (this)?
2. We will bow and until death cry *Vandemataram*. Is it base and degrading to praise our dear mother?
3. Is this perpetual plundering of our wealth to continue and are we to die? Shall we be weeping? Are we not men and is life (sweet as) jaggery?
4. Are the thirty crores of us curs? And young ones of pigs? Are you alone men? Is it just? Why this stubbornness?
5. Is it sinful to love India? Why do you misunderstand us? Is it wrong to seek deliverance from our poverty? Is this hateful?
6. We have considered and understood well that the way of *unanimity* is the only way. We will no longer be afraid of all your cruelties and lose heart.

7. Can you gain your object even though you cut us to pieces and our life perish thereby? The great love that shines in our hearts—will that go away? Will our hearts grieve?

The murder of Mr. Ashe was a direct consequence of this bitter hostility. It very probably led also to the formation of *swadeshi* and *boycott* societies legal in themselves, but some of whose members, Nilakanta, in my opinion, tried to convert into and in some cases possibly succeeded in converting into traitors. I shall take up the evidence of secret societies distinct of course from the treasonable conspiracies now in question as it is earlier in point of time and may possibly throw light on the murder of Mr. Ashe.

Bharata Mata Association.

14. Venkatarama Aiyar, prosecution witness No. 29, states that in the month of *Thai*, i.e., sometime between 14th January to 11th February 1910, he was told by Dharmaraja Aiyar at Shen-cottah in the Native State of Travancore adjoining the district of Tinnevely. "We young men have formed a society. You shall also join it. We must make some contribution and send for papers

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

from Pondicherry. We must hold tea parties, etc." On his agreeing to this, fifteen days later in the month of Masi, i.e., between 12th February to March 1910 he was made to take an oath; Pichumani Aiyar, the fourteenth accused blindfolding him with a cloth and Dharmaraja Aiyar dictating the oath in the following terms: "I shall join the society. I shall treat the members who have already joined as friends and brothers and render them necessary help. I will not reveal the secrets which take place in the society. If I should reveal I shall be subject to such sin as to have killed Rishis and black cows." The oath was first taken on a book and then again on a candle. By the time the oath was taken, Vanchi also appeared and told him that henceforth 'we are all brothers' and then Dharmaraja Aiyar said that 'we should greet one another with *Vande Mataram* and in correspondence should write *Bharatha Matha Sahayam*' and told him that the name of the society was *Bharatha Matha Association*. About fifteen days later in the month of Masi, i.e., between 12th February to 13th March they had a tea party in Dharmaraja Aiyar's house where in addition to the persons already named the witness met Jagannatha Aiyangar and Harihara Aiyar, the sixth and seventh accused. They read the paper "India" and in the words of this witness "We were talking about swadeshi matters that no English goods should be purchased, that we must use only goods manufactured by Indians and that we must carry on swadeshi" business. If we carry on such trade we should be benefited thereby. "The idea was in the words of this witness 'that the members should contribute subscriptions and funds should be formed and from that trade should be carried on' He further states that even at the first meeting when the oath was taken 'he understood that the objects of the society were the encouragement of swadeshi goods in addition to the reading of papers obtained from Pondicherry' and that there also the paper "India" was read. The witness paid subscription for two months and they continued to read the papers obtained from Pondicherry. The persons who were really working the society were according to this witness Dharmaraja Aiyar and Vanchi Aiyar. Then for some time they apparently did nothing. The evidence of this witness is corroborated by the documentary evidence in this case. In exhibit G-3, January 1910, a letter written by Jagannatha Aiyangar, the sixth accused, to the deceased, Vanchi Aiyar, it is written 'that a meeting without Vanchi will

be like the sky without the moon' and Jagannatha Iyengar states, that 'by the grace of Mother Bharatha everything will go on.' Exhibit G-4 is a letter written by the tenth accused to Vanchi in which he asks whether the latter has read the "India" paper forwarded by him. Exhibit G-5 is written by prosecution witness No. 29 to Vanchi. The letter begins 'in the name of Holy Mother Bharatha.' It is dated the 6th April 1910. In exhibit G-6, a letter by Harihara Aiyar to the deceased Vanchi, he says 'May Mother Bharatha help!' It is dated the 9th April 1910. It is to be noticed that according to the prosecution the first meeting held by Nilakanta which had for its purpose the starting of a revolutionary movement was held at Tenkasi on the 10th April and all these letters were written before that date. They cannot be and are not relied upon to support the case for the prosecution so far as the revolutionary movement is concerned. But they support the evidence of prosecution witness No. 29. That witness states that when Vanchi first met him in January 1910 Vanchi told him that they had already formed a society. This is supported by the statement in G-3 which is dated 16th January 1910 which shows that a society had been started before that date. The evidence of this witness and G-3 place beyond doubt that there was a secret society in existence before the middle of January 1910. We do not know the date of its origin. The prosecution evidence makes it quite clear that the treasonable conspiracy which forms the subject of this prosecution was started only on the 10th April 1910. Why was this association formed as a secret society? There was nothing illegal in its avowed objects. It was only to get papers from Pondicherry, to advocate and foster *swadeshi* enterprise. The unfortunate impression that *swadeshi* will be crushed as at Tuticorin and those who are responsible for it will meet Chidambaram Pillai's fate is the only explanation I can find. It is possible that this may account for the society being started at Shencottah in a native state. If it had not its origin at Shencottah, then there must have been other Bharat Mada Associations in British territory of which Arumugam must have been cognisant. I am disposed to accept the suggestion of the Public Prosecutor that there may have been more than one such Association. These Associations were probably a consequence of the events at Tinnevely. Mr. Ashe's murder was directly due to them. Mr. Wynch and Mr. Ashe were the

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

two chief officials in the district and responsible according to the approvers Arumugam Pillai and Somasundaram and those who thought like them for the conviction of Chidambaram Pillai and the ruin of the Swadeshi Steam Navigation Company and other native industries. I have already referred to their evidence that they regretted that there was no one to shoot Mr. Wynch. He left the district and was succeeded by Mr. Ashe who was till then only his subordinate. Their feelings were bitter against him also.

Murder of Mr. Ashe.

15. The detailed evidence on the point is that of Somasundaram the approver. Somasundaram states that when he met Vanchi, who is proved to be the assassin, at Ottappidaram he first learned of the intention to murder Mr. Ashe. Vanchi asked how the swadeshi was getting on in Tuticorin.

Q.—What did he say about Steam Navigation Company, Chidambaram Pillai and Subramania Siva?

A.—Steam Navigation Company Chidambaram worked for everything. The white men have ruined that, saying that the Indians should not conduct the Steam Navigation Company. The two persons who lectured have been sent to jail.

Q.—Yes, anything else?

A.—For these two things, it is Mr. Ashe who is the cause. Generally all white people should be killed. He is the Chief Officer of the district, Mr. Ashe. He should be first killed.

* * *

Q.—Did they say anything of importance?

A.—Yes.

Q.—What is it?

A.—They were speaking about the murder of Mr. Ashe.

Q.—Well, what did they say?

A.—He has spoiled the Steam Navigation Company. It is he that sent to jail those who worked for the country, viz., Subramania Siva and Chidambaram Pillai. First he should be murdered and the other white people should be killed afterwards.

16. This is the evidence on behalf of the prosecution; that Mr. Ashe's conduct at Tuticorin with reference to the conviction of Subramania Siva and Chidambaram Pillai and with reference to the Steam Navigation Company was one of the main causes of

the murder. This has not been impeached in cross-examination and there can be no doubt about it, as the murder was clearly not in pursuance of the conspiracy to expel the British Government, of which the accused are alleged to be members. According to the prosecution evidence, and such is the prosecution case, as I have already set forth, these treasonable societies were started because assassinations of individuals proved a failure in Bengal and at Bombay. They resulted only in the conviction of the assassins. Assassinations of individuals like that of Mr. Ashe were not therefore within the scope of the treasonable conspiracy to which the accused, it is alleged, were parties. The object of the conspiracy was to collect people to rise against the Government on a stated day. This murder will not be in pursuance of that design. Mr. Ashe's murder would obviously defeat that purpose by provoking an enquiry. The evidence of all the approvers is also against the prosecution in this point, Arumugam Pillai the first approver, states that the murder of Mr. Ashe was not suggested or mentioned at any of these meetings. Somasundaram Pillai, the second approver, states that, when he heard of the murder of Mr. Ashe, it never struck him or Arumugam Pillai that anybody connected with their society committed it. Ramasami Iyer, the third approver, also states that the murder was a surprise to him and that it never struck him that it was done by a member of the society and that there was no talk about it amongst them. The murder is otherwise accounted for, I have already referred to the evidence of Somasundaram Pillai that at Ottappidaram Vanchi told him that Mr. Ashe was responsible for the conviction of Chidambaram Pillai and the ruin of the Steam Navigation Company and that therefore he should be killed. Somasundaram also says that, when they heard of the murder, he and Arumugam and certain others discussed it and they all thought that Mr. Ashe was rightly killed because he had killed the Swadeshi Steam Navigation Company. That Vanchi, the assassin, was a strong Swadeshi Advocate is proved by the prosecution evidence and is clear from the fact that it was he and Dharmaraja Iyer who started the Bharata Society (see paragraph 14) about which prosecution No. 29 has given evidence, which I have already referred to. In exhibit G-14 he laments that though born a Brahman in these days one should without following the occupation of a Brahman consider service—by which he no doubt

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

meant the Government service—superior to it—and he states in that letter that he must render some service to “the nation,” “as the family can exist only if the nation exists.” In exhibit 53 he states his intention of forsaking his family. It is proved he was reading newspapers that came from Pondicherry and that he was there sometime before the murder. Exhibit EE, the letter found in his pocket after he had murdered Mr. Ashe, and committed suicide and which has been proved to be in his handwriting runs thus:—

17. “The English enemies have wrested our country and are destroying the imperishable ‘*Sanatana Dharmam*’ (eternal religion) by trampling it under foot. Every Indian is at the present time endeavouring to drive out the Englishmen, who is the enemy of (our) country and to establish *Dharma* and liberty. In a country where our Rama, Sivaji, Krishna, Gurugovind, Arjuna and others lived and ruled so as to make *Dharma* thrive, grand preparations are being made with a view to crown George Panchame ‘George V’ a Mlechcha (foreigner) given to eating the very cow’s flesh. To kill him (George) the moment he sets his foot in our country, we 3,000 Madrasis have taken a vow. To make it known I the least of them did this day commit this act. This alone is the duty which every one in Hindustan ought to do.”

18. This supports the inference suggested by G-14 that his religious feelings were inflamed, Swadeshi and boycott generated dislike and disloyalty towards the Englishmen in general and Mr. Ashe in particular and his excited religious feelings nerved him to undertake the dreadful task. The evidence places beyond doubt that Mr. Ashe’s murder had nothing to do with the alleged treasonable conspiracy now in question.

I shall now consider the evidence of such conspiracy.

19. I have already stated the prosecution case as disclosed by the evidence. It rests really upon the evidence of the three accomplices who have been granted pardon by the local Government on condition of their speaking the whole truth. Against some of the accused there is no corroboration of the approvers’ evidence. Against others there is some kind of corroboration. It is strenuously contended on behalf of the defence that their evidence should not be accepted without corroboration in material particulars, and that such corroboration is wanting in this case. On the other hand, the Public Prosecutor contends that it is unnecessary to insist

Is corrobora-
tion of
accomplices’
evidence
necessary?

upon such corroboration and that these approvers must be treated like any other witnesses coming before the Courts and their evidence believed or disbelieved according to the circumstances of each case. Section 133 of the Evidence Act (omitting certain words which are unnecessary) runs thus: “A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.” Section 114 illustration (b) is this: “the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars” and to this illustration there are certain exceptions pointed out which may be referred to later. Both sides have referred to the English law of evidence on this point. All the earlier cases are fully discussed by Sir Barnes Peacock in *Elahee Buksh’s* case(1) and the later authorities are discussed in *Queen-Empress v. Maganlal*(2) and *Queen-Empress v. Chagan Dayaram*(3), and by my learned brother ABDUR RAHIM, J., in *Vyasa Rao v. Emperor*(4). I shall only refer to two or three cases to illustrate the sections. In *Reg v. Boyes*(5) Martin, B., has thus commented upon the evidence of an accomplice in summing up (page 34) “Assume for the purpose of the present discussion that this man was speaking the truth. Is there any law which prohibits a jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth, simply because he is not corroborated? I know of none. I know of no rule of law myself”

This is really section 133 of the Indian Evidence Act.

Then Martin, B., goes on “but there is a rule of practice which has become so hallowed as to be deserving of respect. I believe these are the very words of Lord Abinger, it deserves to have all the reverence of the law.”

This is in effect as I shall point out later really section 114, illustration (b). Similarly COCKBURN, C.J., in the same case in the course of the argument said at page 35 “I protest against its being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated.” This again is section 133. But in delivering the judgment of the Court he

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1886) 5 W.R. Cr. Rulings, 80. (2) (1890) I.L.R., 14 Bom., 115.
(3) (1890) I.L.R., 14 Bom., 331. (4) (1911) M.W.N., 927.
(5) 1861 9 Cox’s C.C., 32.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

stated both the rule of law and the practice. He said at page 36 "it is stated very well in Taylor on 'Evidence,' page 796, 'The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said they ought not to believe him unless his evidence is corroborated by other evidence, and without doubt great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists upon the subject, and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that Judges in their discretion will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the Judge. Considering too the respect which is always paid by the jury to this advice from the Bench, it may be regarded as the settled course of practice not to convict a prisoner, *except under very special circumstances* (the italics are mine), upon the sole and uncorroborated testimony of an accomplice. The Judges do not, in such cases, withdraw the case from the jury by positive directions to acquit, but only advise them not to give credit to the testimony.' I think that is a fair exposition of what the present practice is. We think that he ought not to have told the jury to acquit if the witness was uncorroborated." Here again he states the law as laid down in section 133 and illustration (b) to section 114.

Similarly in *Reg. v. Gallagher and others*(1), the law is laid down in the same terms. Lord COLERIDGE, L.C.J., states (page 318) "There was no doubt that the law, as very many generations of lawyers had always laid down in the same way—whether it was most convenient, it was not for him to say, but he only repeated the language of those who had sat on that seat before him in laying it down again—that there was no reason why the evidence of an approver should not be acted upon by a jury if they thought it true, because the jury were to be satisfied of the truth of the matters proved before them and stated in evidence, and if from the evidence of the approver himself they were perfectly

(1) (1883) 15 Cox's C.C., 291.

satisfied that he was speaking the truth, then there was no reason in point of law why on his evidence they should not act and find the accused guilty.

This again is section 133. The Lord Chief Justice goes on "But it had been usual, for Judges always to recommend that there should be some corroboration of the evidence given by an informer. The danger of acting upon the uncorroborated statement of an informer was obvious and the wisdom of requiring that some corroborative evidence should be given before such statements are acted upon was perfectly apparent to an intelligent mind. The law was as he had stated but the practice was always to require corroboration."

This again is illustration (b) to section 114.

I will only quote two more cases. *In re Meunier*(1), CAVE, J., says "it is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the jury in each case" (cf. section 133). "No doubt it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated" [cf. illustration (b) to section 114].

In another case, *Rex v. Tate*(2), Lord ALVERSTONE, the Lord CHIEF JUSTICE, states (page 682) "In Taylor on Evidence', 10th edition, page 688, the practice is thus stated 'Judges . . . in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review, its omission will, in most cases, be deemed a neglect of duty on the part of a Judge. Considering too the respect which is always paid by the jury to such advice from the Bench it may be regarded as the settled course of practice not to convict a prisoner, *excepting under very special circumstances* (the italics are mine) upon the uncorroborated testimony of an accomplice.' That appears to me to be a correct statement of the practice. And in 'Russell on Crimes', 6th edition, Vol. III, page 646, it is said that although the practice in strictness rests only upon the discretion of the Judge at the trial, "it may be observed that the practice in question has obtained so much sanction from legal authority that it 'deserves all the reference of law', and a

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

(1) (1894) 2 Q.B., 415 at p. 418.

(2) (1908) 2 K.B., 680.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

deviation from it in any particular case would be justly considered of questionable propriety."

"In the present case, the Judge did not direct the jury in accordance with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner thereby leading them to suppose that if they believed the accomplice's story they might properly convict although his evidence was entirely without corroboration. Under these circumstances, we are of opinion that there has been a miscarriage of justice, and that the conviction should be set aside."

It will be observed here that though he refers to the judgment of CAVE, J. who according to him did not state the law too strongly, he cites both from Taylor and from Russell only the extracts dealing with the practice omitting altogether what they state to be the rule of law, and sets aside a conviction by a jury although they believed the story of the accomplice on the ground that his evidence was entirely without corroboration, and that the Judge did not direct the jury in accordance with the practice as set out by Taylor and Russell. It is clear therefore that according to the learned Chief Justice the attention of the jury must first be drawn to the presumption of the unreliability of an accomplice's evidence and it is only if they find that even, with such presumption against such witness's credibility they believed him, they are entitled to convict, or in other words the circumstances must be such as to rebut that presumption.

The presumption must first be drawn that the evidence is untrustworthy. All the Courts are agreed that a conviction by a jury on the uncorroborated testimony when the Judge has not cautioned them against accepting it must be set aside. If therefore a case cannot be left to the jury without such direction, it seems to follow that this presumption must be raised.

In the latest case, *Rex v. Everest*(1) DARLING, J., said that "it was long ago established that a Judge should direct a Jury to acquit if the evidence against the accused is that of a person put forward as an accomplice and his evidence is not corroborated in some material particulars." The learned Judge here apparently goes beyond what the text writers and the previous Judges stated as a rule of law that the evidence should be left to the Jury.

(1) (1909) 73 J.P., 269 at p. 271.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

As to the text writers, Taylor on Evidence and Russell on Crimes have been already referred to. I shall refer only to one more text writer, Best on Evidence. In the tenth edition, paragraph 171, it is stated "although with strictness a Jury may legally . . . convict on the unsupported evidence of an accomplice or *socius criminis*, yet it is a rule of general and usual practice—now so generally followed as almost to have all the force of law—for the Judge to advise the Jury not to convict on the evidence of an accomplice *alone*." It appears to me that these authorities place it beyond doubt that in England the law may be taken to be what is stated in Taylor's book which three learned Chief Justices, Cockburn, L.C.J., Coleridge, L.C.J., and Alverstone, L.C.J., declare to be a correct statement of the practice that a prisoner is not to be convicted "*except under very special circumstances upon the uncorroborated testimony of an accomplice.*"

If he is convicted by a Jury for presumably exceptional reasons, then the conviction is not for that reason illegal.

In this country we are however governed by the Indian Evidence Act, and though it is stated by Sir James Stephen in his introduction (page 2) quoting from the report of the Select Committee that "it is little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India," we are not entitled to assume the English Law of evidence and then to enquire what modifications have been introduced into it; but we have to follow the provisions of that Act with reference to the matters therein provided for.

I shall briefly refer to few of the decisions cited to see whether the question has been finally settled and whether it is open to us for discussion.

The leading case in India which was decided however before the Evidence Act is what is usually called *Elahee Buksh's case*(1) Sir Barnes Peacock reviewed all the English and Indian cases and declared the law as laid down in the English cases. This was however before the Evidence Act. It has been generally assumed that these rules have now been embodied in the Evidence Act. The law as laid down therein has accordingly been followed

(1) (1866) 5 W.R., Cr. R. 80.

WHITE, C.J., after the Evidence Act came into operation in Calcutta. See
SANKARAN-
NAIR
AND
AYLING, JJ. *Kamala Prasad v. Situl Prasad*(1), *Jemiruddi Masalli v. Emperor*
(2), *Deo. Nandan Pershad v. Emperor*(3) and *Emperor v. Lalit*
Mohan Chuckerbutty and others(4).

—
KING-
EMPEROR
v.
NILAKANTA. The provisions of that Act are fully discussed in *the Queen v. Sadhu Mundul*(5) and the result is thus stated by Phear, J. (page 70). "On the whole the result appears to be that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, *i.e.*, so far as his testimony implicates an accused person, unless he is corroborated in material particulars in respect to that person; that it is the duty of the Court which in any particular case has to deal with an accomplice's testimony to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though, at the same time the Court may rightly in exceptional cases, notwithstanding the maxim, and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration" or in other words, the evidence of an accomplice is to be believed only "in exceptional cases."

In Bombay also, the law has been laid down in the same terms. In *Queen Empress v. Chagan Dayaram*(6), Mr. Justice Jardine states the law in the following terms:—He says: "as pointed out by Bayley, J., in *Maganlal's* case the Courts must give proper effect to the long experience of the ways of rogues embodied in section 114, illustration (b) of the Indian Evidence Act. . . . The rule in section 114 and that in section 133 are part of one subject and both are found in most of the great judgments mentioned in our judgments in that case; and neither section is to be ignored in the exercise of judicial discretion. The illustration (b) is, however, the rule, and when it is departed from, I think the Court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case. As

(1) (1901) I.L.R., 28 Calc., 339 at pp. 342 and 345.
(2) (1902) I.L.R., 29 Calc., 782 at p. 787. (3) (1906) I.L.R., 33 Calc., 649.
(4) (1911) I.L.R., 38 Calc., 559. (5) (1874) 21 W.R., Cr. R., 69.
(6) (1890) I.L.R., 14 Bom., 331 at p. 344.

I said in *Queen-Empress v. Maganlal*(1), it has been held by two eminent Judges now Members of the Judicial Committee of the Privy Council, that it would certainly be unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. These are the words of COUCH, C.J., in *Reg. v. Imambadal Baban*(2) and they pervade Sir Barnes Peacock's decision in *Elahee Buksh's case*(3). It is not enough for a Court to state the rule *pro forma* and merely as a reason to evade it; the Courts must act up to it." Mr. Justice Birdwood (p. 335) also citing Phillipps'. Treatise on the Law of Evidence, Vol. I., page 95, states the law in nearly the same terms. This case was followed in *King-Emperor v. Mahar Martand Kulkarni*(4).

Or, in other words, the law laid down is the same as in Calcutta that the presumption is that the evidence is unreliable and exceptional circumstances must be proved to justify its acceptance.

In a case reported in *Queen-Empress v. Ram Saran*(5), the learned Judge, STRAIGHT, J., discusses the effect of a conviction based on the evidence of an accomplice and holds that the law as laid down in sections 133 and 114 of the Evidence Act is in no respect different from the law of England. He states that it simply reproduces a rule of practice which the English courts have recognised and which their tendency has of late been—(see the case referred to in 73 Justice of the Peace Reports 271)—to apply—*Rex v. Everest*(6), with great strictness. The English cases are therein referred to and discussed. The law as herein laid down is followed by the Chief Justice of that Court in another case, *Queen-Empress v. Imdad Khan*(7) and the same learned Judge Mr. Justice STRAIGHT as Chief Justice adheres to that rule as laid down before in a case, *Queen-Empress v. Baldeo*(8). In a subsequent Volume, *Queen-Empress v. Gobardhan*(9) Sir John Edge also lays down the law substantially in the same terms. He lays down that there is no rule of law that a conviction cannot be based upon the evidence of an accomplice; this is section 133; Evidence Act, but it is "most unsafe" as a general case to convict on his

(1) (1890) I.L.R., 14 Bom., 115 at p. 138.
(2) (1867) 8 Bom. H.C.R., 59 C.C. (3) (1866) 5 W.R.Cr.R. 80.
(4) (1902) I.L.R., 26 Bom., 193. (5) (1886) I.L.R., 8 All., 306 at p. 310.
(6) (1909) 73, J.P. 269. (7) (1886) I.L.R., 8 All., 120 at p. 138.
(8) (1886) I.L.R., 8 All., 509. (9) (1887) I.L.R., 9 All., 528 at p. 554.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

uncorroborated evidence, hence the presumption that arises according to section 114 illustration (b), but "if a Judge after making due allowance for the considerations which make it unsafe to accept the evidence of an accomplice resolved to convict him then that conviction should not be disturbed" that is, first, you had to presume that the witness is unreliable and then you have to see whether there are circumstances which justify the court in disregarding the presumption in that particular case.

In Madras, the earliest case brought to our notice after the passing of the Evidence Act is reported in (*Reg v. Ramasami Padayachi*(1)), where the Indian law is stated after a consideration of the provisions of the Evidence Act in the same terms as the English law. In *Ramaswami Gounden v. Emperor*(2), BODDAM, J., also arrived at the conclusion that the Indian law and the English law were the same and went so far as to say that it would be the duty of the Judge to direct a jury that there was not sufficient evidence before them if they had only the evidence of an accomplice upon which they would be justified in finding an accused guilty. From this latter statement, BHASHYAM AIYANGAR, J., dissented. He says "it may be that except under very special circumstances the settled course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the Judge, there are no special circumstances which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony he may no doubt under section 298 of the Criminal Procedure Code express such opinion to the jury and in that sense to advise them to acquit the prisoner." Or, as I understand him, he takes the same view as in all the cases above referred to. His observations as to the officials who take bribes availing themselves of this section to escape punishment may be safely disregarded as almost every rule of evidence which is intended to protect the innocent is availed of by guilty persons to escape the punishment which they justly merit. SUBRAMANIA IYER, J., quotes that portion of the observations of MARTIN, J., and of COCKBURN, C.J., in *Reg v. Boyes*(3) which are dealt with by section 133 and states that the rule that the evidence of an

(1) (1878) I.L.R., I Mad., 394.

(2) (1904) I.L.R., 27 Mad., 271.

(3) (1861) 9 Cox. Cr. Cases, 32.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

accomplice requires corroboration is not a rule of law but a rule of general and usual practice and the application of it is for the discretion of the Judge by whom the case is tried. In so far as the learned Judge states that the rule is one of general and usual practice, it is in accordance with all the authorities. If the learned Judge means that the Judge need not advise a jury for instance, that ordinarily the evidence of an accomplice should not be accepted unless corroborated and that a Judge trying a case need not start with that presumption, then with all respect to him, it is clearly wrong, according to all the cases cited above. I have not been able to find any Judge laying down the rule in those terms. But if he only means that though that is the presumption it is open to the Judge to find that the special circumstances of that case rebut the presumption, then according to my view of law he is right. It is not argued before us that there is any rule of law that the evidence of an accomplice must be discredited but the argument is confined, as I understand it, to what is stated to be the law by the English Judges that it is "most unsafe to convict on the evidence of an accomplice without material corroboration and that the Court must be satisfied that special reasons exist in the case to accept such tainted testimony without such corroboration."

In *Vyasa Rao v. Emperor*(1), Mr. Justice ABDUR RAHIM reviewed all the decisions of the English Courts and stated the law in the terms it was stated in *Rex v. Tate*(2), namely, "that it is the settled course of practice not to convict a person except under very special circumstances upon the uncorroborated testimony of an accomplice" and as there were no exceptional circumstances in that case he set aside the conviction. I entirely concur with him in that judgment. It was however a case in which the revisionary jurisdiction of the High Court was invoked and AYLING, J., declined to interfere as the credibility of the witness is ultimately one of fact.

20. But we have been invited by the learned Public Prosecutor to consider the Evidence Act itself which he contends supports his contention.

By section 2 of the Evidence Act all rules of evidence contained in any Act are repealed. In so far therefore, as the law

(1) (1911) M.W.N., 927.

(2) (1908) 2 K.B., 680 at p. 682.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

about the credibility of the evidence of an accomplice is a rule of evidence, that is abolished.

Under section 18 all persons with certain exceptions to which it is not here necessary to refer are competent to testify. An accomplice is therefore competent to testify. This is further declared by section 133 in express terms. That section states also that "a conviction is not illegal merely because it proceeds from the uncorroborated testimony of an accomplice." This is strictly in accordance, as I have already pointed out, with the English rule as stated in Taylor's book. But such a provision in section 133 was unnecessary if the evidence of an accomplice stood on the same footing as that of any other witness. The distinction is pointed out in section 114. It states that the courts may presume the existence of any fact regard being had to the common course of natural events and the illustration (b) to the section is that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This section is intended to get rid of any artificial rules of the effect of evidence, and to give them the effect of presumptions or maxims; all rules of evidence which are not statutory having been abolished by section 2. The illustrations here given are for the most part such rules of evidence as are treated as presumptions of law; the Act converts them into maxims or presumptions to be drawn by the Court. I will take some of these illustrations to see how far it is open to a court to disregard them. To take the first illustration: the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or is the receiver of the goods knowing that they were stolen unless he can account for their possession. Now it is clear ordinarily that every court is bound to act on this presumption. The possessor has to account for his possession. But, it is also clear that there may be exceptions as the instance of the shop-keeper referred to in the section. But the shop-keeper has to prove the fact that he is continuously receiving these rupees in the course of his business. The presumption in illustration (c) has been since made the subject of special enactment and all the other illustrations are cases in which the courts, save in exceptional instances, are bound first to draw the presumption as indicated by the section. Failure to draw such presumptions without adequate grounds being shown has also been a ground for interference by a superior Court. Similarly, in the case of an

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

accomplice also, the same section 114 refers to two instances where "very special circumstances" exist for believing an accomplice. In the last exception to the illustration both the accomplices must be proved to be men of the highest character, and that the offence does not import any stain on moral character or truthfulness. In the second exception to the illustration the practical impossibility of three accomplices not having any means of communication with one another telling the same story is a guarantee of its truth. That they had no opportunity for communication with one another has to be proved. Be it noted that both are treated as instances where the evidence of an accomplice might be accepted without corroboration, not as cases of corroboration of one accomplice by another. Other instances might be easily multiplied. If we keep before us the reasons for not accepting an accomplice's evidence, it is not difficult to apply the rule. An accomplice by admitting his complicity in a crime admits his infamous character. He does not redeem it by betraying those who trusted him. He is a man who usually tries to throw the burden of the guilt on others as much as possible. He knows generally that if his evidence is not accepted and the accused convicted, he himself stands a chance of trial and conviction. The strength of the presumption will be weakened in each case according to the extent these considerations are not shown to operate. It will thus depend upon the facts of each case. An Englishman, for instance, who, when threatened by a constable in India with detention in jail, where he knows he will not be treated with any severity, bribes the policeman, is in a very different position, so far as his character is concerned, from a caste Hindu youth who apprehends violent treatment, and to whom such incarceration might mean civil death. The evidence in the one case has to be received with very great caution. Similarly, a man who is already convicted for his offence and undergone his sentence has not much to fear from the future consequences. His evidence need not be disregarded on that ground.

The law is the same as in England and is rightly in my opinion laid down in the Indian cases. My conclusions therefore are that—

(1) The question is not whether a conviction based on the uncorroborated testimony of an accomplice is legal but whether there is a presumption that such testimony cannot be accepted without corroboration;

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.

KING-
EMPEROR
v.
NILAKANTA.

(2) A person should not be convicted except under "very special circumstances" upon the uncorroborated testimony of an accomplice;

(3) The "special circumstances" are that the grounds on which an accomplice's evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength; that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions;

(4) In cases tried by a jury, a jury has to be advised by the Judge of what I have above referred to.

21. As regards the nature of the corroboration which is required, all the cases in India lay down the same rules as those adopted by the English cases. Corroboration of course is of two different kinds. There may be corroboration of the evidence as to the offence itself and corroboration as to the identity of the accused. Independent evidence might be admissible under section 156, Evidence Act, to corroborate the evidence of an accomplice about certain incidents unconnected with a robbery in which he took part. But this will not be "material particulars" under section 114, clause (b). Further as the accomplice certainly knows all the facts of the crime, the evidence which he gives with reference to the occurrence will be no corroboration of his evidence to show that the accused took part in the occurrence. As pointed out by Baron Alderson in *Rex v. Wilkes*(1) cited in the case of *Elahee Buksh*(2). "The confirmation that is required is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged," or in other words, the corroboration must be of some incident which will raise an inference of guilt on the accused. To the same effect is the decision in *Rex v. Imam*(3), *Queen-Empress v. Krishnabhat*(4), *Queen v. Mohesh Biswas*(5), *King-Emperor v. Mohiuddin Sahib*(6), see also *Queen-Empress v. Baldeo*(7). It has been already stated that when soon after the murder of Mr. Ashe, the Police Inspector went to the two accomplices they disclosed

(1) (1836) 7 C. & P., 272.

(2) (1866) 5 W. R. Cr. R., 80 at p. 83. (3) (1867) 3 Bom. H.C.R. C.C., p. 59.

(4) (1886) I.L.R., 10 Bom., 319.

(5) (1873) 19 W. R. Cr. R., 16 at p. 20.

(6) (1902) I.L.R., 25 Mad., 143.

(7) (1886) I.L.R., 8 All., 509.

all they knew about the conspiracy. It is argued by the Public Prosecutor that these previous statements made by Arumugam Pillai and Somasundaram to the Police Inspector which is proved by the Inspector himself is corroboration of the evidence now given by them. Further after the arrest of the first accused, he made, certain statements, exhibits AAAA and AAAA1, which, it is contended by the Public Prosecutor are confessions and therefore admissible evidence to corroborate these accomplices.

22. As to the question whether the statement, exhibit AAAA1, made by Nilakanta may be used to corroborate the evidence of the accomplices against the other accused, reliance is first placed on section 30 of the Indian Evidence Act. Under that section a confession made by any one person affecting himself and another person who is tried along with him may be taken into consideration "as against such other person as well as against the person who makes such a confession." It is necessary therefore that the statement made by Nilakanta must be a confession. There must be an admission of guilt of the person making the statement, or facts must be stated from which there may be an inference of his guilt. Neither of these conditions is complied with in the case. Nilakanta does not admit that he is guilty; and if the facts stated by him are true, even then no inference arises that he has committed any offence. I am therefore clearly of opinion that there is no confession in the case and, if there is no confession, it cannot be taken into consideration at all against the other accused. It is unnecessary to consider the further question whether, even if it could be taken into consideration as a confession, it may be taken as corroborative evidence.

23. We have next to deal with the question whether the previous statements made by the approvers to the Police Inspector may be used as corroborative evidence. The authorities appear to me to be clear on the point that a statement by the accomplice himself or a statement by another accomplice is not the corroboration required under the rule.

24. Under English law there is no doubt on this question. In Taylor on "evidence," 10th edition, paragraph 970, it is stated "in any case moreover in which two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same confirmation is required as if they were but

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.

KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

one," and authorities are cited in support of that proposition. Of course, if one accomplice does not corroborate another in this respect, *a fortiori*, a man's own statement made on a previous occasion cannot be said to be a corroboration of the later statement for this purpose. In the *Queen v. Mohesh Biswas*(1) PHEAR and AINSLEE, JJ., held that the corroboration, needed to make the testimony of an approver witness trustworthy, should be corroboration derived from evidence which is independent of accomplices. This case was decided in 1873—after the Indian Evidence Act. So also in *Reg. v. Malapabin Kapana*(2); the learned Judges after a consideration of section 157 of the Evidence Act came to the same conclusion. This decision was followed in *Queen-Emress v. Bepin Biswas*(3) and they state the law in the same terms. In Allahabad the law has been laid down practically in the same terms that there must be corroboration independently of the accomplice and it makes no difference if there are two accomplices. In Madras the same view has been acted upon though no reported decisions have been referred to us. The text writers also adopt the same view. Mr. Mayne points out that the previous statements of the same accomplice to the same effect as his sworn evidence are not corroboration by virtue of section 157 of the Evidence Act—see paragraph 758 of the 3rd edition. Sir Horatio Hale Shepherd, who was a Judge of this Court in his edition of the commentaries on the Evidence Act by Sir Henry Cunningham of the Calcutta High Court also states that the evidence must proceed from an independent trustworthy source and the previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial is insufficient for such corroboration. The Public Prosecutor argues that section 157 of the Evidence Act itself makes it quite clear that a prior statement is a corroboration of his present statement. That may be so, and the effect of that section has already been considered by the Judges in the cases referred to. It may be pointed out that what is required by section 114 is that the testimony of the accomplice must be corroborated in *material particulars* which evidently implies that his statement cannot be a corroboration. It might be equally well contended that any

(1) (1873) 19 W.R.C.R., 18.

(2) (1874) 11 Bom. H.C.R., 196.

(3) (1884) I.L.R., 10 Cal., 970.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

particular statement made by a witness in one part of his deposition is supported by another statement made by him in the same deposition; whether made before or after, at any distance of time, it remains the testimony of an accomplice and all the statements together form such testimony and it is his testimony comprising all his statements that require corroboration. For instance, if it is shown that the prior statement of Arumugam Pillai is a false one in itself, then the fact that it is made is no corroboration. It is only when the previous statement is not proved to be tainted testimony that it can be used to support the present statement. That in itself is tainted testimony and subject to the same infirmities as the present one. If the prior statement had been made for instance at a time when there was no inducement, as in the present case, to make any false statement, and made under circumstances which would show that they were true, then it is possible the case might be different. Therefore looking to the words of the section, the previous statement made by a witness cannot be a corroboration of that witness himself in any material particular. The illustration to illustration (b) of section 114 of the Evidence Act places in my opinion the matter beyond doubt. The statement made by three accomplices are treated as an exception to what is declared by illustration (b) and is not given as an instance of corroboration. If the testimony of one accomplice may be taken to corroborate that of another, this illustration to illustration (b) is meaningless. For these reasons following the course of decisions which are uniform I hold the previous statement made to Veeraraghava Aiyer cannot be treated as the kind of corroboration that will satisfy the conditions of illustration (b). But the defence pleaders go further and they contend that these statements of the approvers are not even admissible in evidence on various grounds.

25. It was first contended that this statement cannot be admitted, as section 25 of the Indian Evidence Act excludes that statement. The words of section 25 are "no confession made to a Police officer shall be proved as against a person accused of any offence." It is not denied that the statement in question is a confession in the sense that therein Arumugam Pillai expressly admits that he is guilty. It is also not denied that he is guilty of the offences with which the accused are charged in this case. It is not denied that Veeraraghava Aiyer to whom the confession was

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

made is a Police officer. And it is not further denied that it is sought to be proved against persons who are accused of various offences. All the conditions laid down in this section, it appears to me, are thus complied with. *Primâ facie* therefore the statement appears to be inadmissible. But it is contended by the Public Prosecutor that the section only precludes its proof when it is sought to be used against the person making it, who may be accused of any offence, or, in other words, that the section should be read as meaning that no confession made to a Police officer shall be proved as against a person making it, when he is accused of any offence. I am unable to accept the view. The section is inserted as pointed out by Sir James (then Mr.) Stephen who framed the Act to prevent torture by the Police for the purpose of extracting confessions. And the danger is all the greater when it is sought to be used not against the person making it but as against another person as the inducement not to make any false statement will be much less. I am unable to see any principle on which this contention, that a statement which is inadmissible against a person making it may be admitted against others, can be supported. It is conceded that the statement would be inadmissible against Arumugam Pillai himself to prove any offence against him, and a confession is not the less a confession, because it is sought to be used against another person. It has not the sanction of an oath or solemn affirmation. It is not against self-interest as it is inadmissible against himself. The rule of public policy arising from the practices of the police which requires such a provision applies with greater force when it is sought to be used against others. The words of the section themselves are clear and other words have to be interpolated to support the opposite contention. I therefore uphold this contention.

26. It is also argued that this statement is inadmissible under section 162, Criminal Procedure Code. That section runs thus: "No statement made by any person to a Police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence; provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be

furnished with a copy thereof: and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872."

27. It is conceded and there can be no doubt about it that the statement made by Arumugam Pillai reduced to writing by Veeraraghava Aiyer is not admissible under the section and it is contended by Mr. Govindaraghava Ayyar that if the written record of the statement is not admissible, *a fortiori* oral evidence of such statement is not admissible; and it is also contended that the defence in similar cases would be precluded from contradicting the Police officer by the production of the original record itself when such police officer gives false evidence. It is argued that such a result could not have been contemplated by the legislature, and that, therefore, the oral evidence also must be held inadmissible for the reasons given by Knox, J., in *Rustam v. King-Emperor*(1). These objections have no doubt great weight. That a police officer should be allowed to depose from his memory to a statement made by a person, it may be months before, when the writing itself is declared inadmissible by the legislature on account of the untrustworthiness of the Police, may require explanation. But the words of the section are quite clear and I agree therefore with the decision in *Fanindranath Banerjee v. Emperor*(2), that oral evidence of what a person stated to a police witness is not precluded by section 162, Criminal Procedure Code.

28. Then another objection is taken that in this case the writing was substantially used in evidence and therefore the evidence given by Veeraraghava Aiyer is inadmissible. This contention is based on the following statement made by the Police Inspector Veeraraghava Aiyer.

Q.—So you looked into the note-book with a view to give evidence here?

A.—I looked into the note-book before I came to give evidence. As soon as I was told that I was to be examined, I referred to my note-book to refresh my memory.

Q.—I take it the proof refreshing your memory that you gave was a proof from your note-book?

A.—Yes.

Q.—To whom gave you the proof?

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

A.—Mr. Napier.

29. Now if the words of the section are to be construed strictly as meaning that it is "the writing" alone that cannot be filed as evidence it would imply that a true copy taken in any form either issued by a Court or by any mechanical process would be admissible. Also if a police officer repeats the statement word for word sentence by sentence, in Court, then also such evidence would be admissible. This is a construction which, if possible, should not be adopted as it not only renders the section nugatory but aggravates the mischief which it is intended to mitigate. I do not think the words of the section compel us to that conclusion. The words "such writing shall not be used in evidence" may fairly be construed to mean not only that such writing cannot be proved but also that secondary evidence of such writing cannot be given. But in this case it does not appear that what has been deposed to by Veeraraghava Aiyar is really the contents of a written record. It is further contended that he has certainly refreshed his memory by reading the document and he has therefore substantially used that writing in evidence. I am of opinion that a police witness cannot refresh his memory by referring to his note-book in the witness box because under section 161 of the Indian Evidence Act the opposite party would be entitled to inspect in that case. Under section 162, Criminal Procedure Code, a police witness is not bound to produce the note-book to be inspected by the other party. The Court alone is entitled to demand inspection. The provision in the Indian Evidence Act, i.e., section 161, must therefore give way to section 162 of the Criminal Procedure Code, and it follows therefore that a police witness cannot refer to his diary in the witness box. I agree with the judgment of Sunder Lal A. J. C. in 11 Cr. L. J. Reports 121 on this question. But in this case the witness has not referred to the diary in the witness box. If after referring to the diary outside the Court, the police witness simply testifies to the facts mentioned therein not having any specific recollection of the facts themselves (see section 160 of the Indian Evidence Act), then I am of opinion that the writing is used in evidence, because otherwise such evidence would not have come before the Court and is therefore inadmissible. But in this case Veeraraghava Aiyar states that he has also independent recollection of the facts themselves, and the evidence is not therefore inadmissible on that ground. Where a witness

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

gives his evidence from actual recollection of the facts which come to his memory on reading his diary, then he cannot be said to be using the document in evidence. I do not think therefore that this contention can be upheld.

30. It is further contended that this evidence is not admissible under section 157 of the Indian Evidence Act, because Veeraraghava Aiyar was not "any authority legally competent to investigate the fact" under section 157, Criminal Procedure Code. Under section 156, it is an officer in charge of a police station who is entitled to investigate the fact. Under section 161, it is a police officer making an investigation who may examine any person, and under section 551, Criminal Procedure Code, the powers of an officer in charge of a police station may be exercised by any police officer superior in rank to that officer within the limits of the local area of his jurisdiction. It is not denied that Veeraraghava Aiyar is not an officer in charge of a police station. Leaving out of consideration for the present the Police Act of 1859, I am also of opinion that he is not an officer superior in rank to such an officer under section 551, which is evidently intended to include the Inspector, the Deputy or Assistant Superintendent, the Superintendent, the Deputy Inspector-General, etc., having jurisdiction over that local area. Veeraraghava Aiyar is an officer attached to the Criminal Intelligence or Investigation Department working under superior officers in that department without any defined area of jurisdiction and they have not been shown to have any power of control over a Station-house officer. The sections in chapter XIV of the Criminal Procedure Code (see sections 154, 155, clause (1)) contemplate information to be given to an officer in charge of a police station. The right to investigate cognizable cases is also given to a Police Station-house officer (see sections 156 and 157). The obligation to report to the Magistrate is also imposed upon the same officer. Similarly, the power to require the attendance of witnesses is also given to the same officer, and he can summon witnesses living only within the limits of his own or adjoining station. The contention of the Public Prosecutor if upheld would enable Veeraraghava Aiyar who is not attached to any police station to summon witnesses from any place in the Presidency. It is clear to me that the police officer making an investigation referred to in sections 161 and 162 are also Station-house officers. Section 165 also gives

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

the power to a Station-house officer or to any officer deputed by the Magistrate to investigate. When he is unable to make the search himself he may require an officer subordinate to him to make the search. It was suggested by the Public Prosecutor that as Veeraraghava Aiyar has been authorised to make the search he must be taken to be an investigation officer. I cannot agree with this contention. The right given to him is limited, *i.e.*, only to (conduct) search. It does not carry with it to do anything further, or to make an investigation generally. Sections 166 and 167, Criminal Procedure Code, also contemplate the officer in charge of the police station being an investigation officer, and section 168 states that when any subordinate police officer has made an investigation under this chapter he shall report it to the officer in charge of the police station. Sections 169 and 170 strongly support the same view. It leaves it to the officer in charge of the police station to report to the Magistrate whether there is sufficient evidence or reasonable ground of suspicion to justify further proceedings. Section 174 specially refers to an officer not in charge of a police station who may be empowered to hold an inquest. These sections leave no doubt in my mind that the police officer entitled to investigate an offence are the police officers referred to in the Criminal Procedure Code, *i.e.*, the Station-house officer or his superior officer as referred to above. All these provisions restricting the right of investigation to certain defined officers would be rendered nugatory if the contention of the Public Prosecutor is allowed.

The Criminal Procedure Code does not make him legally competent to investigate a case. It is also contended by the Public Prosecutor that by the Police Act, XXIV of 1859, section 21, the police officers have got powers to detect crimes which implies the power to investigate, and that therefore Veeraraghava Aiyar, being a police officer, is entitled to make the investigation under section 157. So to construe the section, would really be to nullify the provisions of the Criminal Procedure Code which, as I have pointed out, imply the power to investigate being vested in those police officers who have only local jurisdiction. This would give a police officer power to detect throughout the presidency. It is not explained whether that statutory power could be in any way limited by his superior officers. I am not able to agree to the contention that the question, whether any authority is legally

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

competent to investigate the fact or not, is a question of fact or a mixed question of fact and law. The power to investigate must be given to him by law. I therefore disallow this contention of the Public Prosecutor. But it has been already held by the majority of the Court in the course of this trial that this evidence is admissible. I shall therefore treat it as evidence.

31. Thus far I have dealt with the general rules as to corroboration and also with the question whether certain evidence put forward as such is any corroboration under section 114 (b) of the Evidence Act. I shall now consider how the story now told affects the usual presumption against the testimony of accomplices. It will be seen that there is no overt act alleged by the accomplices, nor, does the story of the witnesses derive any support from the conduct of the alleged chief conspirator. The last of these meetings is that at Punalur between the 28th of August and the 1st of September. We find (exhibit G-1 dated 3rd September) that soon after that, Nilakanta was contemplating leaving for Madras and indicated that intention to his alleged conspirators. The letters exhibits ZZZ3 (19th September 1910), ZZZ5 (21st September 1910) ZZZ6 (24th September 1910), ZZZ7 (14th October 1910) and 21 form part of the correspondence between him and the Guardian Press at Madras about the publication of a book for which he admits having received pecuniary contribution in exhibit G-3. The other letters exhibits NNN1, NNN2 and PPPP1 all show that in September he was devoting his attention to the publication of his book and not to any conspiracy. Exhibit G-21, dated 13th October 1910 and exhibit DD, dated 1st November 1910 show that he was not keeping correspondence with his friends and that Vanchi and Madasami did not know his whereabouts. Exhibits T-4, T-5 and T-6 show that Vanchi and Madasami were growing uneasy about Nilakanta and had no news of him. Exhibit ZZZ-8 undoubtedly shows that Nilakanta was at Pondicherry in November and exhibit G-26 that he was there on the 11th December. Exhibit 98 shows that on the 21st of December he was in Madras, and he continued to remain in Madras on the 26th and 28th December. He was also there on the 10th January. It is clear that before March, Nilakanta must have fallen out with his Pondicherry friends. In exhibit 5 it is stated that Nilakanta Brahmachar is an imposter, has been going about the country pretending that he was a Yogi named

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Swamigal Nilakanta and that he was the proprietor and editor of the "Dharma" newspaper, that he has been collecting large amount for the paper and appropriated them for himself and collecting money also on the pretence that he is a disciple of Aravinda Gnose, and money was wanted for his use, that Aravinda Ghose denies all connection between himself and Nilakanta and that they also deny all connection with Nilakanta. After his final breach, he seems to have left the Madras Presidency and gone to the north. His evidence on that point is clear and is not impeached by the prosecution. It shows that he was masquerading as a *sanyasi* and wandering about the northern parts of India. It is hardly the conduct of a man who is organising a revolution against the Government. Apparently equally inconsistent with the idea of rising is the fact that there was no talk about the acquiring of arms, about the training of any men either at the meetings at Tenkasi or Tuticorin or Punalur. The omission as to arms is no doubt supplied at Punalur in August where Ramasami Iyer states that Nilakanta informed them that arms will be collected in Pondicherry, a fact of which no evidence was given, and which, coming after the evidence of other two approvers, cannot be deemed to have been proved.

I shall now take up the witnesses separately.

32. Arumugam's evidence is open to all the infirmities that attach to an approver's evidence. On his own showing he is not only a conspirator, a traitor to the British Government, but he has also taken a dreadful oath not to betray his comrades and he is now betraying them. An oath of course is not binding on him. There is no redeeming feature about this witness. He is giving his evidence under a conditional pardon with a natural inducement therefore to earn it by giving such evidence as would satisfy the prosecution. He says that, after he made the statement to Veeraraghava Aiyar, he asked for police protection against the other conspirators from whom he apprehended violence to himself. He would now be anxious to see them out of the way. There is of course the natural tendency of all approvers to make others more responsible than themselves. In addition to all this, it is pressed by the defence, that the story is mainly a police concoction. I am not prepared to accept that view. Veeraraghava Aiyar to whom the statement was made is an Inspector of the Criminal Intelligence Department. He was on duty at Madura on the 18th June.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

On receipt of telegraphic orders on that night he met the Deputy Inspector-General of Police, Criminal Intelligence Department and Railways, next day at the railway platform, and proceeded with him to Tinnevely where he arrived at 5 o'clock on the 19th. From there he was directed by the Deputy Inspector-General and the Tinnevely Superintendent to proceed by the next Shuttle train to Tuticorin with Mr. Johnson, Assistant Superintendent of Police, to search certain houses (among them, this approver K. V. Arumugam Pillai's). He left the place within half an hour and arrived at Tuticorin about 9-30 p.m. The Assistant Superintendent of Police proceeded to his own bungalow, and after some delay they proceeded to the house of K. V. Arumugam at about 2 o'clock in the night and on their arrival there, Arumugam is alleged to have made this statement at once. Now, though it is possible, nay, probable from the letters discovered at Shencottah and elsewhere, from the letter which was found on the dead body of Vanchi and from what they generally knew of the state of things about the distribution of seditious literature in the country, that there may have been a conspiracy, the evidence adduced is not one which in its broad outlines looks like a police concoction. Veeraraghava Aiyar did not stay long at Tinnevely himself. There was hardly time for the police at Shencottah to have manufactured a story and communicated that story to Veeraraghava Aiyar. The letters discovered at Shencottah on search contain references to various persons some of whom are not implicated by Arumugam. There were others accused by Arumugam against whom no evidence has been discovered. There is no suggestion, nor is there any evidence to show, that Veeraraghava Aiyar knew these or anybody amongst them. Veeraraghava Aiyar would have been naturally anxious to get any information about the murder of Mr. Ashe, as it is with reference to that matter that he proceeded to Tinnevely. The story given by Arumugam to Veeraraghava Aiyar throws no light on the murder of Mr. Ashe, though as it now appears Arumugam knew something about it. Another suggestion is that Arumugam had ample time to concoct a story and that therefore it cannot be presumed that he stated the truth when he was surprised by Veeraraghava Aiyer. It is in evidence in this case that Arumugam and the other approver Somasundaram heard of the murder of Mr. Ashe and that they had frequent discussions amongst

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

themselves. It is clear therefore that if they wished it they had ample time to concoct a story before Veeraraghava Aiyar saw them. Nor have I any doubt that they must have bestowed some thought upon the story to be told the police, if any occasion arose for it. Seeing that Veeraraghava Aiyar went there to enquire into the murder of Mr. Ashe, it is surprising that though Arumugam, as it now turns out, knew a good deal about it, he did not give any information on that point to the Police Inspector. It is also possible that, though the main outline of the story must have been given by Arumugam Pillai, only Veeraraghava Aiyar may have made suggestions to him, as the interval between the date of his arrival there and the confession is suspicious. There was no need for any enquiry, as the locality in which Arumugam lived, the name of the street, was already known to them. The letters discovered at Shencottah gave full information.

33. I shall now consider whether there is anything in this story itself to strengthen or weaken the suspicion that attaches to an accomplice's evidence as to the occurrence at Tenkasi. Arumugam's evidence cannot be contrasted with any other Tenkasi evidence. There was another meeting at Tuticorin at which some of those who were present here—Nilakanta, second accused and Arumugam Pillai—were present. Now Arumugam states that what took place at Tuticorin was exactly the same as that at Tenkasi. According to him there was a paper there on which was written everything "just similar to what had been written at Tenkasi. The altered names also had been given"; as to the oath "just in the manner in which we took in Tenkasi" and they drank just as they drank in Tenkasi. Now about the occurrence at Tuticorin there is also another witness, that is, Somasundaram Pillai, who also gives his evidence in detail. It is possible therefore to compare the evidence of these two witnesses. Somasundaram Pillai does not refer to any drinking of blood. Somasundaram Pillai states that those who joined the society should be young men and that they should not be married, as married men are less fit for this sort of work. Arumugam Pillai says that, so far as he remembers, there was nothing of that sort. The case is not one of omission but of direct contradiction. According to Arumugam Pillai, it is only the new names that were written on the paper and against which they impressed their thumbs. According to Somasundaram Pillai, their own proper names were written

first and against them the assumed names and the thumb impression was made opposite to their names. These are some of the material differences: we come to a more serious matter. Both of them said that, as already pointed out, new names were given to them by Nilakanta. According to Arumugam Pillai it was with a view to carry on secret correspondence with one another and that if anybody should come across any of their letters he might not discover them, that it was resolved by Nilakanta that names should be selected to be known only amongst themselves which they might use in their correspondence with one another. But Ramasami (prosecution witness No. 16) denies that any new names were given to the conspirators at Punalur. This omission has not been explained by the prosecution. If it is said that it was only an idea of Nilakanta and the others attached no value to it then all the arguments which were strenuously urged by the Public Prosecutor based on the use of secret names falls to the ground. Further it does not appear, and the evidence is against that view, that Nilakanta retained his influence in full at Punalur. Arumugam further states, as I said, that these secret names were first written on the paper in which oaths were taken and they cut their thumbs and put impression with their blood. At Tenkasi there were (1) Nilakanta, first accused, (2) Chidambaram Pillai, (3) Arumugam Pillai, the approver, (4) Sankarakrishna Iyer, the second accused, and (5) Subramania Iyer, the thirteenth accused. All these five are alleged to have done so. At Tuticorin the same procedure was adopted by six conspirators. There were present (1) Nilakanta, (2) the second accused, (3) the fourth accused, (4) the fifth accused, (5) Somasundaram Pillai and (6) Madasami Pillai. Now according to the approvers, Arumugam Pillai was given the name of Kumarasami, Madasami Ramamurthi, Subba Pillai, the fifth accused Subramania Pillai, Somasundaram Pillai Srinivasan or Srinivasagan. The evidence of the other approver Somasundaram Pillai (prosecution witness No. 12, is to the same effect with this difference that according to him Nilakanta was given the name of Bharadwaja at the meeting at Tuticorin. The evidence of the third approver Ramasami Iyer (prosecution witness No. 16) is that at Punalur there were no other names given to them but they fixed their thumb impression against their true names which they wrote on the paper. I am satisfied that the prosecution has proved beyond all reasonable doubt that Madasami bore the

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

name of Ramamurti and that he was known by that name at least among some of the conspirators. Exhibit G-26 referred to Ramamurti at Ottappidaram where admittedly Madasami is; exhibits G-24 and DD referred to Madasami at Azhaghahi. Exhibits G-2 and G-20 show that Ramamurti belongs to Azhaghahi. Exhibits G-19, G-27 and XX, letters from Arumugam Pillai to Vanchi Iyer, show that Arumugam knows who Ramamurti is. Exhibits G-24, T-4 and T-8 are letters from Madasami to Arumugam. Arumugam swears that G-2, G-20 and G-26 signed by Ramamurti are in Madasami's handwriting. The contents of the letters show that Madasami and Ramamurti at Azhaghahi are probably one and the same persons. Arumugam's evidence therefore must be accepted in the absence of any evidence that there is another person known as Ramamurti. Taking next the accused persons it is said that the two approvers were given the name of Kumarasami and Srinivasagam. Some letters written by them are produced. They give their true names only. No letters written by or to the approvers containing their secret names are produced. Kumarasami in exhibit X cannot obviously refer to Arumugam Pillai as stated by prosecution witness No. 12 because according to the same witness Arumugam is separately mentioned in it. It must therefore refer to another and Kumaran in the other exhibit also may refer to the same person. These are the only two letters written by others in which it is alleged Arumugam's name is used. It is also to be noticed that, in those letters in which Arumugam considers it necessary to refer to these by these assumed names, he does not use his own secret name. See exhibits XX and G-19. Similarly, though Madasami is alleged to conceal his identity by using the name of Azhaghahi for Ottappidaram, he uses Arumugam's true name. Arumugam only swears that he must have used his name when he remembered it and his true name on other occasions. There is no evidence that Arumugam or Somasundram ever used their secret names.

34. We have next to consider the names of Nilakanta and Subramania Pillai. Approver Somasundaram says that Nilakanta's name is Bharadwaja. Before the Committing Magistrate he did not recollect his name. Before Mr. Cox (exhibit EEEEE) he said that Nilakanta's name was Brahmachari. In exhibit X which is addressed to himself by Madasami, the name of Kumaran, he said before Mr. Cox (exhibit EEEEE), stands

for Nilakanta and in this Court at first he said the same and he gave it as his reason that he had written to Madasami where Nilakanta was. Then he changed his ground and said Kumaran was Arumugam Pillai, though he had to admit afterwards that "V.A." in the same letter also referred to Arumugam Pillai, which is absurd. His statement in these circumstances that Nilakanta is given the name of Bharadwaja cannot be accepted. That Nilakanta was not given such a name is clear from the evidence of Arumugam Pillai. He says that he does not remember Nilakanta's name. This is incredible, if Nilakanta the prime-mover in these conspiracies had a name. Moreover in exhibit CCCCC before Mr. Cox, Arumugam said like Somasundram that Nilakanta's name was Brahmachari. In many letters, exhibits G-19, G-26 and others, Nilakanta is called 'friend' and not by his private name. Exhibit G-26 in particular in which the Goddess is prayed "to free us from a state of slavery" gives Nilakanta's full name; and he is called only 'friend'; Madasami in that case signs his assumed name. I have no doubt he would have used his secret name if he had any. I have no hesitation therefore in holding that Nilakanta was not given any name.

35. There remains then the fifth accused who is called Subbayya Pillai who is alleged to have been given the name of Subramaniam. Defence witness No. 42 states he is known by both the names. Defence witness No. 43 says that Subbayya is a contraction for Subramania. This accused is a clerk of defence witness No. 49, apparently a respectable pleader who states that he is known by both the names. Exhibits 138 of 1905, 139 of 1910 and 146 of 1911 show that, on documents public and private, he was known by the name of Subramania Pillai: and even prosecution witness No. 13 admits that he was generally known as Subramania Pillai. It is clear therefore that name could not have been given to him as alleged by the prosecution for use in private correspondence. On these facts, it appears to me that the proper conclusion, if not the only conclusion, is that these names were not given to any of the accused at any of the two meetings; Tuticorin or Tenkasi; that Arumugam has forgotten Nilakanta's name is impossible, and the evidence as to Nilakanta's name is fatal to the prosecution on the point. There remains then the fact that Madasami was admittedly called by another name and this has to be accounted for and Ottappidaram is called Azhaghahi. It appears

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

however in this case that many of the accused were known by other names than their own. Vanchi Iyer the murderer had another name—Sankara Iyer. The tenth accused Mahadeva Iyer was called also Vembu Iyer. Pichumani Iyer, the fourteenth accused, was called also Venkatachella Iyer. It may be possible therefore that Madasami had another name. As to the names of places I do not attach any weight to Pondicherry being called Pandi. It is only an abbreviated form. As to Ottappidaram being called Azhaghahai, there is no evidence of any meeting having been held there and it is not explained why neither Tenkasi nor Tuticorin had any name. Anyhow this name as well as Ramamurti is used in letters in which no concealment is attempted or was necessary. It is also conceded for the purpose of explaining the fact that no names were given at Punalur, that the members attached no value to it and under any circumstances all this does not counterbalance the weight due to the considerations I have above set forth. I have already pointed out that there is no reason to believe that Arumugam Pillai's evidence is a concoction between him and the Police Inspector. So far as Somasundaram Pillai's evidence is concerned it is a matter for observation that it was available only some time after and it is possible—there is no evidence of it—that he may have come more than Arumugam Pillai under Police influence.

36. As to Ramasami Iyer, his evidence is more unsatisfactory than that of Arumugam Pillai or Somasundaram. His house is said to have been searched on the 22nd June. He was arrested however only on the 1st of August and his evidence was taken only towards the end of August. It is said that he was absent from his village. The evidence about the search is very suspicious. The search list, exhibit XXX, is certainly not in the usual form prescribed for searches. It is in pencil writing, it is not attested, the village munsif was absent. The evidence of the Police Sub-Inspector prosecution witness No. 20 is very unsatisfactory and does not explain why the ordinary procedure in the case of searches was not carried out. He was produced and examined only towards the end of August. There is no satisfactory evidence of what Ramasawmi Iyer was doing in the interval. Whether his first statement supports his present evidence has not been proved as in the case of the other approvers. He has given evidence about the meeting in 1911 in Savadi Pillai's house, while in the charge

sheet he is not entered as a witness for that meeting. It was therefore material for the prosecution to show that at that time he had given information to the police about that meeting also. The failure therefore to follow the same procedure in his case as in that of the other approvers is suspicious, and this suspicion is strengthened by the fact that at that time probably he must have given some information against the ninth accused whose detention otherwise there is nothing on record to justify. I am also satisfied that he came into Court to repeat a story that he had already learnt. I shall refer only to one such statement here. Early in his examination-in-chief before he had been many minutes in the witness box, after speaking about the arrangement for the sale of the gramophone, this was what took place.

Q.—What arrangement was made as to the making over of the gramophone?

A.—A meeting was held.

Q.—Was any arrangement made at that time for the handing in of the gramophone?

A.—He said that after *Avani Avittam* all should come and join.

Q.—But I am speaking about handing over of the gramophone, . . .

I am therefore of opinion that the evidence of the accomplices requires corroboration in material particulars both because they are accomplices whose evidence is open to impeachment on all the grounds on which an accomplice's evidence is ordinarily disregarded in the absence of corroboration but also on the ground that there are suspicions in this particular case for not accepting that evidence without corroboration in material particulars.

Let us see now whether there is any corroboration as to the conspiracy itself.

37. *Nilakantam, first accused.*—So far as Nilakantam is concerned the Crown strongly relies upon two statements made by him before Mr. Tampoe, exhibits AAAA and AAAA1. The Public Prosecutor also relies upon an entry in his diary that he was at one time an anarchist. Nilakantam admits in his statements that he went to Chidambaram Pillai's house and that he formed societies at Tenkasi Chidambaram Pillai's house and at Tuticorin and that along with others undertook by an oath to devote his life and property to the country. He admits having offered puja

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

to mother Kali and having written the conditions of their vow on a piece of paper. He admits having signed that paper. He also states that they cut their thumbs and put thumb marks on the paper in blood. He enters in his diary that he has been an anarchist. In this Court he explains that the statements in exhibit AAAA are not true and that he made them under police influence. There is no suggestion in the cross-examination of the witnesses of any police interference with him. He does not state who the Police officers were. He had opportunities of making this allegation before Mr. Tampoe: he is not an ignorant man to be imposed upon by a subordinate officer. I have therefore come to the conclusion that these statements must be taken as having been made voluntarily by him. Taken with his entry in the diary that he was an anarchist, they strongly corroborate the evidence of Arumugam Pillai. He gives no explanation whatever why he made the statement except to say that it was to instil awe into the minds of the people. He does not explain with whom the paper is. In these circumstances so far as Nilakanta is concerned, even if we had no other evidence, I must hold that the evidence of Arumugam Pillai is sufficiently corroborated both as to the occurrence and as to the identity of Nilakanta. I think however there is other corroborative evidence.

38. I am satisfied that Nilakanta left Pondicherry in order to preach revolutionary politics. His previous life lends support to it. As Narain Dube he was at Tuticorin as a public man during Chidambaram Pillai's time. He was connected with "India," "Suryodaya," "Dharma," etc., in Pondicherry. The evidence of the three approvers so far as Nilakanta is concerned bears strong internal evidence of the truth of this part of the story. His procedure is remarkable. Everywhere he first preaches *swadeshi* and *boycott*. This is Chidambaram Pillai's teaching without its political flavour. He then preaches on the evils they suffer from or are assumed to suffer from. These are easily brought home to the mufassal ryots. He tells them that their *Sanathana Dharma* is in danger. He tries to show that it is impossible that their *swadeshi* industries can be fostered and the administration of the country improved without the expulsion of the British Government. He preaches to them that all peaceful methods, or in other words, constitutional agitation has failed; that if articles are published in newspapers or lectures are delivered for the

improvement of the country, the patriots are sent to jail; that assassinations of individuals have done no good. He passes as a religious preacher and gives a religious turn to his preaching. He professes himself a *vedantist* not concerned in the material affairs of this world, he tells them to disregard the body and sacrifice themselves for the country. He deifies the country and makes it an object of worship. All this is not only in strict consistency with but is the actual teaching on its economic side insisted upon at Tuticorin and of the agitators at Pondicherry. Subjected to all kinds of cross-examination during many days the witnesses adhered to the main point of the story referring to various incidents connected with it in such manner as to make it difficult to believe that the story which they were saying that Nilakanta preached revolution is false. There can be no doubt that in the minds of all three of them was impressed this one broad fact by Nilakanta that a revolution for the purpose of expelling the British Government was absolutely necessary. I doubt whether the Police Inspector could have invented the story given by these approvers. It is very difficult to believe that they themselves could have invented such a story and such a character to fit in with the accounts above given of what had happened at Tinnevely and Pondicherry; contrasted with what happened in those places it is difficult not to accept it. His tour to these places stands unexplained. The ostensible purpose of collecting money for the publication of his book, assuming that the book is not seditious, will only apply to a few persons and does not explain his various journeys. I therefore find that his story has been confirmed and I hold Nilakanta is guilty on the first count.

39. *As to the second accused.*—It appears from exhibit G-12 that the second accused met Vanchi on his way to meet Sankarankrishnan. His pleader argues that he met Nilakanta during that trip only by accident and there was no preconcerted plan between them. The subsequent correspondence between the parties and their conduct disprove any such accidental meeting. He came with Nilakanta to Alleppey where Hariharan met them. In exhibit G-11, Hariharan asks Vanchi Iyer to tell him what the second accused besides the first told him about himself. It is not the first accused alone but both of them that promised Hariharan to send the "Dharma" paper. In the face of the other evidence, the suggestion of his counsel that the words may have been

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

carelessly used cannot be accepted. Prosecution witness No. 8, Umayorubagam Pillai and prosecution witness No. 10, Chidambaram Pillai say that they were together at Tuticorin and the correspondence that I have referred to shows the intimate terms in which they moved. There is very strong presumption that he was in the confidence of Nilakanta and the two were acting together. This presumption has not been rebutted by any evidence given by the accused. He pleads that his nuptials were celebrated on the 8th of April and that he could not have left his bride's house for three or four days. The day fixed for the celebration of the nuptials is an unusual day before *Amavasaya*. His oral evidence is worthless. I think accordingly that the evidence of the accomplices is sufficiently corroborated and I hold the case proved against him.

Before I deal with the case of the third accused and other accused, I shall notice the contention of the parties with reference to the numerous letters filed in the case.

Correspondence.

40. The correspondence between the parties is relied upon by the Public Prosecutor to prove that the parties thereto belonged to a secret revolutionary society of which according to the prosecution these accused are members. I now proceed to refer to them.

I have already referred to the letters, exhibits G-3, G-4, T-1, G-5 and G-6 as supporting the story told by prosecution witness No. 29 about the *Bharatha Matha Association*. (See paragraph 14.) In exhibit G-12 (2nd June 1910) Sankarakrishnan, the second accused, writes to Vanchi that he has to speak to him about an urgent and important affair and therefore asks him to meet him at the railway station and to keep the matter confidential. Exhibit G-9 (20th June 1910) shows that the seventh accused, Harihara Iyer, met Sankarakrishnan at Alleppey, went with him to Cochin, sent him on to Ernakulam where he probably met Nilakanta, as Harihara Iyer met them both at Alleppey on his return. Harihara Iyer was much interested in him as in his own words "he looked like a first born son of Mother Bharatha" and he spent liberally in making supplies to him and also gave him money on separating from him. In exhibit G-10 (30th June 1910) and in exhibit G-11 (8th July 1910) Hariharan writes to Vanchi to let him know what Nilakanta and Sankarakrishnan told him about himself. In all these letters, exhibits G-9, G-10 and G-11

he invokes the help of Mother Bharata, and in exhibit G-11 he says he intends to wait for the time when mother Bharata shows the way. These letters also show that Hariharan expected Nilakanta to go to Punalur and speak to Vanchi about all matters. In exhibit G-13 (8th August 1910) Hariharan again writes to Vanchi informing him that he is starting soon to Punalur.

The above letters undoubtedly prove the intimate relation that existed between Vanchi, Hariharan, Nilakanta and Sankarakrishnan.

41. Exhibit G-21 (13th October 1910) is a letter from Madasami to Vanchi asking for news of Nilakanta. Exhibit G-24 (28th October 1910) is a letter written by Madasami to Vanchi wanting to know whether Hariharan is alright and whether he sent any money to Nilakanta and telling him that he shall communicate to Arumugam Pillai Vanchi's wishes. In exhibit G-26 (11th December 1910) Madasami in his assumed name of Ramamurthi complains of "our state of slavery," gives Nilakanta's address at Pondicherry and invokes "mother's" help. Exhibit DD (4th November 1910) is a letter by Vanchi to Bapu Pillai, the eighth accused, styling him younger brother, informing him that he went to Ottapidaram to see elder brother Madasami, tells him that friend Harihara Iyer is now better, speaks to receiving parcel from Tuticorin, and also asking for information of Nilakanta. Exhibit T-4 (6th February 1911) is a letter from Madasami to Arumugam informing that Vanchi Iyer is now at Pondicherry. In T-6 Madasami informs Arumugam that it is difficult to get any letter from Nilakanta for some time and that Vanchi had been there and had returned. Exhibit XX shows that Arumugam distributed "Dharmam" papers to Vanchi and others. Exhibit G-15 (4th October 1910) is a letter from Madasami to Vanchi in which he says "I do not know when mother will bestow her grace." Madasami in this letter states that he desires to see "you all" once more, signs himself as a *young member of the caste of Bharata*. In exhibit G-19 (18th October 1910) Arumugam wants to know from Vanchi the welfare of "our friends" there and says he is himself alright by the grace of the *mother*. In exhibit G-17 (14th September 1910) prosecution witness No. 29 is anxious to hear about *mother Bharata* and invokes the help of that *holy mother*.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

The references in these letters to mother Bharata, the fraternal terms in which Brahmans and non-Brahmans refer to one another belonging as they do to places situated at such distances as between Alleppey, Punalur and Tuticorin, the references in all the letters to various matters which are unexplained and which they do not attempt to explain, the request, in exhibit G-20 by Madasami to Vanchi to destroy all letters, support the Public Prosecutor's contention that these letters prove a secret brotherhood, Madasami going so far as to suggest themselves members of one *Bharata caste*.

42. It was contended by Mr. Govindaraghava Ayyar that these letters do not lend any support to the contention of the Public Prosecutor that the names used therein like Bharata Matha . . . are terms that are usually used in correspondence between persons in the position of these accused, and that therefore such expressions call for no remark, and that even if they show that they were members of an association, the terms are the same as those used in the letters which have been already referred to and that therefore these letters cannot be assumed to prove anything else than that they have been members of the *Bharata Matha Association* which was spoken to by prosecution witness No. 29. As to the names, it is enough to say that they do not stand alone though the coincidence with the name of the older association is suspicious. With reference to the other contention, it is contended by the Public Prosecutor, first, that the Bharata society was dropped and that the men who have been carrying on this correspondence are not only those who have been proved to belong to the old association but certain others in British territory, who there is nothing to show ever belonged to the old Bharata Matha Association. It is however placed beyond all doubt that in December 1910 there was a *Bharata Matha Association*. Exhibit EEE, the letter to the Collector, is according to Arumugam Pillai in the handwriting of Madasami and he gives that warning in the name of that association. All the probabilities point to these references having been made by them as if they are members of the association referred to by prosecution witness No. 29 or a similar association. Bharatha Matha, i.e., "Mother Bharata" is referred to in many of them. Bharata Matha was the name expressly given to the old association. As to the revolutionary society alleged to have been formed by Nilakanta,

Arumugam Pillai distinctly says that it has no name and that it had no such name as Bharata Matha Association (page 184, line 34, page 271, line 44, page 272, line 2). The other approvers also say the same thing, Ramasami (page 510, line 25), whereas prosecution witness No. 29 distinctly states that the name of the old association was Bharata Matha (see pages 803 and 804). The members of the old Bharata Association were to be brothers to each other. It is said that this association is confined to Brahmans only. But there can be no doubt, as will presently appear, if prosecution witness No. 16 can be believed that Bapu Pillai was also a member of a society other than any revolutionary society of which there is any evidence and Madasami Pillai, a member of a Bharata Matha Association, if the approver's evidence that EEE is in Madasami's hand-writing can be accepted. Arumugam's explanation for using the term mother in letter Exhibit G-19 is that "mother Bharata" was the country of India and according to the arrangement made by Nilakanta at Tenkasi they worshipped their mother as "our goddess." Even if this explanation be accepted, it will only show that Arumugam Pillai and others used it but it will not imply that those other persons who were members of the older Bharata Matha Association did not use it as members of their own older association, and it certainly cannot be presumed that any such use implies association with the members of the revolutionary society. But there are other strong reasons to think that the older association survived till at any rate the date of the letter, exhibit EEE, and that these men were only members of that association. Prosecution witness No. 16, Ramasami Iyer, says that he and the seventh accused met Bapu Pillai, the eighth accused at Quilon and that Bapu Pillai offered to purchase a gramophone which Ramasami had in his possession "for his society." Ramasami states that he did not ask him what the society was, nor had he the curiosity to inquire of Harihara Iyer about it. This was before the Punalur meeting when Bapu Pillai and Harihara Iyer were according to the prosecution enrolled as members of this revolutionary society. Further, Ramasami (prosecution witness No. 16), states that when they met some of these accused persons in Dharmaraja Iyer's house at Shencottah also before their enrolment at Punalur, Vanchi Iyer told him that Madasami was a very important person connected with "our society." Ramasami asked Vanchi Iyer what the society was and Vanchi Iyer promised to tell him all

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

about the society afterwards. It is also significant that according to Arumugam, everybody reading Patrika, his Pondicherry paper, is called "friend." Now the Public Prosecutor contends that though the prosecution has offered no evidence of the formation of any revolutionary society in Travancore or about Vanchi, or Madasami or Bapu Pillai, or Hariharan being members of such secret societies, yet still it must be presumed that they were members of such revolutionary societies because before that time such societies had been formed at Tenkasi and at Tuticorin. But both Tenkasi and Tuticorin are not on the west coast and there is no suggestion in the prosecution evidence that any such societies were formed on the west coast. It is hardly likely that, if any such societies were formed, Ramasami Iyer would not have known of them. Nor is it likely that, if these persons were members of the revolutionary societies formed in Tinnevely, Arumugam would not have known about them. Moreover exhibit EEE shews that in 1910 Madasami considered himself to be a member of Bharata Matha Association. Exhibit 14 is in consistent with the prosecution theory and supports the defence. When the facts proved are reconcilable and consistent with and supports the state of facts favourable to the accused, we shall not be warranted in assuming a different state of facts and the existence of a certain treasonable association of which there is no trace in the evidence. I accordingly come to the conclusion that these letters are referable to the Bharata Matha Associations and not to the revolutionary societies started by Nilakanta. And this evidence coupled with the statements of Ramasami and exhibit EEE shows that the Bharata Matha Association as such continued to subsist till December 1910. It is quite possible that the Bharata Matha referred to in exhibit EEE and in the letters may refer to other associations than that referred to by prosecution witness No. 29. But that only strengthens the conclusion that they should not be assumed to refer to any revolutionary societies. If this conclusion is right, then it lies on the prosecution to prove that the alleged revolutionary society in question was not similar to these—and, whether my finding is right or wrong, seeing that the Bharata Matha Association was in existence till a few days before this society was started and the possibilities at any rate of similar associations cannot be denied, the corroboration required must show not only that there were meetings at which the accused were present but they were parties to that part of the occurrence

which constitute it a criminal conspiracy. Because the oaths were almost the same to a certain extent. *Swadeshi* and *boycott* were also the subjects of the lectures at the alleged revolutionary meetings.

43. *Third accused.*—I shall now take up for consideration the case of the third accused. When Nilakanta started on his tour, he naturally would first approach those who, he knew, had been receiving papers from Pondicherry and would therefore be naturally interested in *swadeshi* and *boycott*, and who, he thought, were likely to come round to his revolutionary views. It may be that he succeeded with some, it may also be that he did not succeed with others. We have therefore to see not only that Chithambaram Pillai was at Tenkasi but became a convert to Nilakanta's views. I have already referred to the evidence of the seventh, eighth, and twelfth witnesses which go only to show that there may have been a meeting at Tenkasi. Their evidence would be no corroboration of any matter to implicate Chidambaram Pillai, but there is this fact in favour of the prosecution that it was at Chidambaram Pillai's house that the meeting took place. And if a secret society was formed there or if Arumugam Pillai or anybody else who was present there is guilty of the offence charged, then it may be fairly contended that unless Chidambaram Pillai is able to prove his innocence, he must be deemed to be a participator in the offence; but there are certain special circumstances in the case which show that much weight should not be attached to that presumption. Arumugam Pillai swears that the third accused as well as others took the oath; and they swore to kill white men; and they drank the saffron water to indicate the drinking of the blood of the white men. In his statement Exhibit CCCCC which was made before Mr. Cox, Arumugam Pillai referred to the killing of white men but not to the drinking of blood. Veeraraghava Aiyar (prosecution witness No. 31) is examined by the prosecution to corroborate Arumugam's evidence and he states that, when Arumugam Pillai gave him the story on the night of the 19th or the morning of the 20th, he told him of the conversation between himself and Nilakanta in the separate room; but with reference to the oath itself, in the statement that Arumugam made to him there was no reference either to the killing of white men or to the drinking of blood. There is nothing in that oath or in the paper referred to to show that it was a treasonable society either at Tuticorin or at Tenkasi. With reference to Somasundaram

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

when speaking about the Tuticorin meeting he says Somasundaram told him that it was the duty of everybody to shed the white men's blood in order to obtain *swaraj*. The difference between Arumugam Pillai's and Somasundaram Pillai's statements before him cannot be due to Veeraraghava Aiyar's forgetfulness and it would be unsafe to accept Arumugam Pillai's evidence in its developed form when it appears that the earliest statement before Veeraraghava Aiyar was of a different kind and is consistent with Chidambaram Pillai's innocence. It is clear, as I already said, that he has improved his story. (See exhibit CCCCC.) The reference to the massacre of Englishmen or to the drinking of, saffron water as symbolical of the white man's blood derives no support from his evidence before this Court. After describing what happened between himself and Nilakanta separately from the others, as I have stated above, he said that they came back to the others and what passed between them in the presence of Chidambaram Pillai is thus stated by him:—

In examination-in-chief.

Q.—Then you all five assembled together?

A.—Yes, Nilakanta said that we should take oath.

Q.—After Nilakanta said that you should all take oath what happened first?

A.—We were all staying outside.

Q.—What next?

A.—Then we all agreed to take oath.

Q.—You say you were talking, what were you talking about?

A.—We were talking about *swadeshi* matters and about persons who went to prison and who had been hanged.

Q.—Were you talking about the matters about which Nilakanta had spoken to you?

A.—Yes, only matters relating to that.

Q.—You told us what he told you. Tell us what Nilakanta said in the presence of all the accused during this time?

A.—He said about the very same matter which he talked to me in the room as well as about the matter which took place in 1857, the Sepoy Mutiny.

In cross-examination, this is what is stated.

Q.—When you were all talking together for 2 or 3 hours, you did not talk about bombs?

A.—I do not remember having discussed about bombs, when we were all together, and again later.

Q.—After you joined the other three did Nilakanta repeat all that he had said to you in the room?

A.—I don't remember whether he related about those matters. He only told me repeatedly about the mutiny.

Q.—I don't want to know about what he told you in the room but outside, what did he say when you five met?

A.—Five of us were talking.

Q.—What did Nilakanta say? Did he repeat what he had told you in the room?

A.—I don't remember his having related what he had told me before. He said that oath should be taken.

Q.—This is the first thing he said?

A.—For a long time we five of us were talking.

Q.—What was the conversation about? Do you remember?

A.—About the mutiny which took place in 1857. About the several persons who had been hanged, about several of the patriots having been sent to jail, such matters we were talking about.

It will be noticed that in examination-in-chief he mentioned in reply to a leading question that Nilakanta spoke about the same matter that he had been talking about to Arumugam Pillai and from his cross-examination it seems probable that after he joined Chidambaram Pillai and the rest they may not have spoken about any conspiracy to drive out the British by force. It is said that the fact that Ramasami Iyer does not allege that the third was not at Punalur but only in Shencottah is in favour of the truth of the story. But it appears from the defence that he has a conclusive *alibi* in that respect. The defence can certainly be not expected to prove that the Police officials were aware of it.

The probabilities of the case point to the same conclusion. It must be remembered that when Arumugam Pillai went to Tenkasi according to Somasundaram he thought he was going on *swadeshi* business. Arumugam himself states that he spoke only to Somasundaram and Madasami but did not ask Umayorubhagam to accompany him as he thought he was not interested in the matter. Chidambaram Pillai may have been labouring under the same impression. Then again according to Somasundaram Pillai, soon after Arumugam returned from Tenkasi, he told them all that passed at Tenkasi. This is explicable if the treasonable plot

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

was only a concern between himself and Nilakanta. And so far as Chidambaram and some others were concerned it is only a *swadeshi* business about which he might well speak to his intimate friends. It is probable that Bharata Matha Associations intended to read newspapers from Pondicherry already existed. There is no evidence of Chidambaram Pillai having attended any *swadeshi* or *swaraj* lectures before. It is not explained why Nilakanta thought it necessary to invite Arumugam Pillai to a separate room and there is no reason to assume as the Public Prosecutor invited us to assume that Nilakanta must have already discoursed to them on these matters, and procured his assent to a treasonable conspiracy. We have other instances; where it appears that ordinarily when speaking to strangers or men who have not been already initiated he confined himself at first to *swadeshi* lectures to pave the way apparently for ultimately converting them to the necessity of expelling the British Government. This was what he did at the next meeting in order of time, spoken to by Sivagaminatha Pillai. I therefore acquit the third accused.

44. *The thirteenth accused.*—The other accused who is alleged to have been present at Tenkasi is *Vandemataram* Subramania Iyer, the thirteenth accused. Arumugam Pillai speaks to his presence there. There is no letter written by Subramania Iyer to any of the other accused produced in the case nor any letter to him by any person suspected of seditious tendencies. Nor is there reference to any letter written by him to any others. This is the first of the seditious meetings alleged to have taken place and it is scarcely likely that if the man were a conspirator the prosecution would not have been able to show some correspondence referring to him. No overt act is alleged. The only alleged corroboration that is forthcoming is the evidence of prosecution witness No. 11 that the accused came to Tuticorin to sell copies of two books, *Kanavu* and *Arilorupangu*. The books themselves were not prescribed by Government at that time. I am not satisfied that the mere sale of the books is any corroboration of the evidence as to the guilt of the accused. Arumugam Pillai did not mention this incident before Mr. Cox or to Veeraraghava Aiyar. There is however the fact in favour of the accused that prosecution witness No. 11 states that when the accused first went to Tuticorin he the witness was asked by him

whether he was K. V. Arumugam Pillai. The thirteenth accused certainly does not appear to have remembered Arumugam Pillai at that time. There is also the unexplained fact that the purchase-money of the books was remitted to one P. V. Subramania Iyer and not to this Subramania Iyer. Information was given against the accused on the 28th June and he was arrested only on the 3rd August. The explanation that Arumugam was not taken as an approver till that time is scarcely satisfactory because there can be no doubt that it was the intention of the Crown to take him as an approver. The accused himself is the son of a karnam. He had nothing to do with Ettiyapuram and Arumugam describes him as belonging to Ettiyapuram. I therefore acquit him not only on the ground that there was no corroboration of the evidence of Arumugam on any material point but the other facts proved in the case raise a strong inference that Arumugam must have been mistaken about his identity.

45. *The fifth accused.*—I now come to the case of the fifth accused. No letter from any person alleged to be a conspirator was found in his house. His name is not mentioned in any letter produced. No newspaper even was found in his house. The evidence of the prosecution witnesses Nos. 8 and 10 shows that the accused only went to Nilakanta just as they themselves did. He went with the fourth accused to see him as he was a swami and a *sanyasi*. There is nothing to show that they knew he was a seditionist. It is alleged by the prosecution that the fifth accused was given the name of Subramania Pillai, but in considering the evidence about the names given to the various accused, I have shown that this evidence is beyond all doubt (see para. 35) untrustworthy. He is a vakil's gumastah, he is known as Subramania Pillai in documents, in judicial proceedings, his master the vakil says that he is known by that name, and it is difficult to believe that the name Subramania Pillai would have been given for use in secret communications. The fact that they forget what name they gave to the fourth accused is significant. My opinion is that no such name was given to him and Arumugam's evidence on this point is false. Why then did Arumugam Pillai fasten this name on the fifth accused appears to be clear. In exhibit CCCCC he stated that it was himself who took Somasundaram Pillai and these two accused Nos. 4 and 5 to Nilakanta. The statement that he made to Veeraraghava Aiyar is to the same effect, while the evidence

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

before this Court is that it was Somasundaram Pillai who took them both to Nilakanta. This alteration in the story is in my opinion deliberate because there can be no doubt that the terms in which the families lived preclude the supposition that he would have taken the fifth accused to a meeting for this purpose. It is true that there is no evidence as pointed by the Public Prosecutor of any personal animosity between Arumugam and the fifth accused, but exhibits 140 to 145 show beyond all doubt litigation between the two families and the bitter feelings between them; Arumugam Pillai's maternal uncle complained against Palania Pillai, the nephew of the fifth accused, who conducted the case engaging vakils, giving them instructions and fees on behalf of his uncle, defence witness No. 43, a second-grade pleader who was a witness in the proceedings supports this statement. The above exhibits show that the approver's uncle was convicted once, that the nephew of the fifth accused obtained a decree against the approver's uncle in execution of which there was an order for arrest and there was also sanction granted in the case. There can be no doubt therefore that Arumugam Pillai's family bore great enmity against the fifth accused, and though Arumugam may not have borne any personal animosity against this man on account of anything done to himself, it is impossible to believe that he did not share in the feelings entertained by the other members of his family. It is quite clear to me therefore that the alteration in the story is deliberate to meet the argument of improbability of Arumugam taking them to a treasonable meeting. The enmity is also sufficient to show that the fifth accused would not have taken any such oath when Arumugam Pillai was present or join a society of which Arumugam Pillai was such an important member. The story which the approvers tell appears to me to be improbable on the face of it. Arumugam states that while Sankara Krishna Iyer, the second accused, and Nilakanta were sitting there, prosecution witness No. 8 came and Madasami turned up; Somasundaram came with the fourth and fifth accused. Nilakanta, it appears, asked Umayorubagam Pillai, prosecution witness No. 8, to go away because it seems that from his appearance he did not appear to be a proper person to be enlisted as a member. The reason given is unsatisfactory. All at once then, he states, an oath was taken. He does not say that there was any discussion, that there was any attempt to

persuade these two men (see page 102, line 40). Somasundaram Pillai examined subsequently supplies the omission and gives a more detailed account. He states that Nilakanta repeated the usual story about the mis-government of the country, etc., and they at once proceeded to take the oath. This appears to me to be improbable. It is difficult to believe that these two persons agreed at once to become members of a revolutionary society on being asked by a man like Nilakanta though it may be that Arumugam and Somasundaram also may have tried to persuade them to agree to Nilakanta's proposal. These two approver-witnesses do not hold such a position of confidence, nor does the evidence show that they were such friends of these accused that they would at once agree to any proposals made by them. One of them is apparently an enemy. It is not alleged that there was any prior meeting or that these two accused were spoken to either by Nilakanta or by these approvers before on the subject. To avoid no doubt this improbability, Somasundaram Pillai now states that he knew them before. He states that soon after Arumugam Pillai disclosed to him all about the secret society he spoke about them to the fourth and the fifth accused. But it is shown beyond all doubt that the name of the fourth accused is Muthusami Pillai (exhibit Y), prosecution witnesses Nos. 8 and 13 and defence witnesses Nos. 38, 39, 40 and 43 and this witness Somasundaram called him Muthukumarasami Pillai. However this story is very improbable if the Tenkasi meeting is a seditious meeting. It has also to be borne in mind that before this, was the meeting at Sivagaminatha Pillai's house and at that meeting the talk was only of *swadeshi* and there was nothing about *swaraj*. It is possible that something of that sort may have taken place here too. But without corroboration of the evidence of the accomplices I am unable to believe that any oath was taken or that these accused pledged themselves to take steps to attain *swaraj* or absolute independence by the expulsion of the British Government. For these reasons I find that the case against the fifth accused is a concoction by Arumugam Pillai and acquit him.

46. *Fourth accused.*—The direct evidence against the fourth accused is the same as against the fifth. In corroboration it is said that some newspapers from Pondicherry were found in his house and he paid some subscription for the Dharman newspaper. It is unnecessary to consider the effect of this evidence if the

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

direct evidence is discredited and I have already discredited that evidence. If the fifth is acquitted, he also must be acquitted. I may add even otherwise the evidence against him does not afford sufficient corroboration.

47. *Eleventh and twelfth accused.*—Some of the accused are alleged to have been present at certain meetings held in *Chithrai* month at Shencottah. Ramasami Iyer says that he went to Shencottah in that month where he stayed for two days at the house of Harihara Iyer, the seventh accused. On the first day there was a meeting held in the house of the eleventh accused Savadi Arunachalam Pillai where there were present accused Nos. 2, 3, 6, 11, 12 and 14. They spoke about the steps to be taken for the encouragement of native industries by their manufacture and by *boycotting* all articles of English manufacture. On the second day also there was a lecture by Vanchi Iyer about the encouragement of *swadeshi* industries and the way in which they should conduct themselves and then he added that people should be going about from village to village and collecting people to drive the English out of India.

THE CHIEF JUSTICE.—Q.—In what way?

A.—That Sabhas should be collected and just in the same way in which we conducted meeting in Punalur we should teach these people also and in that way drive the English out of India.

SANKARAN-NAIR, J.—Q.—Teach what?

A.—That *Dorais* should be driven out of our country. That should be taught.

THE CHIEF JUSTICE.—Q.—How driving out?

A.—By shooting them with bombs and drive them with what we can get at.

He says that at the meeting held the next day at the house of the twelfth accused he met accused Nos. 2, 7, 11, 12 and 14, *i.e.*, all those that were present at the previous day's meeting with the exception of the third accused.

48. The date of this meeting is definitely fixed by prosecution witness No. 27, Thirumalaimuthu Pillai. He states that he accompanied Babu Pillai to Shencottah on the 1st of May. He himself went to his sister's house when Babu Pillai, and certain others who were with him left him saying that they were going to the house of Alagappa Pillai, the twelfth accused. After he had finished his business, he went to Alagappa Pillai's

where he met accused Nos. 2, 6, 8, 10, 11 and 12 and Vanchi Iyer. He says he also met the prosecution witness No. 16, Ramaswami Aiyar, whom he had met before at Alleppey; and Babu Pillai and he with the others who had accompanied them before returned to their village. On their way back, Babu Pillai told him that there were societies in various places for the attainment of *swaraj* and that they had formed a society in Shencottah also with a view to Europeans not ruling India and that India might be ruled by the Indians themselves. He refused to join the society. Afterwards in Babu Pillai's house he saw Vanchi Iyer who asked him to take what they called "blood oath" and join the society but he refused to do so. The meeting at Alagappa Pillai's house being according to this witness held on the 1st of May, the meeting at Arunachalam Pillai's house should be on the 30th of April. Taking those as the dates of the meetings in these two houses, the accused adduced evidence to show in the case of some of them that they were not at that time at Shencottah, and the seventh accused adduced evidence to show that at that time Ramaswami Iyer could not have been at Shencottah and that therefore the whole evidence must be false. I will only briefly refer to this evidence as the Public Prosecutor has subsequently stated that he does not rely on prosecution witness No. 27 and on the dates given by him. The reason which prosecution witness No. 27 gives for remembering the dates is that he keeps a diary. In that diary he had stated that he had gone on that day to see his sister at Shencottah and that, as he remembered that when he went to see his sister at Shencottah this incident took place, he is enabled to state that it took place on that day. Now it appears from the evidence adduced on behalf of the seventh accused (see exhibits 156 and 157 and defence witnesses Nos. 53 and 57) that on the 2nd of May Ramasami Iyer was at Alleppey, and that he could not therefore have been at Shencottah on the 1st of May. Exhibit 156 is the ledger and exhibit 157 is the day book. On the 19th of *Chithrai* corresponding to 2nd of May there is an entry which shows that Ramasami Iyer must have been at Alleppey on that day. The account books have been duly proved and there is no doubt about their genuineness. The eleventh accused has proved that he was at Tinnevely between the 12th and 24th of April and that he left Tinnevely for Shencottah on the 24th of April and returned on the 26th to Tinnevely where he

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

remained up to the 20th of *Chithrai*, i.e., the 2nd of May. His diary, exhibit 58, shows that he left Tinnevely on the 2nd of May for Shencottah with prosecution witness No. 64 and arrived there at 4 P.M. Besides the strong support it derives from the prosecution witness No. 64 himself, it is also supported by the evidence of his uncle (defence witness No. 63). Exhibits 168 and 169 show that notices of a meeting were printed by him at Tinnevely on the 1st of May (see on this point the evidence of defence witness No. 65). The fourteenth accused also has adduced evidence which places it beyond doubt that he was at Tanjore on the 1st of May. On that day he had signed a book kept by the Brahman hotel-keeper at Tanjore in which he acknowledges to have received payment of his wages. It is therefore proved beyond all doubt that the evidence of this witness is false, if we are to take it that the meetings at Shencottah took place on the 30th of April and 1st of May as stated by prosecution witness No. 27. But the Public Prosecutor now gives up the prosecution witness No. 27 as not being a true witness, and states that there is nothing in the defence evidence inconsistent with his suggestion which is supported by the evidence in the case that this meeting may have taken place not on the 30th of April and 1st of May as appears from Tirumalaimuthu Pillai's evidence but at some time after the 2nd of May and before the 7th and he invites the Court to hold that between those dates the meetings spoken to by Ramasami Iyer took place at Dharmaraja Iyer's house in Shencottah. It appears to me that this change of front cannot be allowed. When examined before the Committing Magistrate, Tirumalaimuthu Pillai referred to his diary as showing the date of his presence at Shencottah. In this Court also the prosecution relied upon his evidence. When the defence pleaders opened their cases they stated that they were going to prove *alibi* so far as that date was concerned, and it is only after the evidence was closed and the counsel for the first accused concluded his address and in the course of the argument by the pleader on behalf of the second accused that the Public Prosecutor intimated that he did not propose to rely on the evidence of this twenty-seventh witness. As he himself conceded, the eleventh accused has adduced evidence to meet a case of a meeting at Dharmaraja Iyer's on the dates alleged by Tirumalaimuthu Pillai. So far as he is concerned therefore I feel no hesitation in saying that it would be unfair to let the Public

Prosecutor rely on any date other than the 1st of May. As regards the fourteenth accused also, the exhibits filed by him which show beyond all doubt that he was at Tanjore on the 1st of May show, if believed, that from the 1st of May up to the end of 31st May he received his pay for his services under that hotel-keeper. It was argued by the Public Prosecutor that in exhibit 185, after the receipt in the book which is dated 1st May signed by Venkatachala Iyer, the next entry is on the 6th of May made by the hotel-keeper himself (defence witness No. 71); the accused is debited through another one anna which implies that he was not there on the 6th of May and that it is very probable that the hotel-keeper allowed his servants leave of absence for a day or two and Venkatachala Iyer might have therefore run up to Shencottah to attend the meeting. This may possibly be so though I do not think it probable that a cook like Venkatachala Iyer would leave his business for a day or two to attend a meeting like that at the eleventh accused's where nothing in particular was done. However it is enough to say that this man Venkatachala Iyer was not called upon to meet a case of the nature set up and the examination of his witnesses by him and his cross-examination of the prosecution witnesses does not indicate that he attempted to meet such a case. As to the other accused, the seventh, it was contended by the Public Prosecutor that besides trying to show that Ramasami Iyer was not at Shencottah on the dates alleged he has tried further to show that Ramasami Iyer was at Alleppey on the 2nd and that therefore he could not have been prejudiced by this change in the prosecution case. I do not think that meets the difficulty. It is contended on behalf of the defence that he would have been able to show that his client could not have been at Shencottah on those dates and that he was elsewhere, though from the date now available in Court he might not have been able to show that. I think there is a good deal of force in this contention and I think therefore that so far as the accused in this case are concerned we must take it that the case they were called upon to meet was that the meetings were held on the 30th of April and the 1st of May. There is no doubt however that the evidence of Tirumalaimuthu Pillai is false. It is conceded by the Public Prosecutor that if his diary is believed then he could not have been present at these meetings as he states therein and that he was elsewhere on the subsequent

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

days also. This man's house was searched on the 22nd July. He was taken to the police station and though he was not under legal arrest he was detained in the station itself. He was taken by the police to Tenkasi and he made a statement to the Superintendent of police at Courtalum and from there was taken to Tinnevely. His wife also was taken to the police station and kept there for many hours and he says he does not know now why she was taken there. I have no doubt that he gave his evidence under police influence.

49. Apart however from the prejudice to the accused on account of this change of front, I am also satisfied that Ramasami Iyer's evidence in this respect cannot be accepted. The fact that Tirumalaimuthu Pillai gave false evidence does not in itself affect the credibility of Ramasami Iyer. He may have spoken the truth though on account of Tirumalaimuthu Pillai having been put forward as a true witness we are obliged to accept the 1st of May as the true date of the meeting. As to Ramasami Iyer's own evidence it is contended that he also states that the meeting must have been before the 2nd of May and thus it completely rebuts the suggestion made by the Public Prosecutor. In his examination-in-chief he states that from Alleppey he went to Cochin on the 2nd of *Chitrai*. He stayed two or three days at Cochin and after that he came to Shencottah where he stayed in Harihara Iyer's house and attended the meetings in Savadi Pillai's house and Alagappa Pillai's house. It is obvious that if he spent only two or three days at Cochin he must have arrived at Shencottah before the 2nd of May unless some business on his way to which however he does not refer to in his evidence detained him for some days (page 477). He says that the last time he saw Vanchi (see pages 532 and 537) was at these meetings and that it was before the 20 of *Chitrai*, viz., the 2nd of May. It is contended on behalf of the prosecution that these dates which he gives in cross-examination should not be accepted. But it is in a way supported by what he said in examination-in-chief. It is consistent with and supported by the evidence of Tirumalaimuthu Pillai and there is no reason to suppose that when he gave that evidence he was not deliberately making them seeing that at that time that was the prosecution case. In exhibit I-a the charge sheet that was put in Ramasami Iyer is mentioned as the thirty-fifth witness on behalf of the prosecution. His name is given

there as a witness to speak to all the other meetings about which he has given evidence in this case. But these meetings of *Chitrai* are omitted. And taking into consideration that he was an approver and the prosecution knew full well what he had to say, I think there is very little doubt that at that time it was not expected that he was to give evidence in the case about the meetings. Prosecution witness No. 25 is therein mentioned as a witness to speak to these meetings.

Against the twelfth accused the evidence is only with reference to the part he took at the *Chitrai* meetings and Alagappa Pillai must accordingly be acquitted. As to Arunachallam Pillai, there is the evidence of prosecution witness No. 25 who swears that at the second meeting in Alagappa Pillai's house, Arunachallam Pillai asked him to take the blood-oath. The evidence as to the meeting having been rejected this cannot be relied upon to corroborate Ramasami Iyer's evidence as to that meeting. The evidence even if accepted might only raise suspicion. It does not amount to prove any conspiracy as alleged. There is evidence in this case to prove that he went to Northern India to join the Medical College and it is probable that as pointed out by the Public Prosecutor he had some suspicion of what Vanchi was going to do. It may be that he might have remonstrated with Vanchi and to avoid the consequences he ran away to Northern India. But this of course does not prove the offence with which he is charged and I accordingly acquit him. So far as the other accused are concerned, these meetings must be left out of consideration.

50. *Tenth accused.*—The evidence against the tenth accused is only that of prosecution witness No. 27, Tirumalaimuthu Pillai, whom I have already found to be a false witness. The approver Ramaswami Iyer does not speak to his presence. There are no doubt a few letters (exhibits G, G-4, J-1, J-2, P and LL) in which he is referred to, but they are in my opinion worthless. I do not think they prove anything against him. He is therefore acquitted.

51. *Seventh, eighth and ninth accused.*—The case against the other accused, i.e., accused Nos. 7, 8 and 9 depends mainly upon the evidence of the third approver Ramasami Iyer who speaks to the meetings at Dharmaraja Iyer's house in Shencottah and the meeting at Punalur.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

Before referring to this evidence I shall deal with a meeting alleged to have been held at the house of Sivagaminatha Pillai, prosecution witness No. 21. This evidence is given, I presume, to corroborate the evidence of Ramasami Iyer with reference to the other two meetings. This man's evidence is that Vanchi Iyer took his house for a few days for Nilakanta and that Dharmaraja Iyer, Vanchi Iyer, Arunachallam Pillai, Alagappa Pillai, the eleventh and twelfth accused frequently met Nilakanta in that house. There when they were together they shut the door and were always talking about something. When he asked Vanchi Iyer what it was about, Vanchi Iyer replied that they were talking about swadeshi matters and that he would know all about the society if he took the oath and joined them. The witness did not take any oath and he knows nothing more about the society. There are many suspicious circumstances about the evidence of this witness. When he was examined before the District Magistrate he said that this meeting in his house at Shencottah was about the time of the wedding of Savadi Arunachallam Pillai, the eleventh accused, which was in the month of *Avani* (16th August to 16th September). According to the evidence given before this Court, the Public Prosecutor states here that this man's evidence refers to the first visit to Shencottah made by Nilakanta on his way to Tuticorin, that is about the beginning of July. If the statement of the witness in the lower Court is right, then this meeting would be about the same time as the meeting at Dharmaraja Iyer's house after the 20th August and would contradict the evidence of that witness. And it is contended by the defence that the date of the meeting is now pushed further back to avoid that inconsistency. The witness was first examined by Mr. George, the Superintendent of police, in Travancore. Before him he did not say that the eleventh and twelfth accused were present. The evidence of his master, prosecution witness No. 49, shows that he has to sleep at nights at the temple at Aryankavu, and to attend to his duties there and renders it exceedingly improbable that he would have been present at Shencottah to witness these meetings as alleged by him. There are good reasons not to place reliance on his evidence. The witness states that all that Vanchi told him was that they were talking about *swadeshi* matters. It is possible that

as Nilakanta stated, he lived in his house and that the witness met him and talked about only *swadeshi*. To what was purely a swadeshi meeting he has now apparently tried to impart an air of secrecy and suspicion. As corroboration of Ramaswami Iyer's evidence, I think, this is untrustworthy; and even if it is accepted, I think, it is useless because he simply states that they were discussing about *swadeshi* affairs. The difference between swadeshi and *swaraj* is well understood by these witnesses and there is nothing seditious about that meeting so far as is disclosed by the evidence.

52. I now pass on to the meetings at Shencottah and Punalur spoken to by the approver Ramaswami Iyer. As it has been strongly pressed upon us by the defence that the whole evidence of Ramaswami Iyer with reference to these meetings is false, if the dates given by him of those meetings are accepted, I proceed to give his evidence with reference to the dates. He says that he was in his house at Sundarapandiapuram in the Tenkasi taluk for *Avaniavittam* in 1910 which fell on the 20th August in that year. The next day, *i.e.*, 21st August was the *Gayatri* day, and the witness states that he remained in his own home that day. The day after, *i.e.*, 22nd August also, witness states that he remained at home. The day after, *i.e.*, 23rd August, at about 4 o'clock he left his home for Shencottah which is only about ten miles distant and arrived at Shencottah about 7 in the evening. For four days after that, excluding the 23rd, the date of his arrival, *i.e.*, 24, 25, 26 and 27, he remained at Shencottah. According to his evidence, on the 24th and 25th, *i.e.*, the day after his arrival and the next day, they had meetings to discuss treasonable projects. Then on the morning of the 28th at about 5-30 A.M., he left Shencottah for Punalur and arrived at Punalur at 8 or 9 in the morning. On the night of the day he arrived, he says there was gramophone entertainment. It is not quite clear whether this entertainment was on that day or the day after. But I shall take it to be on the night of that day in favour of the prosecution. There was another meeting and at that meeting they took the oath by which they pledged themselves to rise on a certain day and massacre all the English men in the country and obtain *swaraj*. The next day, *i.e.*, 31st August, they all remained at Punalur itself. On the following day, 1st September, by the morning train at about eight o'clock

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

or nine Ramaswami Iyer left Punalur with the deceased Dharmaraja Iyer and the sixth, seventh and fourteenth accused leaving Nilakanta there. These are the facts elicited in the cross-examination of the approver and the plea of the defence is that on these days Nilakanta was elsewhere. Before considering that plea I might here notice the contention advanced on behalf of the prosecution that the date of the approver leaving Punalur must be put back three days, *i.e.*, to the 29th August. The reason alleged is that Ramaswami Iyer remained in his house at Sundarapandiapuram not four days but really two days only, as stated in examination-in-chief and very probably left Punalur not on the second day after the meeting when the oath was taken but the very next day. It is argued that his statements in cross-examination should not be relied upon as it was in reply to a series of embarrassing questions and they were made without a knowledge of the purpose for which the questions were asked. Now, there is no doubt that the witness' statements in cross-examination are definite and clear and when he said in examination-in-chief that he remained at Punalur he evidently meant that he stayed there after *Gayatri*. The witness seems to have understood the object also as he tried to put *Gayatri* before *Avaniavittam*. I am therefore unable to accept the prosecution suggestion that for this reason his statements in cross-examination should not all be upset, nor am I able to accept that he remained a day less at Punalur according to his evidence. The witness has no doubt that he left Punalur by the morning train at 8 o'clock; and he clearly remembers that he stayed there for a day. If he had left it after the oath was taken which was in the night, he could not have stayed there for one day, a fact about which he has no doubt. Therefore he must have left it the day after and not the next day. I am therefore of opinion that the evidence of the witness as to the dates was not under mistake or pressure only but with deliberation.

53. It now appears that according to exhibit QQQQ, Dharmaraja Iyer who accompanied this witness from Punalur to Shencottah on the 1st of September, as above stated, despatched a telegraphic money order for Rs. 20 to Erukkur to Nilakanta where it was admittedly paid to him on the 3rd September. The despatch of the money order and payment are clearly proved and not denied by the prosecution. Now, it is true that it was possible for

Nilakanta to leave Punalur at 8 A.M. by a train leaving at that time and arrive at Erukkur at 7 P.M. the next evening and to receive the money order on the 3rd. But this is very improbable. Furthermore, exhibit G-1, dated 3rd September, shows that a sufficient number of days must have elapsed for Nilakanta to complain of delay on the part of Dharmaraja Iyer to send the deer skin promised by him. If therefore this evidence as to dates is to be accepted, then I think Nilakanta has proved an *alibi*, but I am not satisfied that Ramaswami Iyer's evidence in this respect should be accepted. He was speaking to facts that occurred some time ago. His memory is not very clear and I am not therefore prepared to hold that we are bound to accept these dates. At the same time this evidence shows sufficiently that we must accept Ramaswami Aiyar's evidence with caution. The defence goes further and produces exhibit 93 which, if genuine, disproves the prosecution story. I consider it unsafe to act upon that. In that letter the first accused's father says that he had been to Quilon and fetched Nilakanta, while according to his present evidence it is to Courtalum that the father went and it is also admitted that he did not bring Nilakanta who only promised to come later. There was no reply to that letter by the son-in-law to whom the letter was written and the son-in-law appeared to be very reluctant in the witness box and he gave his evidence in favour of the post card with reluctance, though it must have come from his custody. Nor do I attach any importance to the other oral evidence on behalf of Nilakanta. But as I have already stated, though it is not disproved so far as Nilakanta is concerned, there is sufficient to show that Ramaswami gives evidence that cannot be trusted. I have already discussed the question and have stated my conclusion that the correspondence is quite consistent with their being members of the old *Bharata Matha* Association spoken to by prosecution witness No. 29, or similar associations, if any came into existence. The correspondence therefore above referred to cannot be treated as any corroboration. If any particular letter referring to any one accused is inconsistent with this conclusion, it would be considered with reference to the case of that accused. I now proceed to take up the case of each accused.

54. *Seventh accused.*—The seventh accused is proved by prosecution witness No. 29, as I have already stated, to be a member of

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

the *Bharata Matha* Association. As pointed out already he met Nilakanta and the second accused at Alleppey (see exhibit G-8). Afterwards in August he travelled with Ramaswami Iyer to Quilon, met Bapu Pillai, negotiated the sale of the gramophone and from there went to Punalur, met Vanchi in the railway station and remained there. Bapu Pillai came the next day and he met him at his house. Nilakanta sent for the paper "India" from Chidambaram Pillai's house at Tenkasi. Harihara Iyer arranged with Ramaswami Iyer to get those papers. Ramaswami Iyer got them from Tenkasi and handed them over to Harihara Iyer at Shencottah. He came back and stayed with Harihara Aiyar who took him and two others to Dharmaraja Iyer's house and then they went to Punalur where a society was formed and oath was administered. Then he is alleged to have been present also at a meeting in Alagappa Pillai's house. I have already held that the evidence as to that meeting must be disregarded as against all the accused. That is the prosecution case about him. With reference to the letters, exhibits G-8, G-13, G-9, T-3, T-8 and GG-1, I have shown that they are consistent with their having been members of the *Bharata Matha* Association. I do not attach therefore much weight to them. It is then pointed out that according to the account books that he produced, he was absent from Alleppey during the days these meetings are said to have taken place at Dharmaraja Iyer's house and at Punalur. This may be so. But it does not serve as any corroborative evidence in support of Ramaswami Iyer's statements. Exhibits G-9, G-10 and G-11, show no doubt that he went to Punalur and to that extent supports Ramaswami Iyer's story. But it has nothing to do with the meeting at Punalur where the society itself was formed. It may be possible that Harihara Iyer sent prosecution witness No. 16 to Tenkasi to bring the issues of the "India" newspaper but that is not in support of the prosecution. The prosecution has to show that it is not consistent with the original purposes of the *Bharata Matha* Association or of similar associations. The inference derivable, if any, is not in support of the prosecution. I see no evidence whatsoever to support the evidence of Ramaswami Iyer as to what the seventh accused is said to have done at Punalur or at Dharmaraja Iyer's house in Shencottah. I would therefore acquit him.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

55. But the Public Prosecutor has invited us to draw inferences against the accused for their failure to prove what they have set up in their defence. I am not prepared to draw any such inference against any accused person, as it is not unusual to make such statements without any attempt being made to prove them. The accused make their statements to explain the evidence against them; to show that it is consistent with their innocence; and if such statement discloses that there is evidence which they might have produced in its support, then their statements might be disregarded if they do not produce it; but failure to prove any such statement should never lead to any inference against an accused. It is the failure to observe this caution that often leads accused persons in this Presidency not to speak the truth which might lead to inferences against them. The fact that *dharman* was sent to him from Pondicherry is no corroborative evidence, nor is the fact that he paid any money to Nilakanta. It is not shown that the money was in any way paid to further the objects of the conspiracy and to expel the British Government. But the evidence shows clearly that he was contributing towards the publication of a book of Nilakanta. There is no evidence in this case whether the book was a seditious one or not. There is no doubt the evidence of Arumugam Pillai that Vanchi told him that Hariharan was a member of the revolutionary society. But the fact that Vanchi said so rests only on Arumugam's statement which cannot be accepted without any corroboration. Ramasami Iyer's evidence is not therefore corroborated in any material particular and I therefore acquit this accused.

56. *Eighth accused.*—Against this man also the only evidence is that of Ramasami Iyer. Of course Ramasami Iyer implicates him to the fullest extent. Arumugam refers to a letter by Vanchi in which this man is stated to be a conspirator. The letter itself is not produced and Arumugam's sole testimony cannot be accepted. Letters (exhibits G-1, G-19, G-27, DD, XX and G-20) are relied upon to show that this man must have been a member of a revolutionary society. Exhibit DD is particularly relied upon in which the secret name of Azhaghai is used and Bapu Pillai is styled as younger brother. I have already discussed this document with reference to the question of the names and while I think it is true that Madasami had another name I do not think it has been proved that the name that was

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

given to him was intended to be used in secret communications. It is also noticeable that at the Punalur meeting where Bapu Pillai was admitted a member no secret name was given. In exhibit DD, Vanchi uses his own proper name. He gave his address at Shencottah. Madasami's name is also given and so Hariharan's. It is quite clear that exhibit DD could not have been intended to be a letter devised to conceal the identity of those who were referred to from the police and other persons. Nor do I attach any weight to the reference in exhibit G-19 to "our friends" as Arumugum states that all those who were reading his patrika were called "friends". Therefore I am of opinion that Ramasami Iyer's evidence has not been corroborated as required. As to the meeting at Alagappa Pillai's house also, for the reasons given in the discussion of the evidence of that meeting I hold that that evidence also cannot be relied upon. I accordingly acquit the eighth accused.

57. *Ninth accused.*—As to the ninth accused Desikachari who is connected with the Travancore Agricultural Trading Company, Limited, registered under the Indian Companies Act, there is no evidence against him except that of prosecution witness No. 16. Not even any letter written by him or to him nor any letter in which his name is referred to is produced. Ramasami Iyer's evidence is not satisfactory. He said at first that he saw him first at Bapu Pillai's house and afterwards said that he came from Shencottah. The Public Prosecutor complained that he has not even stated where he was or rendered any assistance to this Court. Considering that statements of the other accused have only been of use to help the prosecution, I cannot help thinking that his pleader exercised a wise discretion in preserving what is called a sulky silence. I am of opinion that the case against this man has not been proved and I accordingly acquit him.

58. *Sixth and fourteenth accused.*—Against these two accused in corroboration of the evidence of the approver, there is the evidence of prosecution witness No. 29 which, if believed, seems to be sufficient corroboration. This witness states that a week after exhibit G-17 which is dated 14th September 1910 there was a meeting at Shencottah in Dharmaraja Iyer's house where they were present, Dharmaraja Iyer, Vanchi Iyer, Jagannadha Iyengar, Pichumani and himself. It appears from his evidence that the others were already members of a society for the purpose

of expelling the British Government and that they had already taken an oath for that. Pichumani said that he had already taken an oath, the witness also might do that. He refused to do so. If we take the date of this meeting to be the 21st of September, then I think it is very probable that Pichumani was not at Shencottah on the 21st. He had shown that on the 12th and on the 15th he was not at Shencottah but at Tanjore (see exhibits 176 and 177). A money order was sent on the 9th September from Tanjore to be delivered to him in Shencottah; it was redirected from Shencottah and paid to him at Tanjore on the 15th. It is very probable therefore that Venkatachalla Iyer was at Shencottah between the 9th and the 12th and it is improbable that a man in his position would have come to Shencottah again to attend the meeting about which prosecution witness No. 29 has given evidence if it was held on or before the 21st; but the date given by the witness (prosecution witness No. 29), viz., a week after G-17, is also an approximate date and it might very well be a few days after. I see no reason to distrust this witness on that account; he is not an accomplice and no sufficient reason has been shown why his evidence should not be believed. I accordingly accept it as sufficient corroboration of the evidence of the approver against the sixth and the fourteenth accused. I accordingly find them guilty on the first charge.

59. *Second charge.*—On the second charge, I have already found that the murder of Mr. Ashe had nothing to do with the treasonable conspiracy. It was neither a consequence of it nor in pursuance of it. On the question whether those convicted on the first charge are guilty of abetment under section 111 of the Code I agree with my learned colleagues.

The following therefore are my conclusions:—

Tuticorin was a centre of *swadeshi* activity and those who were advocating the fostering of *swadeshi* industries and *boycott* of English goods came into conflict with the European non-official community and the officials; among them Mr. Ashe was believed by them to have used his official position to strangle these industries.

The murder of Mr. Ashe by Vanchi was due mainly to the impression that he ruined the *Swadeshi* Steam Navigation Company to benefit his country-men and Vanchi was nerved to undertake it either by the pernicious teaching of Nilakanta

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, JJ.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

or of the writings already referred to. It was not only not a consequence of the conspiracy but was against its objects.

The above impression of official attitude led to the formation of secret societies whose object was *swadeshi* and *boycott*.

In Pondicherry there were a number of persons actively engaged fostering *swadeshi*, *boycott*, feelings of hatred towards the British Government.

Nilakanta was one of these. Whether he was sent out by others or started on his own account is not clear. But he went to various places in the Presidency as a religious teacher, preached *swadeshi*, *boycott*, the incompatibility of British rule with Indian progress, both material and spiritual; converted some of its members to his views; very probably by getting into touch with the secret societies that already existed; made them take oath to expel British Government. It is very doubtful whether any of them realized the effect of their promise and accepting for this purpose the findings of my learned colleagues the only persons intelligent to realize the consequence appear to be Arumugam Pillai the approver, and first, second and seventh accused; it is certain that the cooks sixth and fourteenth accused, the grocers third and fourth accused, could have had no idea of what they were undertaking.

There was no overt act. No preparation for a rebellion. The principal man, Nilakanta, collected money for the publication of a book from his dupes, misappropriated it and ran away to Northern India where others lost sight of him. The conspiracy is contemptible and farcical.

On the second charge I acquit all the accused.

On the first charge I convict 1, 2, 6, 14 and acquit the rest.

By the Court.—As regards the sentences it is scarcely necessary to point out the crime of which the accused Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 14 stand convicted is of a most serious character. The offence is the conspiracy itself. But although it is not necessary that anything should have been done to further the objects of the conspiracy the question whether any overt act has been committed in pursuance of the conspiracy is material in connection with the question of punishment. There is no evidence that any acts were done to carry out the purposes for which the conspiracy was formed.

Although in a sense the conspiracy was contemptible it was certainly not negligible and even though no acts of violence

or lawlessness have been proved as the direct outcome of the conspiracy it is difficult to overestimate the mischievous effect of a conspiracy such as has been proved in this case on the minds of all brought within its influence.

Nilakanta *alias* Brahmachari (the first accused) was the organiser of the conspiracy and the leading spirit amongst the conspirators. It may well be that but for him the men who allowed themselves to be misled by him would not now find themselves in the dock. We sentence him to seven years' rigorous imprisonment.

Sankarakrishna Iyer (the second accused) actively co-operated with Nilakanta and acted as his henchman. We sentence him to four years' rigorous imprisonment.

Harihara Iyer (the seventh accused) is a man of some position and education. We sentence him to three years' rigorous imprisonment.

We sentence Chidambaram Pillai (the third accused) to two years' rigorous imprisonment. The remaining accused whom we convict are men of no importance and we think we are justified in dealing leniently with them. We sentence Muthukumarasami Pillai (the fourth accused), Subbayya Pillai (the fifth accused) Jagannadha Iyengar (the sixth accused), Bapu Pillai *alias* Ramasami Pillai (the eighth accused) and Pichumani Iyer *alias* Venkatachela Aiyar (the fourteenth accused) to one year's rigorous imprisonment each.

TABLE OF CONTENTS OF THE JUDGMENT OF THE CHIEF JUSTICE AND AYLING, J.

	PAGE
The murder of Mr. Ashe	261
Prosecution case	262
The Law of Corroboration of an accomplice	267
Evidence Act, sections 114 and 133	267
What are material particulars?	270
Evidence Act, section 157	272
" " 25	273
Criminal Procedure Code, section 162	274
First accused's statements	275
Statements of the approvers	277
The approvers' evidence	280

WHITE, C.J.,
SANKARAN-
NAIR
AND
AYLING, J.J.
—
KING-
EMPEROR
v.
NILAKANTA.

WHITE, C.J., SANKARAN- NAIR AND AYLING, JJ.	Other evidence	...	...	...	...	PAGE
	Accused No. 1	...	...	...	...	282
	" " 2	...	...	...	...	287
KING- EMPEROR v. NILAKANTA.	" " 3	...	...	...	...	294
	" Nos. 4 and 5	...	...	...	...	296
	" " 6 to 14	...	...	...	...	299
	The Second Count	...	...	...	...	300 to 306
		...	...	...	...	309

TABLE OF CONTENTS OF THE JUDGMENT OF
SANKARAN-NAIR, J.

1. Prosecution case	...	...	...	...	PARA.	PAGE
2. The historical part—					1 to 11	312
The agitation carried on at Pondicherry.					12	318
Swadeshi and boycott agitation at Tinne- velly	...	...	...	...	13	326
3. Bharata Matha Association	...	...	...	...	14	331
4. The murder of Mr. Ashe	...	...	...	...	15 to 18	334
5. The law of corroboration of an accomplice...	...	...	...	...	19	336
6. Evidence Act	...	...	...	...	20	345
7. Nature of corroboration required	...	...	...	...	21	348
8. Whether the statement by a co-accused is admissible?	...	...	...	...	22	349
9. Are the previous statements to the Police Inspector corroborative evidence?	...	...	...	...	23 and 24	349
10. Are they admissible under section 25, Evidence Act?	...	...	...	...	25	351
11. Are they admissible under section 162, Criminal Procedure Code?	...	...	...	...	26 to 29	352
12. Are they admissible under section 157, Evidence Act?	...	...	...	...	30	355
13. The accomplices' evidence suspicious	...	...	...	...	31 to 36	357
14. Accused No. 1	...	...	...	...	37	365
15. Corroboration as to conspiracy	...	...	...	...	38	366
16. Second accused	...	...	...	...	39	367
17. Inferences from letters from Bharata Matha Association	...	...	...	...	40 to 42	368
18. The other accused	...	...	...	...	43 to end	373
Sentences by the court	...	...	...	...		394
J.C.A.						

APPELLATE CRIMINAL.

Before Mr. Justice Benson, Mr. Justice Wallis, Mr. Justice Miller,
Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

MUTHUKUMARASWAMI PILLAI AND SEVEN OTHERS

KING-EMPEROR.*

1912.
April 17.

*Indian Evidence Act (I of 1872), ss. 25, 114, illustration (b), 133 and 157—
Accomplice, corroboration of—Material particulars, what are—Admissibility of
previous statements of accomplice to Inspector of Police—Section 157, "authority
legally competent to investigate the fact," meaning of—Competency of officer of
Criminal Investigation Department.*
*Criminal Procedure Code (Act V of 1898), ss. 162, 154, 155, 157 and 551. Act
XIV of 1908—Letters Patent, clauses 25 and 26—scope of.*

On a preliminary objection raised by the Crown with reference to the juris-
diction of the Court:—

Held that the Letters Patent, section 26, authorises the grant of a certifi-
cate by the Advocate-General in a case tried by a Special Bench appointed under
the Indian Criminal Law Amendment Act (XIV of 1908).

The following five points of law were raised in the certificate of the Advocate-
General in this Letters Patent Appeal, viz.:—

(1) Does the evidence of an accomplice require corroboration in material
particulars before it can be acted upon; is it open to the Court to convict upon
the uncorroborated testimony of an accomplice if the Court is satisfied that the
evidence is true; and does not the Indian Evidence Act (I of 1872), section 133,
read with section 114, illustration (b), merely intend to lay down that a convic-
tion upon the uncorroborated testimony of an accomplice is not illegal where the
presumption of untrustworthiness attaching to the evidence of an accomplice is
rebutted by special circumstances?

(2) Can the previous statements of an accomplice legally amount to
corroboration of the evidence given by him at the trial?

(3) Is an Inspector of the Criminal Investigation Department an authority
legally competent to investigate the fact within the meaning of section 157,
Indian Evidence Act (I of 1872)?

(4) Is a statement of a confessional nature made by a witness to a police
officer a confession of an accused person within the purview of section 25, Indian
Evidence Act?

(5) While statements made by a person to a police officer in the course of
an investigation and taken down in writing may not (by reason of section 162,
Criminal Procedure Code) be proved by the production of the writing, may such
statements be proved by oral evidence?

On the first point, Held (by BENSON, WALLIS and MILLER, JJ.): That the evidence
of an accomplice need not be corroborated in material particulars before it can be
acted upon and that it is open to the Court to convict upon the uncorroborated
testimony of an accomplice if the Court is satisfied that the evidence is true.

* Criminal Miscellaneous Petitions Nos. 68 to 72, 76, 79 and 80 of 1912.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Per BENSON, J.—In my opinion there is nothing in the illustration (b) to section 114 which overrides or renders nugatory the plain and explicit declaration contained in section 133 or which requires us to hold that the evidence of an accomplice must always and in all circumstances be regarded as unworthy of credit unless it is corroborated in material particulars or which requires us to hold that it is not open to the Court to act on such evidence even when the Court believes it to be perfectly true. (p. 422.)

Per WALLIS, J.—Section 114 of the Indian Evidence Act authorises the Court to make certain presumptions of fact. Nine well-known maxims are there given as illustrations of the section, the second of which is “the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.” They are all presumptions which may naturally arise but the legislature by the use of the word “may” instead of “shall” both in the body of the section and in the illustrations shows that the Court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised. (p. 437.)

Per ABDUR RAHIM, J.—It is well-established law that except in circumstances of an especial nature it is the duty of the Court to raise the presumption that accomplices’ evidence is unworthy of credit as against the accused persons unless it is corroborated in material particulars and the failure of the Judge to direct the jury to that effect is an error in law. It will none the less be an error in law if the trial was held without a jury and the Judge or the Magistrate misdirected himself on this point and treated an accomplice’s evidence like that of any other witness. (p. 483.)

To my mind it is quite clear from the nature of the cases cited in the illustrations that, except in the special circumstances, examples of which are attached to the section, the legislature requires that the Court should make the natural presumptions referred to in the section. (p. 472.)

No doubt there are cases and cases and while in doubtful cases the position contended for on behalf of the Crown may well be sound there is nothing at least in the Indian Evidence Act or in reason that in other cases in which there could be no two opinions that the presumption that an accomplice is unworthy of credit unless corroborated applies in full force not being either negatived or rebutted an omission to raise the obvious presumption should not be treated as an error in law. On the other hand the illustrations to section 114 furnish an indication to the contrary (p. 473.)

There is no foundation whatever for the suggestion that these provisions are in any respect different from what is laid down in the rulings of the Indian Courts on the subject, either since the passing of the Indian Evidence Act or before it, or of the English Courts. (p. 474.)

Per SUNDARA AYYAR, J.—Having regard to the condition of the case law in England it would be safe to proceed to determine the law in this country by a consideration mainly, if not solely, of the provisions of the Indian Evidence Act. (p. 506.)

Judges are entitled to lay down a rule that although the legislature has given the Court the discretion to make a particular presumption or not according to the circumstances, the proper course for the Courts to follow is to make the presumption unless there be special occasion for not doing so. This does not deprive the Court of the right given by the legislature to exercise its discretion (p. 507.)

There may no doubt be circumstances in any particular case which would justify the Court in not making the presumption [in illustration (b)]. But I think it would be reasonable to hold that there must be some good reason given for not making the presumption in such a case. (p. 508.)

I entirely agree with the statement of the law by EDGE, C.J., in *Queen-Empress v. Gobardhan*(1) where after he points out that a jury being bound to convict on the uncorroborated evidence of an approver if they believe it a Judge cannot direct them to acquit the accused in the absence of corroborative evidence, he says: “A Judge would advise a jury that it would be unsafe to act upon, in other words to believe, the uncorroborated evidence of an accomplice as he would advise a jury not to act upon the evidence of any other witness whose evidence might from any cause be open to suspicion. But in either case he would have to tell the jury that if they believed the evidence they might legally convict the prisoner.”—With this addition, that it is the duty of the Judge to draw the attention of the jury to any circumstance either in favour of or against the credibility of the accomplice. (p. 512.)

On the second point, *Held* (by BENSON, WALLIS and MILLER, JJ.): That the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial.

Per BENSON, J.—I do not think there is anything in the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in section 157, nor can it be suggested that “corroborate” is used in section 157 in a different sense from that in which it is used in illustration (b) to section 114. The former statement of an accomplice is, therefore, legally admissible to corroborate his testimony at the trial but the weight to be attached to it, or, in other words, how far it does really corroborate the evidence given at the trial must vary with the facts of each case. No hard-and-fast rule, capable of mechanical application, can be laid down. In the great majority of cases it would, no doubt, be found to be merely the repetition of tainted evidence affording no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand, if there was evidence or even a suggestion put forward by the defence that the evidence given by the witness at the trial was the result of recent influences brought to bear upon him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before the influences relied on by the defence had been brought to bear upon him. (p. 427.)

If it is necessary in this case to determine whether the phrase “material particulars” in illustration (b) to section 114 is to be regarded, as, in some sense, a technical expression implying corroboration by independent or untainted evidence, I am unable to go so far and to say that as a matter of law the previous statement of an accomplice can never amount to corroboration in material particulars. (p. 430.)

If there are some circumstances in which a prior statement may amount to sufficient corroboration we cannot say as a matter of law that a prior statement can never be corroboration in material particulars though no doubt in the great majority of cases it will be found that the prior statements do not add anything to the credibility of the evidence given at the trial . . . How far a

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1887) I.L.R., 9 All., 528.

BENSON,
WALLIS,
MILLER,
ABDUR

RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

prior statement does corroborate evidence given at the trial is a matter to be determined by the jury or where there is no jury by the Judge. (p. 431.)

Per WALLIS, J.—Previous statements admissible as corroboration under section 157 of the Indian Evidence Act may or may not amount to sufficient corroboration and whether they will be so or not depends on the facts and circumstances of the particular case. (p. 441.)

Taken by itself the previous statement may of course be as tainted and untrustworthy as the evidence in the box and not supply any real corroboration; but on the other hand the circumstances in which it was made may afford strong corroboration of its truthfulness apart from the credibility of the accomplice. (p. 442.)

Per MILLER, J.—I see danger and not safety in ruling out as inadmissible in the case of accomplice witnesses any tests of credibility which are available in the case of other witnesses whether the test applied tends to confirm or to discredit the evidence. (p. 454.)

Per SUNDARA AYYAR, J.—The previous statement of an accomplice cannot legally amount to corroboration within the meaning of illustration (b) to section 114 of the Indian Evidence Act. The question whether it is admissible at all as corroborative evidence under section 157 for any other purpose is not free from doubt. It is possible to hold that it is admissible for proving his consistency and as disproving a suggestion that it was recently concocted by him. But I am inclined to think that it would be dangerous to admit it even for this limited purpose of proving his consistency. To do so would lead to the danger of its being relied on to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence of corroboration. The safer rule in my opinion would be to hold that section 114, illustration (b), requires the rejection of the previous statement altogether. (p. 524.)

On the third point, Held (by BENSON, WALLIS and MILLER, JJ.) that an Inspector of the Criminal Investigation Department is an authority legally competent to investigate the fact within the meaning of section 157, Indian Evidence Act.

Per BENSON, J.—I do not think that the words “investigate the fact,” in section 157 of the Indian Evidence Act should be construed in a narrow sense so as to restrict competence to the police officer who under Chapter XIV of the Criminal Procedure Code is charged with the investigation of an offence. (p. 433.)

Per WALLIS, J.—Sections 156 and 157 deal with the corroboration of witnesses as to relevant facts, and reading the two sections together, I think section 157 should be read thus, as if the words in brackets were there, “in order to corroborate the evidence of a witness [as to a relevant fact] any former statement made by the witness as to the same fact before any authority competent to investigate the fact may be proved.” (p. 443.)

The Presidency may well be held to be the “local area” to which the seven Inspectors in the department on whom the work of investigation must necessarily fall are appointed. (p. 444.)

I am inclined to think that the word “investigate” in section 157 of the Indian Evidence Act cannot be read as limited to investigation under the Code of Criminal Procedure, that the Inspector had been brought down from Madras specially to investigate the murder of Mr. Ashe and that he was not only legally competent but under a duty to investigate and in the course of such investigation to record the statements now in question. (p. 445.)

Per ABDUR RAHIM, J.—One would not in my opinion be justified in construing section 157 in a loose general sense having regard to the fact that it permits a statement made in the absence of a party to a proceeding which he had no means of testing to be used in evidence against him. Such departure from the ordinary rule relating to judicial evidence must be confined within the strictest limits. (p. 488.)

It was argued by the pleaders for the accused that the word “investigate” in section 157 in the Indian Evidence Act is used in the technical sense of the Criminal Procedure Code. But this is clearly not so. The application of that section of the Indian Evidence Act is not confined to criminal cases and the word “investigate” is obviously used in its natural and popular meaning. (p. 488.)

The Criminal Investigation Department was created to assist the ordinary Police force in the detections of certain crimes and neither that fact nor the fact that a member of the Criminal Investigation Department holds the rank of an Inspector would by itself entitle him to exercise the same powers within the Presidency of Madras as an officer in charge of a police station has within the local limits of his station under section 157, Criminal Procedure Code. (p. 489.)

Per SUNDARA AYYAR, J.—Legally competent must I think mean “having power under some law statutory or otherwise.” The power need not be derived from an express provision of the law as stated by the majority of the Special Bench if by that expression be meant “some definite statutory enactment” but it must be shown that there is power under some law or other to investigate. The words “authority” and “competent” support this view. (p. 526.)

Section 21 of the Police Act (XXIV of 1859) which makes it the duty of a police officer to detect and bring offenders to justice cannot be taken to give a police officer all powers necessary for that purpose and therefore power to investigate offences and that every Police officer has these powers throughout the Presidency. (p. 526.)

It is quite impossible to hold that the mere imposition of duties of a comprehensive nature would authorise a person on whom they are imposed to restrain the rights or liberties of individuals or to exercise any specific powers over them. (p. 527.)

It cannot be inferred that an Inspector of the Criminal Investigation Department has been appointed to any local area under section 551, Criminal Procedure Code.

On the fourth point, Held (by BENSON, WALLIS and SUNDARA AYYAR, JJ.) that a statement of a confessional nature made by a witness to a police officer is a confession of an accused person within the purview of section 25, Indian Evidence Act.

Per BENSON, J.—It seems to be especially undesirable to extend the language of section 25 beyond its plain meaning when the effect of doing so might tend to encourage those corrupt practices of the Police in regard to working for confessions which it is the policy of the law to prevent. Effect must be given to the language of section 25 and it renders the statements of the approvers to the Inspector inadmissible. (p. 434.)

Per WALLIS, J.—I think the safer, as it is certainly the simpler, course is to read the words of the section in their natural meaning without putting any restrictive interpretation upon them and so reading them I hold that these confessions were inadmissible even as corroborative evidence, under section 25 of the Evidence Act. (p. 450.)

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, J.J.
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Per MILLER, J.—Sections 25, 26 and 27, Indian Evidence Act, were imported into the Indian Evidence Act from the Criminal Procedure Code of 1861. . . . Those sections of the code were not dealing with the question of witnesses in criminal trials. . . . I am unable to find any reason for giving the sections (in the Evidence Act) a more extended meaning than they bore in the Code of 1861. (p. 455.)

I am unable to see that it is more dangerous to allow a witness to be corroborated by a self-incriminating statement made to a police officer than by a self-exculpatory statement to the same effect. (p. 457.)

Per ABDUR RAHIM, J.—The word "confession" used in section 25, Evidence Act, could not have been used in the wide and popular sense in which it is used in every day conversation as meaning an acknowledgment of some fault for that would make the section ridiculous and there can be little doubt that it is to be understood in the technical sense of the criminal law. (p. 489.)

Whether a statement is to be called a confession or not depends not merely upon the nature of the statement itself but also on the use which is sought to be made of it. Whenever the evidentiary value of a statement as against the person making it is in question it is then that it would be properly called an admission or confession according as the proceeding in which the question arises is of a civil or criminal nature but not when it is intended to be used as evidence against a third person. (p. 490.)

Per SUNDARA AYYAR, J.—The word "confession" does not import that the admission of guilt should be by a party to the criminal proceeding before the Court. If the word "confession" in section 25 was intended to refer only to an admission made by a party to the proceeding before the Court the legislature would have said so. The expression "made by an accused person" in section 24, Evidence Act, means that the person must be an accused person at the time of the confession. (p. 535.)

An admission of guilt made to a police officer by any person cannot be proved as against any person accused of any offence whether he be the person who made the admission or not. (p. 535.)

On the fifth point, *Held (per totam curiam)*, that while statements made by a person to a Police officer in the course of an investigation and taken down in writing may not (by reason of section 162, Criminal Procedure Code) be proved by the production of the writing, they may be proved by oral evidence.

Before the High Court has decided any point of law raised in the Advocate-General's certificate, the accused cannot be heard on any point not included in the certificate.

PETITIONS under section 26 of the Letters Patent for the High Court praying that, in the circumstances stated therein, the High Court will be pleased to review the Special Bench Case No. 1 of 1911, tried by a Special Bench of this Court, constituted under the provisions of the Indian Criminal Law Amendment Act, XIV of 1908.

The facts for the purpose of this report are sufficiently set out in the report of Special Bench Case No. 1 of 1911.* The

* (1912) I.L.R., 35 Mad., 247.

certificate of the Advocate-General is set out in the Judgment of BENSON, J., at p. 419 *infra*.

The Hon. Mr. C. F. Napier (Acting Advocate-General), for the Crown, raised the preliminary objection that the Court had no jurisdiction to hear the case. He urged that the Indian Criminal Law Amendment Act (XIV of 1908) was a special Act providing for the more speedy trial of certain offences and there the procedure was set out with great minuteness. The only Act there referred to was the Criminal Procedure Code which was made to apply where its provisions were not inconsistent (section 14). Therefore unless statutory power was found elsewhere the judgment of the special Bench must be final. The question therefore arose, "was this a procedure coming within the sphere of the Letters Patent clause 22?" Original criminal jurisdiction under the Letters Patent being limited to the town of Madras and then only to sessions trials, clause 11 therefore did not apply. There was also an extraordinary criminal jurisdiction under clause 24 but this also did not affect this case. The Magistrate was not here "expressly empowered by the Government" as required by section 24.

Section 25 under which this case was brought before the Court had reference to sections 22 and 24 and the trial must be with reference to the jurisdiction given in those sections. Those sections did not contemplate a trial by a Special Bench.

A statutory jurisdiction to be exercised in a limited manner which for instance has not even discretion to fix the number of Judges could not be affected by sections 22, 24 and 25. The Act did more than give power to the Government to give power to a Magistrate to commit, it established an entirely new procedure.

[MILLER, J.—The Magistrate takes cognisance first.]

The moment the Magistrate took cognisance the Government was empowered to apply the Act which enabled the Magistrate to commit. The power of the Magistrate was to be found in the Special Act and not in the Letters Patent. The Government could not authorise commitment, it could only apply the Act. The power of commitment was here a statutory power. Where Government had authority to empower a Magistrate to commit, it would be within the section but where the Government had only

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, J.J.
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

authority to apply an Act which Act itself empowered the Magistrate to commit it did not come within the section.

The Hon. Mr. L. A. Govindaraghava Ayyar in support of the certificate said the Magistrate's jurisdiction arose out of sections 2 and 3 of the Special Act and pointed out that he must actually receive an order under section 2 which made him an officer specially empowered.

He further argued that section 25 was in no way governed by sections 22 and 24.

The Court having over-ruled the preliminary objection, the Hon. Mr. L. A. Govindaraghava Ayyar, vakil for the seventh accused, proceeded to argue the points of law arising out of the certificate of the Honourable the Advocate-General. After reciting the charges and the facts necessary for the argument of the review he stated that two general propositions first arose—(1) whether corroboration of the approvers was necessary and (2) whether the corroboration that was relied on by the majority of the Special Bench was corroboration of the kind required by law. Here the Special Bench had relied on the previous statements of the approvers to Inspector Veeraraghava Aiyar as affording the corroboration required by law and in addition they apparently relied on the demeanour of the approvers in the witness box and the fact that they had not been broken down in cross-examination.

As regards the first point he pointed out that in England the law was clear that an accused person should not be convicted upon the uncorroborated testimony of an approver unless under special circumstances. Section 114, illustration (b), reiterated the English rule by raising a presumption of untrustworthiness and in this case the majority of the Special Bench did not refer to any circumstances of such a nature as would rebut this presumption. In a trial by jury it would be for the judge to tell the jury that it should presume an accomplice was ordinarily unworthy of credit unless corroborated in material particulars and further he should state what were the special circumstances under which his evidence could be relied on without corroboration. The majority of the Bench had no doubt stated that great caution was required but it had not applied its mind to the principles upon which caution was necessary. The majority may have drawn the presumption as required by law but it had not in fact required the presence of

special circumstances such as would rebut it. This presumption was of no less force because it was contained in an illustration.

[SUNDARA AYYAR, J.—Is it not a question of not making the presumption at all rather than rebutting it?]

The illustration had the force of a maxim. The words "may presume" meant that the Court might call for proof or it might presume an accomplice was unworthy of credit until the contrary was proved. Here the majority did not hold the approvers unworthy of credit and call for proof of credit. It merely insisted on great caution and thereafter lost sight of this requirement. It had, however, required corroboration as might be seen when it dealt with individual accused. Therefore it seemed clear that the presumption of untrustworthiness was raised by the majority. But having raised it they had proceeded to decide the case without proper reference to it. He further argued that section 133, Evidence Act, must be read with section 114, illustration (b). They were not inconsistent with one another. If the jury convicted on the uncorroborated testimony of an approver it would only mean that it considered special circumstances existed for not drawing the presumption of unworthiness which would necessitate the presence of corroboration, and if the Judge's direction was correct the conviction would not be upset. But the present case was different to that for the presumption having been drawn, before there could be a conviction there must be corroboration in material particulars. The vakil referred to *Queen-Empress v. Deodhar Singh*(1) and *Kamala Prasad v. Sital Prasad*(2) to show that it was now part of the law that an accomplice's testimony should be corroborated in material particulars. He also cited the following cases in this connection. *R. v. Elahee Buksh*(3), *Emperor v. Lalit Mohan Chuckerbutty*(4), 4 M.H.C.R., Appx. vii(5), *Reg. v. Ramasami Padayachi*(6), *Queen-Empress v. Kunjan Menon and Sankunni*(7), *Queen-Empress v. Arunuga and others*(8), *Queen-Empress v. Bharmappa*(9), *Emperor v. Smither*(10), *King-Emperor v. Mohiuddin Sahib*(11), *Empress of India v. Ganraj and*

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

- (1) (1900) I.L.R., 27 Calc., 141. (2) (1901) I.L.R., 28 Calc., 339.
(3) (1866) 5 W.R. Cr. R., 80 at p. 83. (4) (1911) I.L.R., 38 Calc., 559 at p. 579.
(5) 4 M.H.C.R., Appx. vii. (6) (1878) I.L.R., 1 Mad., 394 at p. 395.
(7) (1891) 1 M.L.J., 397 at p. 403. (8) (1889) I.L.R., 12 Mad., 196.
(9) (1889) I.L.R., 12 Mad., 123. (10) (1903) I.L.R., 26 Mad., 1 at p. 11.
(11) (1902) I.L.R., 25 Mad., 143 at p. 146.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

others(1), *Queen-Empress v. Jagrup and another*(2), *Ramaswami Gounden v. Emperor*(3).

He submitted that *R. v. Meunier*(4), threw no light as that was an application in *habeas corpus* and the Judge had not to go into the whole of the evidence nor was it before him. It could only be considered as regards the facts of that case.

The rule that the evidence of an accomplice required corroboration had become a rule of practice which deserved all the reverence of law. *Re Elahee Buksh*(5).

The nature of the crime committed and the extent of the complicity of the approvers were determining factors as to the extent of the corroboration required. In this particular case the approvers had as much gone into the crime as the accused themselves, and the enormity of their crime was as great as that of the accused: indeed their complicity was even greater. There could therefore be no doubt that their evidence required corroboration in material particulars. When an accused person was convicted on the uncorroborated testimony of an accomplice for special reasons the Court in revision should see what the special circumstances were which rendered the evidence of the accomplice admissible.

Grounds 2, 3 and 4 in the Advocate-General's certificate related to the admissibility of evidence. As regards ground No. 2, the vakil submitted that the previous statements made by accomplices could not legally amount to corroboration of the evidence given by them at the trial. He cited in support of his contention *Reg. v. Malapabin Kapana*(6), *Queen-Empress v. Bepin Biswas*(7), *Queen v. Mohesh Biswas*(8), *Queen-Empress v. Krishna-bhat*(9), *Queen-Empress v. Ram Saran*(10), *Queen-Empress v. Maganlal and Motilal*(11), and *Emperor v. Baji Krishna*(12).

What their Lordships would have to see was whether the previous statement of an accomplice could be deemed to be corroboration so as to lead to the belief as to the truth of the evidence at the trial. With reference to section 157 the previous statement

(1) (1879) I.L.R., 2 All., 144.

(2) (1885) I.L.R., 7 All., 646.

(3) (1904) I.L.R., 27 Mad., 271 at p. 290.

(4) (1894) 2 Q.B., 415.

(5) (1866) 5 W.R. Cr. R., 80.

(6) (1874) 11 Bom.H.C.R., 196.

(7) (1884) I.L.R., 10 Calc., 970.

(8) (1873) 19 W.R., Cr. R., 16.

(9) (1886) I.L.R., 10 Bom., 319.

(10) (1886) I.L.R., 8 All., 306.

(11) (1880) I.L.R., 14 Bom., 115.

(12) (1904) 6 Bom. L.R., 481 at p. 484.

of a witness might be admissible for the purpose of corroborating the testimony at the trial, but still it would not be legally sufficient corroboration.

Section 114 contemplated something different to section 157. Only after the application of the maxim in section 114, illustration (b) could section 157 be invoked. An accomplice was not on the same footing as an ordinary witness. The words "material particulars" could not mean a previous statement. The previous statement was a test of consistency only. The statement of an accomplice whether made at or before the trial was worthless and would not be more valuable because of its repetition. He here quoted Mayne's Criminal Law, third edition, paragraph 758, Ameer Ali and Woodroffe's Evidence Act, fifth edition, page 894, and Taylor on Evidence, ninth edition, volume I at page 970. Referring to the illustration to section 156 he submitted that it did not apply in the present case as it referred only to corroborating the crime itself and not the presence of those involved in it. This restriction was necessary as nothing would be easier than for an accomplice to substitute a person not present for one present or introduce an additional person who in fact was not present.

He further urged that section 157, Evidence Act, was controlled by section 162, Criminal Procedure Code. The case *Queen-Empress v. Tribhovan Manekchand*(1) was distinguishable. There the question was a civil one and whether the statement was to be taken as against third parties was not considered. The party there was not an accused person.

As regards the fourth point he maintained that under section 25, Indian Evidence Act, the statements were inadmissible. The approvers were accused persons when they gave their statements and there was strong evidence in support of this. The policy of the legislature must have been to minimise the chances of police officers interfering with accused persons. It was held in *Emperor v. Harisingh Ganpatsingh*(2) that if a confession made by an accused person to a police officer could not be used against him *a fortiori* it could not be used as against his fellow accused.

As regards the fifth point raised in the certificate, viz., that the opinion of the Court that while a statement made by a person to a

RENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1885) I.L.R., 9 Bom., 131.

(2) (1910) 12 Bom. L.R., 899.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

police officer in the course of an investigation and taken down in writing may not be proved by the production of the writing it may be proved by oral evidence, should be further considered, there was no reported case on all fours with the present, but the entire object of section 162, Criminal Procedure Code, would be defeated if the writing was not admissible while the oral evidence was.

[SUNDARA AYYAR, J.—Does not section 162 only want to make section 35, Evidence Act, inapplicable to a record made by a police officer. It does not make the statement inadmissible?]

The proviso to section 162 showed that not the record only was being dealt with in the section but also the statement itself. The word statement in the last sentence of the proviso means a statement as apart from the record of it. There was no safeguard that the oral evidence would be any more reliable than the record. According to the construction put on the section by the prosecution if the police officer be examined by the defence he could not be allowed to corroborate because of the proviso whereas if called by the prosecution he could be allowed to corroborate. Further the legislature had always considered a document to be the best evidence and if the prosecution contention was upheld oral evidence would become better than documentary evidence. He quoted:—*Isab Mandal v. Queen-Empress*(1), *Emperor v. Narayan Raghunath Patki*(2), *Emperor v. Akbar Badoo*(3), *Bhulai Singh v. Emperor*(4) and *Rustam v. King-Emperor*(5) to show that it could not have been the intention of the legislature that when writing was available oral evidence was admissible.

On the third ground, viz., that Inspector Veeraraghava Aiyar was not an authority legally competent to investigate the facts within the meaning of section 157, Indian Evidence Act, the vakil contended that there was no statutory power conferred on the Inspector except that he was an officer of the Criminal Investigation Department. He referred to the judgment of SANKARAN-NAIR, J., and pointed out that if the opposite view were correct Act 24 of 1859 read with Madras Act III of 1895, section 2, would

(1) (1901) I.L.R., 28 Cal., 348. (2) (1908) I.L.R., 32 Bom., 111 at p. 123.
(3) (1910) I.L.R., 34 Bom., 599. (4) (1910) 11 Cr. L.J., 117 at p. 120.
(5) 7 All. L.J., 468.

give kavalgars power to make investigations throughout the Presidency.

The vakil here again proceeded to argue with reference to the first point in the certificate and maintained that the first portion thereof included two points, viz. :—

- (1) whether corroboration was necessary at all;
- (2) whether it need be on material particulars.

[SUNDARA AYYAR, J.—It may mean that the material particulars need not be connected with the particular accused.]

[BENSON, J.—The certificate does not entitle you to argue as to the finding that the material particulars depend on the facts of each particular case.]

The vakil here contended that he could be allowed to argue apart from the certificate and cited *Subrahmania Ayyar v. King-Emperor*(1) as authority for the proposition that for the purpose of finding on the points of law in the certificate the whole case may be gone into. He also referred to *Emperor v. Narayan Raghunath Patki*(2). He argued that the power to review could not depend upon the last words of section 26 of the Letters Patent because the word "thereupon" comes before them. The reviewing must therefore take place with reference to the points of law not with reference to the final decision thereon.

[MILLER, J.—If you are right we can convict your client on the second charge.]

That can be done apart from my argument.

The Court ruled that no argument would be heard outside the certificate.

The vakil thereupon referred to certain decisions to show that the words "material particulars" in section 114, illustration (b), Indian Evidence Act, meant particulars involving the guilt of the individual accused.

M. D. Devadoss for the third accused, following, submitted that it was for the Full Bench to consider whether the majority of the Judges of the Special Bench directed themselves correctly in regard to the weight to be attached to the accomplices' evidence. Though in places the Indian Evidence Act had departed from the English Law of Evidence, e.g., section 120, no departure had been

(1) (1902) I.L.R., 25 Mad., 61 at p. 65.
(2) (1908) I.L.R., 32 Bom., 111 at p. 123.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

made in section 133. He referred to Mayne's 'Criminal Law', paragraph 757, 'Phipson on Evidence', 4th edition, page 470, and 'Wills on Circumstantial Evidence', page 365. If the legislature intended to lay down that an accomplice was to be treated as any other witness, section 133 would have been worded differently.

As to the nature of the corroboration required, he quoted 'Phipson on Evidence,' page 471, *Owen v. Moberly*(1), and 32 and 33 Vict., C. 68, sec. 2.

The Honourable the Acting Advocate-General (C. F. Napier) for the Crown contended in opening that the certificate under the Letters Patent did not follow the language of the Letters Patent but introduced an element not warranted by law. The certificate presumed the majority of Court came to certain decisions on the law which in fact did not appear to be borne out by the judgment. Further the test was whether an error of law had affected the judgment. It was not sufficient for the Advocate-General to find an error—it must be an error having some practical result. The Letters Patent did not force the Court to decide something with no practical result. An *obiter dictum* having no bearing on the judgment as a whole was not a matter for the High Court to deal with. He contended that from this standpoint the first point in the certificate did not arise out of the judgment. The majority of the Court had held that it did not require corroboration in this case at all. Having done so it had then proceeded to consider the nature of the corroborative evidence existing in the case.

[SUNDARA AYYAR, J.—The majority of the Court very distinctly states that it is of the utmost importance to consider the nature of the corroboration. Does it not seem that they require corroboration and that they have not in fact acted without it?] The effect of the judgment was that the approver's statements could be acted upon without corroboration. If the majority has held that the uncorroborated testimony is sufficient and has translated that ruling into action in its judgment the question for consideration was whether this Court could say that the decision was illegal.

On the first point in the certificate he contended that the clear effect of the Indian Evidence Act, section 133, could not be altered

(1) 64 J.P., 88.

by reference to section 114, illustration (b). The other side was attempting to attach the illustration as if it were a proviso to section 133, but where in an act positive language was used the intention of the legislature need not be considered [*Norendra Nath Sircar v. Kamalbasini Dasi*(1), *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* and *Jodonath Bose v. Shumsoonnissa Begum*(2), and *Johnson and Porto Novo Cundasamy v. Madras Railway Company*(3)]. The words "the Court may presume" meant that "the Court need not call for proof." No Court was bound to state its reasons for presuming or not presuming but if after giving reasons it did not act up to them it would only amount to a want of exercise of judicial discretion and not to an error in law and its decision was not therefore liable to be reviewed.

[ABDUR RAHIM, J.—What is the force of the word "but"? If the word "may" leaves it entirely to the discretion of the Court why is this word so used?]

The word "but" meant "but remember this." Though the illustrations limited the power to presume unworthiness illustration (b) could not limit the plain words of section 133.

Granted that section 114 laid down no absolute command to draw the presumption it could not be said that the power to presume unworthiness limited section 133.

In answer to SUNDARA AYYAR, J., he agreed that if the word "shall" had been used instead of "may" the illustration would no doubt limit section 133. *Ameer Ali*, and *Woodroffe's Evidence Act*, page 121, and *Taylor on Evidence*, paragraphs 70 and 214, referred to.

He further urged that the English rule requiring corroboration was a rule of practice, not of law, citing *Reg. v. Stubbs*(4). No doubt *Elahee Buksh's* case said it was a rule having all the reference of law but this only emphasised the conclusion that it was not strictly a rule of law. Further in England the practice was with reference to charging untrained juries; here there was no reason why the Special Bench should have directed themselves as if they were a common jury. He then cited *Reg. v. Ramasami Padayachi*(5), *Queen-Empress v. Gobardhan*(6), *Queen-Empress v.*

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1896) I.L.R., 23 Calc., 563 at p. 571. (2) (1867) 11 M.I.A., 551 at p. 604.

(3) (1905) I.L.R., 28 Mad., 479.

(4) 25 L.J.M.C., 16.

(5) (1878) I.L.R., 1 Mad., 394.

(6) (1887) I.L.R., 9 All., 528 at p. 552.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
Ayyar, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Mayanlal and Motilal(1), *Queen-Empress v. Chagan Dayaram*(2), *King-Emperor v. Malhar*(3), *Kamala Prasad v. Sital Prasad*(4), *Ramaswami Gounden v. Emperor*(5), *Reg. v. Boyes*(6), *Reg. v. Gallagher*(7), *In re Meunier*(8), *Reg. v. Moores*(9), *Reg. v. Wilkes*(10), *Reg. v. Tate*(11), and *R. v. Ellsom*(12).

Proceeding to deal with the second point raised in the certificate he stated that the point involved the question as to what were material particulars. It was for the jury to decide what were material particulars. If materiality were a question for the Judge to decide the result would be that no case would be left to the jury at all.

[SUNDARA AYYAR, J.—Why not charge as follows?—"You are entitled to convict on the uncorroborated testimony of the accomplice but if you consider you want corroboration it must be in material particulars and I tell you that in this case there is no such corroboration. Therefore if you consider corroboration necessary you must acquit."]

That would not be what the illustration contemplated. The question of material particulars necessarily involved the question of the person against whom the evidence was sought to be used.

In bastardy cases corroboration in some material particulars was necessary and the materiality had to be found to the satisfaction of the Justices. *Bessela v. Stern*(13), *Reg. v. Cooper*(14) and Taylor on Evidence, volume I, page 630, and paragraph 964 (notes) referred to. He then quoted *Queen-Empress v. Ram Saran*(15) and *Queen-Empress v. Gobardhan*(16).

[SUNDARA AYYAR, J.—The two last cases have little bearing on the second point.]

As regards *Reg. v. Malapabin-Kapana*(17) he maintained that the judgment in that case made too wide a criticism. Quoting

- (1) (1890) I.L.R., 14 Bom., 115 at p. 133.
(2) (1890) I.L.R., 14 Bom., 331 at p. 335. (3) (1902) I.L.R., 28 Bom., 198.
(4) (1901) I.L.R., 28 Calc., 339 at p. 342. (5) (1904) I.L.R., 27 Mad., 271.
(6) (1861) 9 Cox. C.C., 32 at p. 37. (7) (1888) 15 Cox. C.C., 291.
(8) (1894) 2 Q.B., 415. (9) (1836) 7 C. and P., 270.
(10) (1836) 7 C. and P., 272. (11) (1908) 2 K.B., 680.
(12) (1911) 78 J.P., 38. (13) (1877) 2 Com. Pleas. Div., 265.
(14) (1877) 41 J.P., 470. (15) (1886) I.L.R., 8 All., 306 at p. 310.
(16) (1887) I.L.R., 9 All., 528 at p. 575. (17) (1874) 11 Bom.H.C.R., 196.

Queen-Empress v. Bepin Biswas(1) he pointed out that trial included statements before the committing Magistrate. The rule was there restricted to trials. In *Queen v. Mohesh Biswas*(2) independent corroboration of the details of the share of each accused seemed to be required. The effect of this would be to make a conviction practically impossible [*Queen v. Nawab Jan* (3), *Reg. v. Mullins*(4) and *Queen v. Dowling*(5)].

In no case since the enactment of the Indian Evidence Act had the question been considered with reference to the wording of the section.

Proceeding to deal with the fourth point in the order of reference, viz., whether the statements of prosecution witnesses Nos. 6 and 12 to No. 31 were rendered inadmissible by reason of the provision of section 25, Indian Evidence Act (I of 1872), he pointed out that this provision was inserted for the benefit of the accused and not for that of a witness, for a witness could be cross-examined. The section really meant "no confession made by an accused person shall be used against such accused on his trial." If a statement which is not a confession is admissible under section 157 *a fortiori* why should a confession itself not be admissible? [*Queen-Empress v. Tribhovan Manekchand*(6) referred to]. In *Reg. v. Malapabin Kapana*(7) it was assumed that such statements were admissible though they were confessions. He here referred to Monier on the "Law of Confessions," page 14 and Ameer Ali and Woodroffe's "Evidence Act," pages 208, 209 and 210 as to the meaning of the word "confession". He submitted that under the Code of 1861, a confession of a co-accused was not admissible. Section 30 was a provision enacted in 1872 for the first time. In *Emperor v. Lalit Mohan Chuckerbutty*(8) the High Court animadverted strongly on the absence of a previous statement of an approver.

As regards the fifth point he relied upon *Fanindranath Banerjee v. Emperor*(9) and *Rustam v. King-Emperor*(10) and the plain words of section 162, Criminal Procedure Code (Act I of

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
Ayyar, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

- (1) (1884) I.L.R., 10 Calc., 970. (2) (1873) 19 W.R.Cr.R., 16 at p. 21.
(3) (1867) 8 W.R.Cr.R., 19 at p. 26. (4) (1848) 7 St.Tr. N.S., 1111, Appx. A., s.c. 3 Cox C.C., 528.
(5) (1848) 7 St. Tr. N.S., 381. (6) (1885) I.L.R., 9 Bom., 131 at p. 135.
(7) (1874) 11 Bom. H.C.R., 196. (8) (1911) I.L.R., 38 Calc., 559.
(9) (1909) I.L.R., 36 Calc., 281. (10) 7 All. L.J., 468.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

1898), which only excluded the writing and nothing more. [He was stopped by BENSON, J., who observed that the whole Court agreed with the decision of the Special Bench on this point.]

Dealing with the third point in the Advocate-General's certificate, as to the competency of the Inspector Veeraraghava Aiyar to investigate the case, he pointed out that this objection to his evidence was not taken at the time. He submitted that Veeraraghava Aiyar as a member of the Criminal Investigation Department was a competent authority to investigate the case.

[WALLIS, J.—Searching does not include investigating.]

Mr. Johnson had actually arrested a person.

[SUNDARA AYYAR, J.—Mr. Johnson was a competent authority, being the Assistant Superintendent of Police, but was Veeraraghava Aiyar a competent authority within the meaning of section 157?]

The Inspector was an officer of the Criminal Investigation Department and as such had authority to investigate throughout the whole Presidency. The fact which he was directed to investigate was one relating to the murder of Mr. Ashe. The Police Act (XXIV of 1859), sections 1, 9 and 21, showed that directly he was appointed he became entitled to investigate throughout the Presidency until he was confined to the exercise of his powers within a specified area. Only appointment to an area could restrict the police officer's powers, for the Criminal Procedure Code did not limit the power given by the Police Act.

T. M. Krishnasami Aiyar, in reply, submitted upon the third point that the Criminal Investigation Department had no power to investigate a particular case unless a local area was assigned to the department. In the present case, the Inspector was not competent to summon witnesses, and he was therefore not an authority competent to investigate the case. If the provisions of the Criminal Procedure Code were known to be taken as conferring powers, that would go a long way to show that section 25 of the Police Act was not intended to confer any powers on the police, but only to enable them to perform certain duties. The mere fact that a superior officer asked an ordinary police officer to do the particular act of apprehending a person which any other man under the Criminal Procedure Code would be entitled to do was not the power contemplated by section 157. The power contemplated by that section was an act done in the course of an investigation of a fact

which the person doing such act was legally competent to investigate.

The argument of the Acting Advocate-General that the powers of investigation need not necessarily be looked for in the Criminal Procedure Code but might be inferred from section 21 of the Police Act (24 of 1859) was based on a misapprehension of section 21 and the purposes for which the Police Act came to be passed. As the preamble indicated that Act was passed for the purpose of making the police force a more efficient body in helping Magistrates to keep the King's peace.

Section 21 was enacted to define in a general way the duties of police officers. It was not intended by that section to confer upon the police any powers and this was made clear by a perusal of sections 22 to 43 of the Police Act which gave the police officers certain powers such as arresting offenders without warrant in certain cases, entering public houses, etc.

The words of the very next section made it clear that the legislature kept apart the powers and the duties of police officers and, while section 22 made it the duty of a police officer to arrest certain offenders without warrant, it further went on to provide that the police officer in those cases was authorised to arrest.

[ABDUR RAHIM, J.—Drew his attention to section 44 of the Act.]

The provisions of that section which provided for penalties to be imposed on police officers in case of breach of duty made it clear that the object of that enactment was not to empower police officers but to define their duties and to grant them powers in express terms where the legislature thought advisable.

The scope of section 21 therefore was limited only to a general statement of the duties of police officers and a power to investigate could not be extracted from that section where the same power could not be otherwise found in other provisions of law.

Further it would be imputing to the legislature an ignorance of the meaning of section 21 if it were to be supposed that section 21 granted powers of investigation to all police officers. There was really no purpose in the provision of the Criminal Procedure Code which empowered police officers to investigate into offences under given conditions if independently of the Code of Criminal Procedure any police officers could be said to have a power to investigate under section 21 of the Police Act.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Again while the provisions of the Criminal Procedure Code would go to show that in defined local areas the power to investigate into offences was confined to certain grades of police officers it was hard to presume that such power was conferred on police officers of any grade throughout the Presidency.

The effect of the Advocate-General's contention would be that until the amending Act, 1895, the village kavalkars and kattupudies who were included in the definition of the word police, as the Police Act originally stood, had full powers of investigation over all offences all through the Presidency. The vakil submitted therefore that the Police Act could not be evoked for the purposes of giving a power to investigate to Inspector Veeraraghava Aiyar.

Further the powers that were expressly given to the police officers under the Police Act of 1859, sections 22 to 43, were incorporated into the provisions of the Criminal Procedure Code Act 25 of 1861 and as soon as the latter Act was passed Act 17 of 1862 repealed sections 22 to 43 of the Police Act of 1859, referring to the Criminal Procedure Code of 1861 for the powers of the Police and Magistrates in respect of offences. Thus it was clear that the powers of the police ought to be looked for in the Criminal Procedure Code.

The Inspector would be an investigating officer within the meaning of section 551, Criminal Procedure Code, if he was appointed to any local area but he was not so appointed.

[WALLIS, J.—Does not the Government Order conferring powers on the officers of the Criminal Investigation Department generally to assist the police throughout the Presidency have the effect of appointing them to the whole area?]

That order was not sufficient authority to investigate. That order dealt with the relations between the local authorities and the Criminal Investigation Department and until the members of that department were appointed to a particular local area they were to be regarded as no more than the agents of the Deputy Inspector-General of Police. Mr. Thomas gave evidence to the effect that Mr. Venkoba Rao, Deputy Superintendent, had been deputed to investigate the case and Inspector Veeraraghava Aiyar was not mentioned by Mr. Thomas as one of the persons authorised to investigate the case. Besides the duties which members of the Criminal Investigation Department could perform under the

provisions of the Police Act, the Criminal Procedure Code conferred no powers on them to investigate cases unless appointed to any particular area.

[ABDUR RAHIM, J.—As a member of the Criminal Investigation Department, he has powers to assist the police in detection of crime.]

That power to assist did not include the powers of investigation.

As regards the fourth point he submitted that an admission became a confession when the person making it was accused of an offence and not before. He referred to *Emperor v. Harisingh Ganpatsingh*(1). Here the approver Arumugam (prosecution witness No. 6) had actually been arrested and therefore his statement amounted to a confession. He referred to the evidence of the approver to show that he admitted being arrested by the Inspector Veeraraghava Aiyar.

[ABDUR RAHIM, J.—In a case of defamation with which the police have nothing to do would the statement made by the accused amount to a confession?]

It would be a confession.

Criminal Miscellaneous Petitions Nos. 68 to 72 and 76 of 1912 coming on for hearing on the 7th, 8th, 11th, 12th, 13th, 14th, 15th, 18th, and 20th days of March 1912; upon perusing the petitions, the certificate of the Advocate-General, dated the 27th February 1912, the judgments of the Special Bench and the records in the case; and upon hearing the arguments of Mr. B. Narasimha Rao, counsel, and Mr. T. M. Krishnaswami Ayyar, vakil for the fourth and fifth accused, Mr. L. S. Veeraraghava Aiyar for Mr. N. K. Ramasami Ayyar, vakil for the sixth accused, the Hon. Mr. L. A. Govindaraghava Ayyar and Mr. L. S. Veeraraghava Aiyar, Vakils for the seventh accused, Mr. T. M. Krishnaswami Ayyar, Vakil for the eighth accused, Mr. M. D. Devadoss, Counsel, and Mr. E. S. Chidambaram Pillai, vakil for the third accused, and of the Hon. Mr. C. F. Napier and the Hon. Mr. T. Richmond, Counsel on behalf of the Crown; and the petitions having stood over for consideration till this day and having been set down to be spoken to this day; and further arguments of the Hon. Mr. L. A. Govindaraghava Ayyar and

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Mr. M. D. Devadoss having been heard; and Criminal Miscellaneous Petitions Nos. 79 and 80 of 1912 coming on for orders this day in the presence of Mr. T. Prakasam, counsel for the second and the fourteenth accused, the Court delivered the following

JUDGMENTS (BENSON, J.).—In this case fourteen persons were tried by a Special Bench of this Court, constituted under section 6 (b) of the Indian Criminal Law Amendment Act, 1908, for an offence punishable under section 121-A, Indian Penal Code (conspiring to commit certain offences against the State), and also with abetting the murder of Mr. Ashe. The Special Bench acquitted all the accused on the latter charge. The majority of the Court (Sir ARNOLD WHITE, C.J., and AYLING, J.) convicted the first seven and the fourteenth accused of the offence charged under section 121-A and acquitted the remainder. The third Judge of the Special Bench (SANKARAN-NAIR, J.) convicted the first, second, sixth and fourteenth accused and acquitted the remainder. The late Advocate-General has given a certificate under clause 26 of the Amended Letters Patent of 1865 to the effect that the decision of the Court on certain specified points of law requires further consideration. The present Advocate-General, who, as Public Prosecutor, appeared for the Crown at the trial, raises a preliminary objection that the Letters Patent do not authorize the grant of a certificate in a case tried by a Special Bench appointed under the Indian Criminal Law Amendment Act of 1908. His contention is that cases under the Act must be dealt with in accordance with the special procedure prescribed by the Act and that there is no provision in it for a review of judgment either on a certificate from the Advocate-General or otherwise. The Act, however, does not profess to lay down complete rules of procedure: the ordinary procedure has to be followed except in so far as it is modified by the Act: there is nothing in the Act to modify the ordinary procedure in this particular respect: clause 26 of the Letters Patent gives power to the High Court on the Advocate-General's certificate to review in every case mentioned in clause 25 of the Letters Patent, *i.e.*, in "any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more of the Judges of the said High Court." The present trial satisfies these conditions and is therefore open to review on a certificate granted by the Advocate-General.

The points of law which are certified as requiring further consideration are stated as follows in the certificate of the Advocate-General:—

1. "That in my judgment the opinion of the majority of the Court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the Court to convict on the uncorroborated testimony of an accomplice if the Court was satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether section 133 of the Indian Evidence Act read with section 114, illustration (b), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances.

2. "That in my judgment the opinion of the majority of the Court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial should be further considered.

3. "That in my judgment the opinion of the majority of the Court that the statements made by prosecution witness No. 6 and prosecution witness No. 12 to prosecution witness No. 31 were made to an authority legally competent to investigate the facts within the meaning of section 157 of the Indian Evidence Act, should be further considered.

4. "That in my judgment the opinion of the majority of the Court that the statements of prosecution witness No. 6 and prosecution witness No. 12 to prosecution witness No. 31 were not rendered inadmissible by reason of the provisions of section 25 of the Indian Evidence Act, should be further considered.

5. "That in my judgment the opinion of the learned Judges that, while the statements made by a person to a police officer in the course of an investigation and taken down in writing may not be proved by the production of the writing, they may be proved by oral evidence, requires to be further considered."

The facts of the case, so far as is necessary to understand the questions raised, may be briefly stated as follows:—

The accused are alleged by the prosecution to have conspired at various places between January 1910 and 17th June 1911 with certain persons not now before the Court, *viz.*, with one Vanchi

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Iyer, who is proved to have shot himself on the 17th June 1911 immediately after murdering Mr. Ashe (who was then District Magistrate of Tinnevely), one Dharmaraja Iyer, who is now dead (the case for the Crown being that he committed suicide) and one Madasami who has absconded, and also with three others, Arumugam, Somasundaram and Ramasami Aiyar, who were given a pardon under the usual conditions and taken as approvers and called as witnesses (Nos. 6, 12 and 16) for the prosecution in this case. The approvers have given evidence as to a certain treasonable society founded by the first accused, Nilakanta, of which they were all members. They have also given evidence of meetings of the society at Tenkasi and Tuticorin and elsewhere attended by the accused, and there is no question, but that, if the accused were present at these meetings and took the "blood oath" as alleged by the approvers, they are guilty. The chief evidence against the accused is the evidence of the several approvers. They are admittedly accomplices. The questions of law that have been raised relate to the legal validity of an accomplice's evidence, if uncorroborated, and to the admissibility and legal effect of certain statements made by two of the accomplices (Arumugam and Somasundaram) in this case prior to the trial. The following are the circumstances under which the statements were made: Mr. Ashe was murdered for political reasons by Vanchi Iyer on 17th June, and Vanchi immediately afterwards shot himself. When his house at Shencottah was searched next day (18th), certain letters were found which showed that Arumugam (prosecution witness No. 6) was in communication with him; so on the evening of the next day (19th) immediately after the arrival of Mr. Thomas, the Deputy Inspector-General of the Criminal Investigation Department, a party of police was despatched to Tuticorin to search his house. The party was in charge of Mr. Johnson, Assistant Superintendent of Police, a gazetted officer of three years' standing and of Veeraraghava Aiyar (prosecution witness No. 31), an Inspector of the Criminal Investigation Department who had just arrived with Mr. Thomas from Madura. Having arrived at Tuticorin the party surrounded the house of Arumugam about two hours after midnight and sealed it with a view to search it after daybreak. Arumugam was awakened and told that his house would be searched in connection with the murder and he was asked if he knew anything about it. He then offered to tell

all he knew, and his statement was thereupon taken and recorded in the Inspector's note-book. On information given by Arumugam, the house of Somasundaram (prosecution witness No. 12) was searched the next day, and he in like manner made a statement to Veeraraghava Aiyar, which was recorded by him. Three days later, both these men made statements substantially to the same effect to Mr. Cox, the Magistrate, which he recorded under section 164, Criminal Procedure Code. At the trial before the Special Bench, which began in the following September and went on for some months, Arumugam and Somasundaram were examined as witnesses for the prosecution and gave evidence, as already stated, involving not only their own guilt, but also the guilt of several of the accused who took the "blood oath" at the treasonable meetings held at Tenkasi and Tuticorin. In order to corroborate this evidence of the accomplices, given at the trial, the prosecution relied on the statements recorded by the Magistrate, Mr. Cox. They also called the Inspector, Veeraraghava Aiyar, to give evidence of the statements made to him by the accomplices. The defence objected to this evidence as inadmissible but the majority of the Special Bench held that the Inspector might give oral evidence of the statements made to him, but could not use the writing in his note-book as evidence. The learned Judges of the Special Bench state in their judgments that the extent to which, and the conditions under which, the evidence of accomplices should be acted upon was the subject of much argument and contention before them, and their judgments show that they considered the various questions raised with the greatest care and came to their conclusions after a full examination not only of the codified law of India, but also of the case law of the courts in England and India relating to the questions raised.

I will now turn to the five points of law which the Advocate-General certifies should be further considered.

The *first* is thus stated—

"The opinion of the majority of the court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the court was satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether section 133 of the Indian Evidence Act read with section 114, illustration (b), does not merely intend to lay down that a conviction upon

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." The substantive provision of the Indian Code Law is contained in section 133 of the Indian Evidence Act, 1872, which, in explicit terms, declares that "an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." But with this section it is also necessary to bear in mind section 114 which provides that "the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." To assist the courts in applying the general words of this section, various illustrations are appended to it. One of these relates to accomplices, and it is stated as follows: "The court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But the Court shall also have regard to such facts as the following, in considering whether such maxim does or does not apply to the particular case before them: A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself." And again, "a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable." In my opinion there is nothing in the illustration (b) to section 114 which overrides, or renders nugatory, the plain and explicit declaration contained in section 133, or which requires us to hold that the evidence of an accomplice must always, and in all circumstances, be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the court to act on such evidence, even when the court believes it to be perfectly true. The very terms of the illustration itself appear to be intended to guard against such an interpretation. The words are "the court may presume" (not "the Court shall presume") "that an

accomplice is unworthy of credit, unless he is corroborated in material particulars." But it then adds a caution to show that the presumed unworthiness is not a rule of universal application. It styles the presumption "a maxim," not a rule of law, and says, "but the court shall also have regard to 'certain facts' in considering whether such maxim does or does not apply to the particular case before it." It then refers to the case of a person of the highest character giving evidence of an offence committed by the negligence of himself and another person of equally high character. The witness is an accomplice, and he is not corroborated in any particular, still less in material particulars; yet the court should have regard to various circumstances, viz., the high character of the witness, and of the accused, and the nature of the offence alleged, and would be at liberty to refuse to draw any presumption against the credibility of the witness, even though his evidence stood alone and uncorroborated.

Judges do, no doubt, ordinarily regard the evidence of accomplices with great suspicion, and rightly so, for reasons which are so manifest and so often stated that it is unnecessary to restate them here, and judges do ordinarily require corroboration in material particulars before they will act on the evidence of an accomplice. It is the duty of the Judge to explain to the jury the taint and infirmity which ordinarily attach to the evidence of an accomplice, and to remind them that they may presume that his evidence is unworthy of credit unless corroborated in material particulars. But it is also his duty to refer to any circumstances or facts (such as those referred to in the illustrations to section 114) which show that the presumption should not be drawn in the particular case or which rebut the presumption, if drawn, and he should instruct them that if, having scrutinized the evidence of the accomplice with care and caution, and having considered it in the light of the circumstances in which it was given, and all other circumstances, tending to show its truth or falsehood, they believe it to be true, they should act upon it, even though there may be no corroboration of it in the strict sense of the word, but that if they are not satisfied of its truth they should refuse to act upon it.

This is, in effect, how the majority of the Special Bench have laid down the law. In my opinion they have correctly stated the law as laid down in the Indian Evidence Act, and in the Indian and English cases quoted by them: *Reg. v. Ramasami*

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Padayachi(1), *Ramaswami Gounden v. Emperor*(2), *Queen-Empress v. Gobardhan*(3), *Reg. v. Boyes*(4), *Reg. v. Gallagher*(5) and *Rex v. Tate*(6).

The suggestion made in the latter part of the Advocate-General's first point, if I understand it aright, is that the presumption of untrustworthiness must always, and in all circumstances, first be drawn, and the evidence cannot in any case be acted upon unless "*special circumstances*" are found which rebut the presumption. I think this way of stating the law is less accurate than that adopted by the majority of the Special Bench and might possibly mislead juries by leading them to think that circumstances affecting their judgment should be technically divided into two classes, special and non-special or ordinary, and that unless a circumstance could be technically labelled "*special*" it should not be at all considered by them. Section 114 speaks simply of "*facts*" not "*special circumstances*," and the caution attached to illustration (b) merely says "the court shall also have regard to such *facts* as the following" not "*special*" facts or "*special*" circumstances. Any fact which is admissible as evidence, and which is duly proved, may, in my opinion, be considered for what it is worth, without attempting to classify it as a "*special*" or non-special fact. In this connection, however, it may be stated that the majority of the Special Bench do, in fact, refer to a number of what may well be called special circumstances, which powerfully influenced their opinion as to the credibility of the accomplice witnesses. It is, therefore, difficult to understand what practical purpose was to be served in the present case by the further consideration of the first question raised by the certificate of the Advocate-General.

In dealing with the first point in the Advocate-General's certificate, Mr. Govindaraghava Aiyar, on behalf of the accused, desired to argue that the view of the majority of the Special Bench as to what constitutes "*material particulars*" in illustration (b) to section 114 is incorrect. We, however, were unanimous in holding that no such question was raised in the certificate of the Advocate-General and that it was not open to the accused's pleader to argue

(1) (1878) I.L.R., 1 Mad., 394.

(2) (1904) I.L.R., 27 Mad., 271 at p. 290, *per* Bhaashyam Aiyangar, J.

(3) (1887) I.L.R., 9 All., 528 at p. 554, *per* Edge, C.J.

(4) (1861) 9 Cox., C. C. 32, *per* Cockburn, C.J.

(5) (1883) 15 Cox., C. C. 291, *per* Coleridge, C.J.

(6) (1908) 2 K.B., 680, *per* Lord Alverstone, C.J.

any question of law not raised in the certificate. Mr. Govindaraghava Aiyar contended that as soon as a certificate was granted in regard to any point of law the whole case was opened up for consideration under clause 26 of the Letters Patent. That clause is as follows: "On its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." I do not think that these words can be held to open up the whole case as if on appeal, for clause 25 enacts that there shall be no appeal. The grant of the certificate no doubt gives the Court "power and authority to review the case or so much of it as may be necessary," that is, in my opinion, "necessary" in order to determine the point or points of law raised. This is clear from the words "and finally determine *such* point or points of law" which follow the word "necessary"; after the point or points of law have been finally determined, then, or to use the word in clause 26 "thereupon," the Court may alter the sentence and pass such judgment and sentence as may seem right; and the Court may, of course, then go into the case so far as is necessary in order to enable it to do this correctly. When the case has reached that stage, then the Court has to be guided by section 167 of the Indian Evidence Act which enacts that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." This view is in accordance with the judgments of Beaman and Devar, JJ., in the case reported in *Emperor v. Narayan Rughunath Patki*(1), where the question is fully discussed.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1908) I.L.R., 32 Bom., 111.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Turning now to the *second point* in the Advocate-General's certificate, it is stated as follows: "In my judgment the opinion of the majority of the Court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial, should be further considered." There were two sets of previous statements of Arumugam and Somasundaram admitted at the trial, viz., (1) their statements to Inspector Veeraraghava Aiyar and (2) their statements, four and three days respectively later, to the same effect to the Magistrate, Mr. Cox, recorded by him, under section 164, Criminal Procedure Code. I think that the opinion of the majority of the Full Bench on the question of their admissibility is right. The law on the subject is contained in section 157 of the Indian Evidence Act, 1872, which reproduces in a simplified form the provision in section 31 of Act II of 1855 and enacts that "in order to *corroborate* the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved." This section, which differs widely from the English law, expressly states that a former statement made by a witness may, if made under the conditions stated in the section, be proved in order to *corroborate* the evidence of the witness at the trial. No exception is made in the section, or elsewhere in the Act, so as to exclude such former statements in the case of a witness who is an accomplice. It was contended in the argument that the general rule as to the admissibility of former statements laid down in section 157 is limited in the case of accomplices by a special rule to be inferred from illustration (b) to section 114. It may, however, be doubted whether such a method of reasoning is not contrary to accepted canons of interpretation. It seems unreasonable to hold that the express rule of law stated in section 157 can be limited by a maxim which is not of universal application. The validity of the suggested reasoning depends on an assumption that the Court must always, and in all circumstances, presume that an accomplice is unworthy of credit, whereas we have seen in dealing with the first point certified by the Advocate-General that there may be circumstances in which the Court would be justified in not drawing the presumption. The illustration itself gives an instance of such a case. In such a case it is impossible to see any reason why the evidence of the accomplice witness should not be

corroborated by a previous statement to the same extent and subject to the same conditions as in the case of a witness who was not an accomplice. I do not think that there is anything in the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in section 157, nor can it be suggested that "corroborate" is used in section 157 in a different sense from that in which it is used in illustration (b) to section 114. The former statement of an accomplice is, therefore, legally admissible to corroborate his testimony at the trial and the weight to be attached to it, or, in other words, how far it does really corroborate the evidence given at the trial must vary with the facts of each case. No hard-and-fast rule, capable of mechanical application, can be laid down. In the great majority of cases, it would, no doubt, be found to be merely the repetition of tainted evidence affording no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand, if there was evidence, or even a suggestion, put forward by the defence that the evidence given by the witness at the trial was the result of recent influences brought to bear upon him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before the influences relied on by the defence had been brought to bear upon him. For example, take the accomplice, Arumugam, in the present case. He gave evidence at the trial involving several other persons beside himself, and stating various particulars about the treasonable meetings which they attended. If the prosecution proposed to corroborate that evidence by proof of a former statement made months after his arrest, and when the police had collected their other evidence, and had, in fact, completed the scheme of the case to be proved against the accused, it is obvious that the former statement would add no strength to, would be no real corroboration at all, of the evidence of the witness at the trial. But, is not the case very different when, as was found by the majority of the Special Bench, it appears that Arumugam first told the same story at a time, and under such circumstances, as to entirely negative the idea that it was either falsely concocted by himself or suggested to him by the police; when it appears that the story told was not what the police wanted at that time, nor was such as was supported by the evidence then in their hands, nor was such as would have been concocted by Arumugam

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

either of his own motion, or in consultation with Madasami or Somasundaram, if he was anxious to protect himself or them from prosecution for complicity with Vanchi Aiyar in the murder of Mr. Ashe, nor was such as Arumugam's previous relations with the persons then named would render probable? Is it not unreasonable to say that those and similar matters referred to by the majority of the Special Bench ought not to have been considered in judging whether Arumugam was a truthful witness or not? So, too, if there was reason to think that owing to the lapse of time the memory of a witness at the time of the trial could not be wholly relied on, the fact that he had made a statement to the same effect when the facts were fresh in his memory would be highly relevant in corroboration of the evidence at the trial. The rule, then, would seem to be that the former statements are legally admissible, and may be considered for what they are worth, but that the weight to be attached to them depends entirely on the facts of each case. The point raised in the Advocate-General's certificate is whether such statements "can legally amount to corroboration of the evidence given at the trial." It is not clear whether this means "are legally admissible as corroboration" or whether it means "can legally amount to corroboration in material particulars within the meaning of illustration (b) to section 114." If it means the former, I have stated the answer above. If it means the latter, I do not think that the question is one that arises in this case.

In the argument before us it was assumed by the pleaders for the defence, that Arumugam and Somasundaram were found by the majority of the Court to be unworthy of credit by reason of their being accomplices, and that it was, therefore, necessary to find that they were corroborated in material particulars within the meaning of section 114, illustration (b), before their evidence could be relied on, and that the former statements made by them were used as such corroboration. I do not think that this is a correct view of the judgment of the majority of the Special Bench. I do not anywhere find that they arrived at the conclusion that the approvers were untruthful witnesses. On the contrary they distinctly arrived at the conclusion that they were truthful witnesses. In arriving at this conclusion they state that they were influenced by the demeanour of the witnesses, and by the way in which they stood the test of cross-examination. They say

that each of these witnesses "was subjected to the most rigorous and searching cross-examination at the hands of one after another of the ten learned counsel and vakils appearing for the defence for periods extending over two or three days" and that though the cross-examiners had the advantage of being able to compare their evidence at the trial with three prior statements (viz., those made before Veeraraghava Aiyar, and before Mr. Cox, and before the Committing Magistrate) "the prolonged cross-examination did not succeed in breaking down the evidence of any of the three approvers," and conclude by saying, "we do not consider that there is anything in the evidence of the witnesses inconsistent with its substantial truth." They had previously referred to the circumstances under which the approvers made their first statements, especially the intrinsic evidence of truthfulness to be derived from the very nature of the facts stated. They pointed out that the circumstances under which the statements were first made strongly negatived the idea that they were the result either of concoction by the witnesses themselves or of suggestion by the police; that the story told was not what the police wanted, and that the persons implicated were not those that would probably have been implicated if the police had suggested the statements or wished to obtain evidence to fit in with the letters then in their hands. They also pointed out that the story told was not such as would have been concocted by Arumugam either by himself or in consultation with Madasami or Somasundaram in order to save themselves from prosecution for complicity with Vanchi Aiyar in the murder of Mr. Ashe. They also considered that the conduct of Arumugam in not destroying the highly seditious literature found in his house, and his previous relations with the persons accused as conspirators, negatived the idea of the story having been concocted by the witnesses. In view of all the circumstances in which the statements were made and the inferences to be drawn from the nature of the statements and the conduct of the witnesses themselves, the majority of the Special Bench found it "impossible" to believe that the statements were "tutored" by the police or "concocted" by the witnesses themselves. If the evidence was not "tutored" by the police or "concocted" by the witnesses themselves, there would be no reason for regarding it as other than truthful in the ordinary sense, that is truthful so far as the witnesses themselves knew and believed, though, of course, the

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

witnesses might make an unintentional mistake like any other honest witnesses. This view is not inconsistent with the fact that the majority of the Special Bench acquitted the 9th and 13th accused, though they were apparently implicated by the approvers, Ramasami and Arumugam respectively. It will be seen that they were acquitted, not because the approvers were found to be intentionally giving false evidence against them, but because there was a doubt in each case as to whether the accused was the person really referred to by the approver as present at the meetings.

It is clear, then, that the majority of the Special Bench, for reasons stated, came to the conclusion, that the accomplice witnesses were truthful witnesses and were not unworthy of credit so as to require corroboration in material particulars, if that phrase is to be interpreted (as some of the cases do interpret it) as requiring that the corroboration should be by the evidence of independent witnesses. We have already seen, in dealing with the first point raised by the Advocate-General, that corroboration is not legally necessary if there are circumstances which lead the court to the conclusion that the witness though an accomplice is a truthful witness.

The question, then, "whether the previous statement of an accomplice can legally amount to corroboration in material particulars of the evidence given at the trial within the meaning of illustration (b) to section 114" is one that is not expressly raised by the certificate of the Advocate-General, nor do I think that it is one which it is necessary to consider in order to decide the questions raised by him, or the correctness of the judgment of the majority of the Special Bench. I have already shown how the former statements have been used in their judgment to corroborate the evidence of the witnesses given at the trial, and I have expressed the opinion that they were admissible under section 157 and were properly used.

If, however, it is necessary in this case to determine whether the phrase "material particulars" in illustration (b) to section 114 is to be regarded, as in some sense, a technical expression implying corroboration by independent or untainted evidence, I am unable to go so far and to say that as a matter of law the previous statement of an accomplice can never amount to corroboration in material particulars.

The pleader for the defence relies on the cases reported in *Reg. v. Malapabin Kapana*(1), and *Queen Empress v. Bepin Biswas*(2). In the former it was said, at page 197, that the previous statement of an accomplice "can scarcely be said to answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed." In the latter, the Judges refer with approval to the Bombay case, but add at page 974, "It is not necessary for us to consider whether the rule should be extended as far as to exclude a statement made before arrest, but we have no doubt at all that the exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence, such as we ordinarily require to make it safe to convict any particular prisoner." It is clear that the Judges in that case did not lay down any such absolute rule as is now suggested by the pleaders for the defence.

If there are some circumstances in which a prior statement may amount to sufficient corroboration, we cannot say as a matter of law that a prior statement can never be corroboration in material particulars, though, no doubt, in the great majority of cases, it will be found that the prior statements do not add anything to the credibility of the evidence given at the trial. As I have already said, how far a prior statement does corroborate evidence given at the trial is a matter to be determined by the jury (or, where there is no jury, by the Judge), on a consideration of all the facts of the case including the time when, and the circumstances in which, the former statement was made, and the facts related in the statement, considered in their relation to the knowledge of the speaker at that time and all the surrounding circumstances.

It may be added that very little light as to the application of section 157, can be gained from a consideration of English cases, since the English law has no rule similar to that in section 157 and is generally unfavourable to the admission of former statements of a witness to corroborate his evidence at the trial, though permitting it in certain cases.

The third, fourth and fifth points certified by the Advocate-General relate to three objections that were taken to the admissibility of the statements made by the accomplices, Arumugam and Somasundaram, to Veeraraghava Aiyar. It may be stated at

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1874) 11 Bom. H.C.R., 196.

(2) (1884) I.L.R., 10 Cal. 970.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

once that the admissibility or inadmissibility of those statements cannot make any difference in the decision of the present case, since the majority of the Special Bench who admitted the statements expressly say that they find it impossible to believe that the statements were either tutored or concocted, even if the witnesses' statements to Veeraraghava Aiyar are discarded and if regard is paid only to their statements recorded, four and three days respectively later, to the same effect, by Mr. Cox, the Magistrate, under section 164, Criminal Procedure Code, the admissibility of which is not, and cannot be, disputed. As, however, the questions are raised in the Advocate-General's certificate and are of great general importance, I will state my opinion in regard to each of them.

The objection referred to in the *fifth point* depends on the construction of section 162 of the Criminal Procedure Code and may be very shortly dealt with. All the Judges of the Special Bench are agreed as to the proper construction of that section. The same construction was placed upon it in the recent case of *Fanindranath Banerjee v. Emperor* (1). The words of the section are clear. I agree with the conclusion arrived at by all the Judges of the Special Bench, and for the reasons stated in their judgments.

The *third point* may also be shortly disposed of. The question is whether Veeraraghava Aiyar was an authority "legally competent" within the meaning of section 157 of the Indian Evidence Act, to investigate the facts in relation to which the former statements of Arumugam and Somasundaram were made, that is, the facts relating to the murder of Mr. Ashe. It was contended before us that the words "competent to investigate" must refer exclusively to the persons competent to hold the police investigation into an alleged offence under chapter 14 of the Criminal Procedure Code. But I do not think that this view is correct. The words in the Evidence Act are perfectly general, "competent to investigate the fact"—Can it be supposed, for instance that a statement made before a civil court relating to some fact, the existence of which the court was legally competent to try, and otherwise relevant under section 157 of the Indian Evidence Act in a subsequent criminal trial, could be shut out on the ground that the word

(1) (1909) I.L.R., 36 Calc., 281.

"investigate" would not include a trial by a civil court? I take it that the answer must be in the negative. It is unfortunate that there was no adequate inquiry before the Special Bench as to how far Inspector Veeraraghava Aiyar was an authority legally competent to investigate the facts relating to the murder of Mr. Ashe. The Deputy Inspector-General of his Department, Mr. Thomas, was a witness, but he was never asked any question at all as to the Inspector's competency to investigate. The result is that we are obliged to deal with the case on very imperfect information as to the facts. On the whole, however, I am inclined to hold that the Inspector was legally competent to investigate the facts relating to Mr. Ashe's murder. He was an Inspector of the Provincial Criminal Investigation Department, a branch of the Police, whose work is not confined to any particular district, but which was created "to assist in the investigation of crimes which are of such a special character that the local officers are unable to deal with them adequately without help." (G.O. No. 913, Judicial, dated 2nd July 1908). He was directed by the head of his own department (the Deputy Inspector-General) and by the local District Superintendent of Police to search certain houses, including the house of Arumugam at Tuticorin, in connection with Mr. Ashe's murder. It is not contended that his deputation for this duty was other than legal or that he was not legally competent to conduct or take part in the searches. I take it that conducting the searches was an integral part of the investigation, and legal competency to conduct the searches, carried with it legal competency to do all things properly incidental to, and connected with, the searches, and included the listening to any statements relating to the murder or those who took part in it, made by the persons whose houses were being searched.

I do not think that the words "investigate the fact" in section 157 of the Indian Evidence Act should be construed in a narrow sense so as to restrict competency to the police officer who, under chapter 14 of the Criminal Procedure Code, is charged with the investigation of an offence. I am, therefore, not prepared on the evidence before me to dissent from the view of the majority of the Special Bench that the Inspector was an officer legally competent to investigate the facts relating to Mr. Ashe's murder within the meaning of section 157 of the Indian Evidence Act. A suggestion was thrown out that "the fact" in this case

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDOU
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

must be the conspiracy, not the facts generally relating to the murder of Mr. Ashe, and it was argued that, in that view, the Inspector could not investigate it without the order of a magistrate, as it (the conspiracy) is a non-cognizable offence. This argument, I think, proceeds on an incorrect view. The Inspector was engaged in and upon the investigation of facts relating to Mr. Ashe's murder, and the statement was made to him by the person whose house was being searched and it was made as a matter "relating" to the murder. It cannot be regarded as relating only to the conspiracy and not at all to the murder.

It remains to notice the *fourth point* in the Advocate-General's certificate which is as follows:—"That in my judgment the opinion of the majority of the court, that the statements of prosecution witness No. 6 and prosecution witness No. 12 to prosecution witness No. 31 were not rendered inadmissible by reason of the provisions of section 25 of the Indian Evidence Act, should be further considered." Section 25 of the Indian Evidence Act states that "No confession made to a police officer shall be proved as against a person accused of any offence." The words of section 25 in their plain and ordinary meaning seem to me to render the statements made by the accomplices to the Police Inspector, Veeraraghava Aiyar, inadmissible. The statements are confessions: they were made to a police officer and it is now sought to use them as against some of the accused in this case. The majority of the Special Bench point out that in section 26, the confession (when made not to a police officer, but while in his custody) is expressly made inadmissible only as against the person who made it, but may be proved as against other persons and observes that as the "mischief" of the two sections is the same, section 25 also should be understood as only excluding a confession made to a police officer from being used as against the person making it. It is difficult to accept this view without putting too great a strain on the plain language of section 25. It certainly is difficult to see any satisfactory reason why the scope of the two sections should be different, but that is hardly a sufficient reason for not construing each section so as to give effect to its plain language. It seems to be especially undesirable to extend the language of section 25 beyond its plain meaning when the effect of doing so might tend to encourage those corrupt practices of the police in regard to working for

confessions which it is the policy of the law to prevent. There is much force in the observation of BATCHELOR, J., in the case reported in *Emperor v. Harisingh Ganpatsingh*(1), that a confession which is inadmissible against the person making it, ought *a fortiori* to be inadmissible against another person implicated by it. The case in *Queen-Empress v. Tribhovan Manekchand*(2), cited by Mr. Napier for the prosecution, is hardly an authority for his contention, as the present question did not arise in that case. The point that WEST, J., was enforcing was that section 25 did not refer to the use of a confession in other than a criminal proceeding, that an enquiry under section 523, Criminal Procedure Code, was not a criminal proceeding, and that a confession could, therefore, be used as an admission in an enquiry under that section.

Since writing the above, I have had the advantage of perusing the judgments which my learned brothers, WALLIS and MILLER, JJ., are about to pronounce on this question. I am much impressed by the force of the argument that may be drawn against my view from reasoning founded on the history of sections 24 to 26 which are embodied first in the Code of Criminal Procedure of 1861 and afterwards transferred without material alteration to the Indian Evidence Act of 1872, but I am still inclined, on the whole, to the opinion that effect must be given to the language of section 25, and that it renders the statements of Arumugam and Somasundaram to Inspector Veeraraghava Aiyar, inadmissible.

But as I have already pointed out this can make no difference in the decision of this case, since the majority of the Special Bench expressly stated that it is impossible to believe that the evidence of the sixth and twelfth prosecution witnesses was either "tutored" by the police or concocted by the witnesses themselves, even if the witnesses' statements to Veeraraghava Aiyar are discarded and if regard is paid only to their statements made a few days later to the magistrate, the admissibility of which is not, and cannot be, disputed. In other words the learned Judges were prepared to act on the evidence of these witnesses as truthful, apart from any corroboration derived from their statements to the Inspector. In these circumstances, it is not open to us as a court of review to go into the facts and consider whether the learned Judges ought or ought not to have arrived at that conclusion.

BENSON,
WALLIS,
MILLER,
ABDOU
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1910) 12 Bom. L.R., 899.

(2) (1885) 1 L.R., 9 Bom., 131.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

I would therefore dismiss the petitions that have been presented asking us to set aside the convictions of the accused.

WALLIS, J.:—This was a case tried before three Judges of this Court, under Act XIV of 1908, and comes before us on a certificate of the then Advocate-General pursuant to clause 26 of the Letters Patent that certain points of law which in his opinion were decided by the Judges, or, a majority of them, require to be further considered. Objection was taken at the outset by the Officiating Advocate-General that clause 26 does not apply to criminal trials before the High Court under Act XIV of 1908. Reference was made to clause 24 conferring extraordinary original criminal jurisdiction on this Court and it was contended that the accused before the Court were not "persons brought before it on charges preferred by the Advocate-General or by any magistrate or other officer specially empowered by the Government in that behalf" so as to come within that clause, but were committed to this Court for trial by a magistrate acting under the powers conferred upon him by section 6 of Act XIV of 1908. Assuming that to be so and that the jurisdiction of the Court does not arise under clause 24 but under an Act of the Indian Legislature to which the provisions of the Letters Patent are subject, I am still of opinion that the objection fails, because clauses 25 and 26 of the Letters Patent, as to points of law being reserved by the Court or certified by the Advocate-General, are perfectly general in their terms and, in my opinion, apply equally to all criminal trials before this Court whether in the exercise of its ordinary or extraordinary original criminal jurisdiction under clauses 22 and 24 of the Letters Patent or of any future statutory original criminal jurisdiction that may be conferred upon it by a competent legislature. Further, Act XIV of 1908, nowhere, says that clauses 25 and 26 of the Letters Patent are not to apply to trials under the Act and the presumption is strongly against any intention on the part of the Indian legislature to modify by implication provisions of the Letters Patent issued under an Act of Parliament. I think therefore we were bound to hear and dispose of the application for review, however much our so doing may tend to defeat the object of this special legislation, which was to ensure the speedy trial of these cases, or may further interfere with the business of the Court by withdrawing five Judges from their ordinary duties.

The Advocate-General's certificate has been granted under that part of clause 26 which empowers him to certify that "a point or points of law which has or have been decided by the said Court shall be further considered." The certificate purports to have been granted upon certain representations made to the learned Advocate-General and does not show whether the written judgments of the Court were before him. They are before us and we have to satisfy ourselves in the first place as to what was actually decided by the majority or the full Court as the case may be with reference to each of the points of law and as to whether the decision was erroneous.

The points before us arise on the Indian Evidence Act, I of 1872, and, as the learned Officiating Advocate-General has argued, it is undoubtedly our duty in construing that Act, which is in the nature of a Code, to follow the language of the sections of the Act, so far as they are clear, and, only in cases of ambiguity or obscurity, to fall back upon the English law upon which it was based.

The certificate as to the *first point* is as follows:—

"That in my judgment the opinion of the majority of the Court, that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the Court to convict on the uncorroborated testimony of an accomplice if the Court was satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether section 133 of the Indian Evidence Act read with section 114, illustration (b), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances."

As to this, I am of opinion that the proposition that it would be open to the Court to convict on the uncorroborated testimony of an accomplice in the sense and in the terms in which it is stated in the judgment of the majority of the Judges is correct and does not amount to an error in law. Section 114 of the Indian Evidence Act authorises the Court to make certain presumptions of fact. Nine well-known maxims are there given as illustrations of the section, the second of which is "the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars." They are all presumptions which may

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

naturally arise, but the legislature by the use of the word "may" instead of "shall," both in the body of the section and in the illustrations, shows that the Court is not compelled to raise them but is to consider whether, in all the circumstances of the particular case, they should be raised. To make this clearer still, there is the additional provision: "But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it," and then as to each of these maxims, instances are given of facts in which the maxim is inapplicable, and, in the case of the maxim now in question, there are two such instances. Now, if section 114 stood alone, I do not see how it could be said that it was not open to the Judges of fact in the particular case, whether judge or jury, to apply or not apply any of these maxims, having regard to all the facts of the case before them; and this is expressly stated by the draftsman, the late Sir Fitzjames Stephen, in his Indian Evidence Act, at page 174, "Finally it declares in section 114 that the Court may in all cases whatever draw from the facts before it whatever inferences it thinks just." But as regards the particular maxim, section 114 does not stand alone, because section 133 provides that "a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." If the law was so laid down in the Act, it was, I have no doubt, because it was the English law as understood at the time and had been the law ever since the decision of *Atwood's case*(1) by the twelve Judges at the close of the eighteenth century and because the draftsman and the legislature were not prepared with anything to substitute for it. They were not of course unaware of the well-established practice of the courts in England and India according to which, to use the language of Sir Fitzjames Stephen in article 121 of his Digest of the Law of Evidence, published in 1876, "when the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the Judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so." The adoption of the practice in England may be traced in *R. v. Wells*(2), *Rex v. Noakes*(3),

(1) (1787) 1 Leach C. C., 464.

(2) (1829) 1 M. and M., 326.

(3) (1832) 5 C. and P., 326.

Rex v. Addis(1), *Rex v. Webb*(2), *Rex v. Neal*(3), *Rex v. Moores*(4), and *Regina v. Farler*(5), where it is said to deserve all the reverence of law. In these cases the Judges told the jury they ought not to convict on the evidence of accomplices, whether one or more, unless it was confirmed or corroborated not only as regards the offence generally but as regards the particular accused, but the decision was invariably left to the jury; and in *Reg. v. Mullins*(6) MAULK, J., pointed this out and observed that these directions to the jury were not directions on points of law which the jury were bound to adopt but observations respecting facts to assist the jury in their endeavour to judge of the facts. Then in *Reg. v. Stubbs*(7) the Court of Crown Cases Reserved held that the omission of the Court to warn the jury that they ought not to convict one of the accused, as to whom the evidence of the accomplices was not corroborated, was only a departure from the usual practice, which was again stated by the Judges, and did not involve any question of law on which the Court of Crown Cases Reserved could review the case under 11 and 12 Vict., Cap. 78. The law was laid down precisely in the same way by the Court of Queen's Bench in *Reg. v. Boyes*(8) and by Lord COLERIDGE, L.C.J., sitting with BRETT, M. R. and GROVE, J., at the Central Criminal Court for the trial of Gallagher, *Reg. v. Gallagher*(9) and by CAVE and COLLINS, JJ., in *In re Meunier*(10). Under the larger powers now given by the Act, 1907, the Court may now treat a failure to comply with the well-established practice of directing juries as to how the evidence of accomplices is to be regarded as having involved a miscarriage of justice within the meaning of section 4, *Rex v. Tate*(11); but this in no way affects the authority of the above decisions; nor are they affected by the fact stated by Sir Alfred Wills in his "Circumstantial Evidence," at page 365, that in one case Baron Bramwell and in another he himself withdrew the case from the jury when there was no corroboration and directed an acquittal. In India at any rate such a course would be a direction at variance with the provisions of the Indian Evidence Act.

(1) (1834) 6 C. and P., 388.

(2) (1834) 6 C. and P., 595.

(3) (1835) 7 C. and P., 168.

(4) (1836) 7 C. and P., 270.

(5) (1837) 8 C. and P., 106.

(6) (1848) 7 St. Tr., N.S., 1111 Appx. A.

(7) (1855) Dearsly C.C., 555.

(8) (1861) 9 Cox C.C., 32.

(9) (1883) 15 Cox. C.C., 291.

(10) (1894) 2 Q.B., 415.

(11) (1908) 2 K.B., 680.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

As regards the practice in India it has been observed that the danger of acting on the uncorroborated evidence of accomplices is even greater than in England; and before the passing of the Indian Evidence Act is was held by a full Bench of the Calcutta High Court in *Elahee Buksh's* case(1) on a review of the English authorities that a failure to direct the jury in accordance with the practice was a misdirection on which the conviction could be set aside. With regard to the effect of the Indian Evidence Act on the practice: I cannot altogether agree with the observation which has been sometimes made that the practice was embodied in section 114, illustration (b). The legislature might, of course, have enacted that no one should be convicted on the evidence of accomplices "unless corroborated in some material particular by evidence, implicating the accused," as in 48 and 49 Vict., Cap. 69; but this would have been a serious departure from the law as previously understood both in England and in India and in my opinion the legislature were not prepared to go so far but were content with enacting the maxim as ordinarily applicable, whilst leaving it to be applied or not according to the circumstances of the particular case. They must, however, I think, have contemplated that the law as declared rather than newly enacted in the section would continue to be applied under the safeguard of the practice; and it is not, I think, surprising that the practice should have continued unaffected by the passing of the Act, as appears from the Indian cases which are fully reviewed in the judgment of Mr. Justice SANKARAN-NAIR. The practice, it must be borne in mind, was one of advising the jury not to convict on the uncorroborated evidence of an accomplice, leaving it to them whether to follow the advice or not, a liberty they undoubtedly possess under section 114 read with section 133 of the Indian Evidence Act. The same degree of liberty must necessarily be reserved where the Court itself is the judge of fact instead of the jury. In such a case the judge cannot be required consistently with the provisions of the Indian Evidence Act to direct himself not to convict on the uncorroborated evidence of an accomplice. All that he can be required to do is to exercise extreme caution in departing from such a well-established rule of guidance. In such a case, the learned Judges constituting the majority lay it down that it is the

(1) (1866) 5 W.R., Cr. R., 80.

duty of the Court to bear in mind that it is tainted evidence, to scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then if you believe it, act on it even if there is no corroboration in the strict sense of the word. This direction seems to me in accordance with the law laid down by this Court in *Reg. v. Ramasami Padayachi*(1) and *Ramaswami Gounden v. Emperor*(2). If the alternative proposition as to special circumstances put forward in the certificate of the learned Advocate-General means more than this and involves an enquiry as matter of law in each case whether there are special circumstances entitling the Court to act on uncorroborated evidence I am unable to agree with it. I am of opinion that in the judgment of the majority on this point there is no error of law entitling us to interfere under clause 26 of the Letters Patent.

The second point is whether the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial. Reading the certificate with the judgment of the majority of the Court it appears to me that the question for our consideration is whether such previous statements if proved can be regarded as amounting to corroboration of the accomplice in material particulars within the meaning of section 114, illustration (b) of the Indian Evidence Act, as it is scarcely disputed that under section 157 such statements are admissible in corroboration. I do not think that the Courts in England have ever attempted to define exhaustively what will amount to corroboration—a question which appears to be rather one of fact depending on a consideration of all the circumstances of the case. In India, the evidence of previous statements made in certain circumstances is admissible under section 157 of the Indian Evidence Act to corroborate the testimony of the witness. It is therefore admissible evidence in corroboration of the evidence even of a witness who is an accomplice, and I am not prepared to say as the Advocate-General wishes us to say that the previous statements of an accomplice cannot legally amount to corroboration of the evidence given by him at the trial. I think that previous statements admissible

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1878) I.L.R., 1 Mad., 394.

(2) (1904) J.L.R., 27 Mad., 271.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

as corroboration under section 157 of the Indian Evidence Act may or may not amount to sufficient corroboration and that whether they will be so or not depends on the facts and circumstances of the particular case. That previous statements may in some cases amount to corroboration where, as in the present case, there are the previous statements of several accomplices was pointed out in *Elahee Buksh's* case (1) the leading Indian authority. Sir Barnes Peacock, at page 84, observed "but if two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II of 1855, section 31" which is the same as section 157 of the present Act. It is in my opinion clear that in the opinion of the learned Judge the previous statements of the accomplices in those circumstances would amount to sufficient corroboration of their evidence and this is also in accordance with the dictates of good sense. In England, previous statements of witnesses whether accomplices or not, are not generally admissible in evidence; but when admissible in exceptional cases as in regard to assaults on women, they are admitted, it is now settled, as evidence of corroboration—*Rex. v. Osborne*(2) and it is clear from the recent decision of the Court of Criminal Appeal in *R. v. Ellsom*(3) that in the opinion of the Court such statements, if properly before the Court, may, when considered in the circumstances in which they were made, amount to strong corroboration of the evidence of an accomplice. Taken by itself the previous statement may of course be as tainted and untrustworthy as the evidence in the box and not supply any real corroboration; but on the other hand the circumstances in which it was made may afford strong corroboration of its truthfulness apart from the credibility of the accomplice, as in the case put by Sir Barnes Peacock which has now been inserted as an illustration to section 114 (b) of the Indian Evidence Act.—"A crime is committed by several persons. A, B and C, three of the criminals, are

(1) (1866) 5 W.R. Cr.R., 80. (2) (1905) 1 K.B., 551.
(3) (1911) 76 J.P., 38.

captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts *corroborate* each other in such a manner as to render previous concert highly improbable." In such a case the previous statements not only corroborate each other but also the sworn statements in the box, and they are evidently regarded as confirming the tainted evidence of the accomplices and making it right to act on that evidence. It is true that they are given in the section rather as facts rendering corroboration unnecessary than as amounting themselves to corroboration, but this, it appears to me, is a distinction which makes no real difference, as the Court is invited to believe the evidence and act upon it. The previous statements received and acted upon by the majority of the learned Judges in this case, both those made to the Inspector and those made to Mr. Cox, were in their opinion of this character and in my opinion the learned Judges were justified in receiving and acting upon them as corroboration. They have not in my opinion misdirected themselves at all in this respect, and that being so, we have no authority, sitting here not as an appellate Court, but as a Court of error under the Letters Patent, to call in question the conclusions they have arrived at on evidence properly before them. With regard to the decisions in *Reg. v. Malapabin Kapana*(1), and *Queen-Empress v. Bepin Biswas*(2), I do not think they can be taken as laying down as matter of law that previous statements of accomplices cannot amount to sufficient corroboration of their testimony, and if they do I think they go too far. A direction to that effect by a Sessions Judge was made the ground of an appeal against acquittal by the Bengal Government in 1898, *Queen-Empress v. Bhairab Chunder Chuckerbutty*(3), but the case went off on another point.

The *third point* is whether the previous statements of the sixth and twelfth witnesses for the prosecution to Inspector Veeraghaba Aiyar, the thirty-first witness, were admissible as not made to an authority legally competent to investigate the fact within the meaning of section 157 of the Indian Evidence Act. It is not suggested that when the statements were made the Inspector was competent to investigate the charge of conspiracy, a non-cognizable offence, on which the accused have been convicted,

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1874) 11 Bom. H.O.R., 196. (2) (1884) I.L.R., 10 Cal., 970.
(3) (1898) 2 O.W.N., 702.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

but it was contended for the prosecution but denied for the defence that he was competent to investigate the murder of Mr. Ashe and that it was in the due course of that investigation that these statements were elicited. Whether this would be sufficient depends on the construction of the words "legally competent to investigate the fact" in section 157. Sections 156 and 157 deal with the corroboration of witnesses as to relevant facts, and reading the two sections together, I think section 157 should be read thus, as if the words in brackets were there, "In order to corroborate the evidence of a witness [as to a relevant fact] any former statement made by the witness as to the same fact before any authority competent to investigate the fact may be proved." It seems to me that under the section the evidence of witnesses in the box as to relevant facts may be corroborated by proof of previous statements as to the same facts, if made before an authority legally competent to investigate such facts. It cannot, I think, be questioned that an Inspector investigating the murder of Mr. Ashe was legally competent and bound in the course of his investigation to elicit the statements now in question; and this being so, I think the provisions of the section were so far satisfied; and that to make the previous statements admissible it was not necessary that the Inspector should have been legally competent to investigate the conspiracy of which the accused have been convicted. As to whether the Inspector to whom the statements were made was in fact legally competent to investigate the murder of Mr. Ashe, section 156 of the Code of Criminal Procedure provides that any officer in charge of a police station "may, without the order of a magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try" and section 551 provides that "Police officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station." The learned Judges forming the majority have found that there can be no question that the Inspector is a police officer superior in rank to an officer in charge of a police station, and also that as a member of the Provincial Department of Criminal Investigation, the "local area" within the meaning of section 551 of the Code of Criminal Procedure, to which he was appointed, was the Presidency of Madras. The word 'Provincial' is

undoubtedly used as equivalent to the Presidency of Madras, which is one of the Provinces of British India; and it is a matter of common knowledge that the department was constituted in pursuance of recommendation 35 of the Police Commission, 1902-1903, which is as follows:—"That there should be constituted in each province a Criminal Investigation Department for the purpose of collecting and distributing information regarding organized crime, and to assist in the investigation of crimes when they are of such a special character as to render their assistance necessary." Such investigation would necessarily take place in any part of the Presidency in which these crimes should occur, and in these circumstances I think the Presidency may well be held to be the "local area" to which the seven Inspectors in the department on whom the work of investigation must necessarily fall are appointed. The assassination of a Collector—a crime happily unprecedented in the history of the Presidency for over fifty years—was obviously a crime of such a special nature as to render the assistance of the department necessary. The Inspector in this case had come down with the head of his department in connection with this murder. I think his evidence and the G.O. No. 913, Judicial, dated 2nd July 1908, which has been put in defining the relations between the officers of the Criminal Investigation Department and the ordinary police officers in the various districts of the Presidency, was evidence sufficient to support the finding—though not perhaps so full as if this objection had been taken when the statements were tendered in evidence and had not been reserved for the argument after the evidence for both sides had been closed. I do not think that these are matters which we should go into sitting here as a Court of error under clause 26 of the Letters Patent. I am also inclined to think that the word "investigate" in section 157 of the Indian Evidence Act cannot be read as limited to investigation under the Code of Criminal Procedure, that the Inspector had been brought down from Madras specially to investigate the murder of Mr. Ashe, and that he was not only legally competent but under a duty to investigate it and in the course of such investigation to record the statements now in question. In the result, I hold there is no ground for interference under this head.

The two remaining points certified by the Advocate-General, whether confessions by an approver to a police officer are not

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

excluded both by section 25 of the Indian Evidence Act and section 162 of the Code of Criminal Procedure may, I think, conveniently be dealt with together and the latter first, because as pointed out in *Queen-Empress v. Babu Lai*(1), these three sections (sections 25 and 26 of the Indian Evidence Act, 1872, and section 162 of the Code of Criminal Procedure, 1898), which were designed to guard against improper practices on the part of the police in obtaining statements from witnesses and confessions from the accused first made their appearance together as sections 145 (now 162), 148 and 149 of the Criminal Procedure Code of 1861; and sections 148 and 149 of that Code have since been transferred without material alterations to the Indian Evidence Act, 1872, where they appear as sections 25 and 26; and as observed by Lord BLACKBURN in *Mayor of Portsmouth v. Smith*(2), "Where a single section of an Act is introduced into another Act, it must be read in the sense which it bore in the original Act from which it is taken, and consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act." This it seems to me is the proper method to apply even where, as here, the sections have been introduced into a measure of codification, and I am unable to attach much force to arguments depending on the position of sections 25 and 26 in the Indian Evidence Act. As to whether the previous statements of the approvers to the police were inadmissible under section 162 of the Code of Criminal Procedure, 1898, as previous statements of witnesses to the police, the Code of 1861, section 145 (now section 162) provided for the oral examination of witnesses by the police and permitted these statements to be taken down in writing "provided that any statement so reduced into writing shall not be signed by the person making it, nor shall it be treated as part of the record or used as evidence." Such statements were no doubt usually taken down in writing, and there does not appear to have been any attempt made to give oral evidence of them to corroborate the witnesses under the Codes of 1861, 1872 or 1882, which in this respect were not materially different. By Act X of 1886, section 6, section 162 of the Code of Criminal Procedure was altered by inserting into the section the word "shall" as shown in brackets.

(1) (1884) I.L.R., 6 All., 509.

(2) (1885) L.R., 10 A.C., 384 at p. 371.

"No statement, other than a dying declaration made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, or (shall) be used as evidence against the accused." As thus altered the section appears to go still further and to make statements to the police inadmissible whether they were taken down in writing or not. In 1898, an attempt was made by the prosecution to use the previous statement to the police of an approver to corroborate him, but the statement was rejected as inadmissible under section 162, *Queen-Empress v. Bhairab Chunder Chuckerbutty*(1); and if the section, as it then was, had not been altered, there can be no doubt the statements now in question would have been inadmissible. In the Code of 1898 which came into force in 1899, the provisions of section 162 were altered. The main alterations as pointed out in *Dadan Gazi v. Emperor*(2), was made for the purpose of setting at rest the controversy as to the circumstances in which the accused were entitled to have access to and make use of such previous statements of the witness to contradict them—a course the police had endeavoured to prevent by taking them down in their diaries which are privileged under section 172. This was dealt with by a new *proviso* entitling the accused to require the Court to refer to such previous statements, and if the Court thinks it expedient in the interests of justice to direct copies to be given to the accused. But as against this concession to the accused, the body of the section was altered in such a way as to modify the absolute exclusion of such statements as evidence for the prosecution, contained in the Code of 1882 as modified in 1886. The present section runs thus:—"No statement made by any person to a police officer in the course of an investigation under the chapter (XIV) shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence." Here it is only the writing that is excluded. The change of language must, I think, have been deliberate and I am constrained to agree with the decision of the learned Judges, and with *Fanindranath Banerjee v. Emperor*(3), and the judgment of KARAMAT HUSAIN, J., in *Rustam v. King-Emperor*(4), that oral evidence of such statements is not inadmissible. On this point, I am of opinion that there was no error in law.

(1) (1898) 2 C.W.N., 702.

(2) (1906) I.L.R., 33 Cal., 1023.

(3) (1909) I.L.R., 36 Cal., 281.

(4) 7 A.L.J., 468.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Going back now to the *fourth point* whether the statements are inadmissible, not under section 162 of the Code of Criminal Procedure as previous statements of witnesses to the police, but as confessions made to the police under section 25 of the Indian Evidence Act which provides that "no confession made to a police officer shall be proved as against a person accused of an offence," the question is, does the section mean that no confession to a police officer by an accused person is to be used against him, or that it is not to be used against others either? The next section 26 relating to confessions made by accused persons in the custody of the police unless in the immediate presence of a magistrate renders them inadmissible as against such persons. The two learned Judges forming the majority see no reason why any difference should be made between the two sections, and read section 25 as also relating to confessions made by a person accused of an offence to the police, and as rendering such confessions inadmissible only as against them. SANKARAN-NAIR, J., on the other hand thinks that confessions made to the police may have been considered to require more stringent provisions than confessions made by accused persons when in police custody to others. In accordance with the rule already stated, I proceed to consider the meaning and effect of these sections as first enacted in the Code of Criminal Procedure, 1861. Section 145 of that Code (now section 162) as already pointed out provides that statements of witnesses to the police if reduced to writing shall not be used as evidence. The following sections then deal with the confessions of accused persons to the police in the course of investigations by the latter. Section 146 forbids the police to offer any inducements by threat or promise to an accused person to make any disclosure or confession. Section 147 forbids the police to record any statement or any admission or confession of guilt which may be made before him by an accused person. Section 148 (now section 25 of the Indian Evidence Act) then provides that "no confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence," and section 149 that "no confession or admission of guilt made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a magistrate shall be used as evidence against such person." As I have already said, confession in these sections appears to mean confession by an accused person to the

police in the course of an investigation under the chapter, and as before the passing of section 30 of the Indian Evidence Act of 1872 confessions of accused persons could not be used against co-accused, such confessions could only be evidence against the accused persons making them, or to corroborate their evidence when they turned approvers, by treating their confessions as previous statements made by the witnesses under section 31 of Act II of 1855 since reproduced as section 157 of the Indian Evidence Act, 1872.

Now it may be said on the one hand that as by section 145 of the Criminal Procedure Code of 1861 immediately preceding, the legislature had made an exception in the general law regarding the use of previous statements as corroboration restricting the use in evidence of such previous statements if made to the police, whether they amounted to confessions or not, and practically excluding them, it is not likely that they intended in section 148 to introduce a further exception as to the use of previous statements which amount to confessions; that, as observed by MILLER, J., if any such fresh provision had been intended, it would have extended to exculpatory statements by accused persons as well as to confessions, and to confessions made by accused persons whilst in police custody under section 149 (now section 26 of the Indian Evidence Act) as well as to confessions to the police themselves coming within section 148 (now section 25 of the Indian Evidence Act). It may be said further that the language of section 148 "no confession or admission of guilt made to a police officer, shall be used as evidence against a person accused of any offence" is susceptible of the meaning that no confession made by such a person to the police should be used against him, and that in this respect the scope of the two sections 148, 149 is the same, although in the latter the draftsman dealing with more complicated provisions has expressed his intention with greater precision. These considerations appear to me to have considerable force in favour of a restrictive construction of the section. The result of such a construction, as already explained, would be that confessions regarded merely as previous statements to the police were practically excluded as corroborative evidence down to 1886, and absolutely excluded from 1886 down to 1898, and only became admissible owing to the change in section 162 of the Code of 1898.

On the other hand, as against this view there is the fact that the terms of the prohibition in section 148 of the Code of 1861 and

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

now in section 25 of the Indian Evidence Act are perfectly general; and as observed by BENSON, J., a construction which renders statements which are inadmissible against the persons making them admissible against other persons is not one to be favoured. It is also perhaps worthy of note that confessions to the police which come under section 148 were forbidden to be recorded by section 147, whereas there was no such prohibition as regards confessions made by persons in police custody which come under section 149. The question then is whether giving due weight to all these considerations, as I have endeavoured to do, there is sufficient to require the court to put a restrictive construction upon the section or to justify it in so doing. I have felt great doubt upon this point especially in view of the difference of opinion among the members of the Court; and in these circumstances I think the safer, as it is certainly the simpler course, is to read the words of the section in their natural meaning without putting any restrictive interpretation upon them, and so reading them I hold that these confessions were inadmissible even as corroborative evidence under section 25 of the Indian Evidence Act.

I am, however, of opinion that the rejection of the statements made by the two approvers to the Inspector cannot affect the result of the trial. It has been held in a long catena of Indian cases that, in reviewing a case under clause 26 of the Letters Patent, it is the duty of the Court when it finds there has been a misreception of evidence to apply the provisions of section 167 of the Indian Evidence Act, and not to reverse the conviction if it shall appear to the Court that "independently of the evidence objected to and admitted there was sufficient evidence to justify the decision," the decision here being that of the original tribunal. Hitherto this jurisdiction under clause 26 has only been exercised in jury cases where of course no reasons were given for the verdict, and the Court of review was perforce bound to go into the evidence itself for the purpose of seeing whether or not the remaining evidence justified the decision of the jury. In the present case under section 11 (3) of the Criminal Law Amendment Act, 1908, the decision is that of the majority of the Court, and the reasons for that decision have been given in a most careful and elaborate judgment. Now discarding the previous statements of the two approvers to the Inspector, we find that, within a few days after these statements, the approvers made statements to the same effect

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

before a magistrate, Mr. Cox, as to which no question of inadmissibility arises, and the learned Judges have observed that, even if the statements to the Inspector are discarded and only those recorded by Mr. Cox are considered, they find it impossible to accept the defence theory that the approvers' story was concocted or tutored, and, from a perusal of the judgment, it is perfectly plain that discarding the statements to the Inspector they accepted the evidence of the two approvers as generally truthful, and acted upon it as they were entitled to do. Here I may observe that the learned Judges had before them the fact, which was properly in evidence, that before their statements to Mr. Cox the approvers had made still earlier statements to the Inspector at a time and under circumstances which in their opinion negatived the concoction at that stage of such a story as they afterwards told to Mr. Cox and in the witness-box; and they were, I think, justified in view of all the circumstances in rejecting the suggestion of subsequent concoction in the interval between the two sets of statements, unless supported by a reference to the earlier statements which were available to the defence under the *proviso* to section 162 of the Code of Criminal Procedure, and would not, as we now know, have supported it. If then the Court had rejected the statements made to the Inspector and still convicted the accused, it would have been impossible for us to say that there was not sufficient evidence to justify their decision; and it appears to me to be equally impossible for us to say so, when in effect the learned Judges tell us that though considering the evidence admissible they did not consider it necessary to base their decision upon it and were prepared to convict without it.

I think therefore the applications must be dismissed.

MILLER, J.—On the preliminary question I do not think I can usefully add anything to what has already been said. I agree with the opinions of BENSON and WALLIS, JJ.

On the *first point* in the Advocate-General's certificate I have a few words to say but having had an opportunity of perusing the judgments written by some of my learned colleagues I do not think it necessary for me to discuss the decided cases bearing on the subject. On the effect of the decisions I agree with what has just been read by WALLIS, J.

I consider that the majority of the Special Bench have correctly laid down the law, and that it is not the law that special

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

circumstances must be found to exist before an accomplice's statement can be acted upon without corroboration. To hold so as a matter of law would, it seems to me, deprive the Court of the discretion given by section 114 of the Indian Evidence Act to raise or not to raise the presumption—would in effect substitute the phrase “shall presume” for “may presume” in that section.

I do not dissent from the decisions which have held that ordinarily as a matter of practice a court should not accept the uncorroborated evidence of an accomplice as sufficient evidence to support a conviction, but it is impossible consistently with the Indian Evidence Act to hold that as a matter of law the presumption must be raised, and rebutted by special circumstances or by corroboration.

I am not sure that the conclusions of SANKARAN-NAIR, J., stated at pages 347 and 348(1) differ materially from those of the other two learned Judges, but if he intended to lay it down as law that a conviction is illegal which is based upon the uncorroborated evidence of an accomplice, unless something which amounts in law to a “special circumstance” be found by the Judge or jury, then it seems to me he goes beyond the statement of the English law accepted from “Taylor on Evidence” by the learned CHIEF JUSTICE in *R. v. Tate*(2), for that statement, so far as I am at present concerned with it, is only to the effect that the respect habitually paid by juries to the advice of Judges has given rise to a settled practice not to convict upon the uncorroborated evidence of an accomplice except in very special circumstances. Consequently, as I understand it, Judges are bound by law to advise juries to adhere to this practice, but it does not follow that juries are bound as a matter of law to do so.

In the present case, the majority of the Special Bench have given reasons for deeming the accomplices to be credible witnesses in the circumstances of the case, and Mr. Govindaraghava Aiyar had consequently to argue that “special circumstances” are circumstances differing in quality from those which are ordinarily applied as tests of the credibility of witnesses on whom there rests no taint of complicity in the crime with which the accused is charged.

To accept this contention would to my mind, be to introduce into the law on this subject an additional and entirely undesirable and unnecessary element of artificiality; the contention itself is

(1) (1912) I.L.R., 35 Mad., 247.

(2) (1908) 2 K.B., 680.

perhaps an illustration of the danger of adopting the suggested rule as a rule of law.

I concur on the *second point* with the majority of the Special Bench, when they hold that the previous statements of accomplices are admissible under section 157 of the Indian Evidence Act to corroborate their testimony given at the trial.

It was not denied that such statements cannot, having regard to section 157 of the Indian Evidence Act, be excluded if made in the circumstances set forth in the section, and inasmuch as the section expressly admits them in order to corroborate the testimony of a witness, it necessarily follows that they are legal corroboration of the evidence given at the trial.

The words of section 157 of the Indian Evidence Act cannot be controlled by the illustrations to section 114, a section which treats of presumptions which may be made: but the evidence admitted under section 157 may be so far affected by the illustrations to section 114 that the corroboration afforded by it might, conceivably, not be in law sufficient corroboration to justify the Court in acting on the evidence given at the trial. Consequently I must take it, I think, that the Advocate-General suggests for our consideration the view that the phrase “corroborated in material particulars” in illustration (b) to section 114, is a technical term connoting a corroboration different from that of section 157, in fact a corroboration by independent or untainted evidence. I am unable to find reasons to accept this view as a matter of law. The evidence, I conclude, is admissible as corroboration and whether it is sufficient or not to justify the Court in believing the evidence given at the trial is a question of the weight to be given to it and not a question of law.

I do not think that I can usefully add much to what has already been said upon this point by WALLIS, J., whose judgment I have had an opportunity of reading: I concur entirely in his conclusions as to the law.

I may point out that the learned Judges in *Queen-Empress v. Bepin Biswas*(1) declined to consider whether the rule should be “extended” to the case of previous statements made before arrest, and that SANKARAN-NAIR, J. (at page 351), is prepared to hold that there might possibly be a difference where the previous statement

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1884) I.L.R., 10 Cal., 970.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

of an accomplice is made at a time when there was no inducement to make a false statement and in circumstances which indicate that it is true.

But if previous statements made under some circumstances are sufficient corroboration, then it seems to me very difficult to lay down as a matter of law the rule suggested by the Advocate-General, simply because, in our opinion, such cases are fewer than those in which the previous statements are valueless. And there is no need for us to try to do so: the discretion given to Judges and juries in weighing evidence is all that is required, and no rule is in my opinion wanted except to secure that Judges and juries dealing with facts shall have fully before them the defects inherent in the evidence of accomplices and the tests which experience has shown to be the best aids in estimating its real value in the particular case.

I see danger and not safety in ruling out as inadmissible in the case of accomplice witnesses any tests of credibility which are available in the case of other witnesses whether the test applied tends to confirm or to discredit the evidence.

The third point.—I do not think that our decision upon points 3, 4 and 5, can affect our judgment on the case, because it seems to me quite clear from their judgment that the CHIEF JUSTICE and AYLING, J., were prepared to arrive at the conclusion at which they did arrive whether the evidence of Veeraraghava Aiyar proving previous statements of the accomplices, Arumugam and Somasundaram, is admitted or rejected. It seems, therefore, to me really unnecessary to express any opinion upon these three points, but I follow my learned colleagues in doing so.

So far as the third point is concerned the decision of the majority is correct, if Inspector Veeraraghava Aiyar was legally competent to investigate the "fact" within the meaning of section 157 of the Indian Evidence Act: that is for the most part a question of fact and the evidence bearing on this point was put before us at the hearing. It shows that the Inspector was deputed by Mr. Thomas to assist the local Assistant Superintendent in making searches in Tuticorin—and it is not denied that, if deputed to investigate by Mr. Thomas, the Inspector would be legally competent to make the investigation for which he was deputed. In the absence of any statement by Mr. Thomas to the contrary I consider that the deputation to assist in making the searches is

equivalent to an authority to the Inspector to assist at an investigation: the making of searches is investigation, is investigating within the meaning of that word in the Criminal Procedure Code, if that be necessary; the investigation in question was not the collection of evidence to determine who murdered the Collector of Tinnevely; the assassin had killed himself and no investigation was wanted: the investigation was to collect evidence to establish a charge of abetment of the murder, to ascertain who were the instigators of the crime. The existence of the conspiracy alleged by Arumugam was relevant to the issues involved in that investigation and the statement of Arumugam was therefore relevant to that investigation, and it makes no difference that the conspiracy alleged by Arumugam has not been shown at the trial to have been a conspiracy of abettors of the particular murder in question. Whether 'the fact' of section 157 of the Indian Evidence Act be here the truth of the statement of Arumugam or the existence of a conspiracy to murder, Veeraraghava Aiyar was competent to investigate it so far at any rate as he could do so in the course of his searches at Tuticorin.

Of course it is possible that his authority was only to guard the door or make or copy a list of papers or carry boxes or dig up floors, but I am not prepared to presume that that was what was expected of an officer of the rank of an Inspector of the Criminal Investigation Department. I therefore find nothing in the evidence put before us to require me to hold that the CHIEF JUSTICE and AYLING, J., were in error on this point.

The fourth point.—On this point I am of opinion that there is no error of law in the judgment of the CHIEF JUSTICE and AYLING, J.

I agree with those learned Judges that there is no difference in the object of sections 25 and 26 of the Indian Evidence Act; that both are aimed at the same mischief: and I have not been satisfied that there is any substantial reason for attributing to the Legislature an intention to place a confession made to a police officer on a different footing from one made by a person in the custody of the police. Consequently I approach the consideration of this question from the point of view that, as section 26 applies only to the proof of a confession as against its maker, so it should be held that section 25 has a similar scope unless we are bound by some language or for some other reason to give it a wider application. Now sections 25, 26 and 27 of the Indian Evidence Act were

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

imported into the Indian Evidence Act from the Criminal Procedure Code of 1861, where they were placed among the provisions dealing with the powers of police officers in making investigations into cases of alleged offences. So far as I know there was at that time, that is in 1861, no provision in the law of evidence as administered in India, corresponding to section 30 of the Indian Evidence Act of 1872; and so there is no apparent reason why it should suggest itself to the framers of the Code that it was necessary to provide for the case of the use of a confession as against any person other than the person who made it. These sections of the Code of 1861 were not dealing with the question of witnesses in criminal trials or with a consideration of what might or might not be corroboration of the testimony of witnesses in such trials and sections 147, 148, 149 and 150 of that Code are clearly intended to render it, so far as possible, useless for police officers to extract confessions from accused persons for use at their trial. They are not and could not be meant to prevent the taking of confessions by the police in all circumstances, even as aids to investigation: section 147 permits the police officer to make a note for his own information of a confession made to him.

By section 147 of the Code of Criminal Procedure of 1861 a police officer is prohibited from making a record of a confession, except for his own information, when the confession is made by "a person accused of any offence:" that is to say, as I understand it, a person against whom there is a 'case' which is being investigated under section 135 (*vide* section 144). Section 148 forbids the use of any confession made to a police officer, as evidence against "a person accused of any offence:" that is to say, or so it seems to me, the same person whose confession the police officer is forbidden to record except for his own information. Then section 149 makes a similar prohibition of the use as evidence against the maker of a confession made by any person while he is in the custody of the police.

The case having been investigated, the person accused of any offence is put on his trial: the confessions made by him to the police officer, or while in custody of the police officer, are not to be used as evidence against him.

That, it seems to me, is the natural meaning of these provisions, and the only meaning appropriate to them having regard to their position in the Code of Criminal Procedure. In short they have

nothing to do with the statements of witnesses. I am not at all pressed by the difference in language between section 148 and section 149 of the Code of Criminal Procedure of 1861, because I think a careful examination of the two sections will shew that, in order to express clearly and at the same time correctly and elegantly the particular position dealt with by section 149, it may very well have been deemed necessary to depart from the brief and succinct diction of section 148. I think then there can be very little doubt that in the Code of 1861, both these sections were intended to prevent the use, as evidence against the maker, of confessions made actually or in effect to police officers.

Then the sections are imported without material alteration of language, into the Indian Evidence Act of 1872, and I am unable to find any reason to give them a more extended meaning than they bore in the Code of 1861. For *prima facie* the law of evidence does not allow the use of a confession, which is a form of admission, as evidence against any person except the maker: section 30 provides for a particular and exceptional case: and that being so there seems no reason to suppose that the legislature in transferring sections 148 and 149 of the Criminal Procedure Code of 1861 to the Indian Evidence Act, had any intention of extending their application. On the other hand, had there been any such intention I should have expected to find an alteration in the language of section 26 in the Indian Evidence Act, so as to extend that section to cases other than that of the maker of the confession.

It has to be remembered too that the confession of a witness is not used as a confession at the trial of some one else: it is not used as an admission: it is put in to corroborate or to contradict the witness: and section 25 of the Indian Evidence Act was not, as I understand the matter, concerned with the statements of witnesses. If used for corroboration the confession is put in to show that certain allegations against other persons, allegations made by the witness at the trial of those persons, were made by him at some earlier period, at a time when or under circumstances in which it may be regarded as somewhat probable that he might have been telling the truth. And I am unable to see that it is more dangerous to allow a witness to be corroborated by a self-incriminating statement made to a police officer than by a self-exculpatory statement to the same officer.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR..

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

On the other hand section 30 seems to indicate that in the view of the legislature a man is less likely to make false accusations against others when he is incriminating himself as well as them. I agree, then, with the dictum of WEST, J., in *Queen-Empress v. Tribhovan Maneekchand*(1) and am of opinion that the CHIEF JUSTICE and AYLING, J., were right as regards this point of the Advocate-General's certificate.

I may add that I do not think the cases dealing with section 30 have any great bearing on the question which I am discussing. It is true that the learned Judges in one case, *Emperor v. Harisingh Ganpatsingh*(2) remark that their conclusion is confirmed by the language of section 25, but it is impossible from this to draw the inference that they considered the question we have to deal with, while it is quite possible to arrive at their conclusion by reading sections 30 and 25 together without affecting the present question in any way.

Fifth point.—On this point I desire only to say that the language of the section and the history of the various amendments made from time to time constrain us to accept the law as laid down by the learned Judges of the Special Bench.

There is no ground on which we can interfere with the decision of the Special Bench and the petitions of the accused must be dismissed: and as I have said the same result is arrived at if I am wrong, and if the evidence of Veeraraghava Aiyar is excluded so far as it relates to the previous statements made by Arumugam and Somasundram.

ABDUR RAHIM, J.—Fourteen persons were tried on charges under section 121-A, Indian Penal Code, and section 302, Indian Penal Code, read with sections 109 and 111, by a Special Bench of three learned Judges (the Chief Justice, SANKARAN-NAIR and AYLING, JJ.) constituted under the provisions of the Indian Criminal Law Amendment Act (XIV of 1908) which provides for the speedy trial of certain offences. The trial was held without a jury in accordance with section 11 of the Act, and the Bench unanimously found that the charge under the latter sections of abetment of murder was not proved against any of the prisoners and acquitted them all under that head of the indictment. But upon the remaining count, viz., the charge of conspiring to wage

(1) (1885) I.L.R., 9. Bom., 131, at p. 134.

(2) (1910) 12 Bom. L.R., 899.

war against the King-Emperor, the learned Judges did not agree with respect to the case against all the accused: the CHIEF JUSTICE and AYLING, J., came to the conclusion that the charge was substantiated against 9 out of the 14 persons tried but not against the rest (i.e., the ninth, tenth, eleventh, twelfth and thirteenth accused) while SANKARAN-NAIR, J., was of opinion that the Crown failed to establish the case not only against the five persons acquitted by the majority of the Bench but also against four other accused persons (viz., those mentioned and the third, fourth, fifth and the seventh). The Judges were unanimous in finding four of the prisoners guilty, namely, the first, second, sixth and the fourteenth accused. Under section 11 of the Act referred to, judgment was pronounced in accordance with the opinion of the majority and sentences were passed accordingly.

The case is now brought before us under article 26 of the Amended Letters Patent of this Court upon a certificate granted by the Advocate-General on a petition presented to him by the accused Nos. 3, 4, 5, 6 and 7. The present Advocate-General who appeared for the Crown has taken the preliminary objection that article 26 of the Letters Patent has no application to a case tried in accordance with the provisions of the Indian Criminal Law Amendment Act and we have therefore no jurisdiction to review the case. That article must be considered in connection with articles 22, 23, 24 and 25. Article 22 defines the local limits of its ordinary original criminal jurisdiction which mainly coincides with the local limits of its ordinary civil jurisdiction and article 23 empowers the High Court in the exercise of such jurisdiction to try all persons brought before it in due course of law. Then article 24 declares that in addition to its ordinary original criminal jurisdiction the High Court shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to the superintendence of the High Court—the prisoners here answer the description—and shall have authority to try at its discretion any such person brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer especially empowered by the Government in this behalf. Article 25 next lays down that the accused has no right of appeal to the High Court from any sentence or order passed in any criminal trial before the Courts of original criminal jurisdiction which may be

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

constituted by one or more Judges of the High Court but that it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. Article 26 provides that on such a point or points being so reserved or on its being certified by the Advocate-General that in his opinion there is an error in the decision of a point of law decided by the Court of original criminal jurisdiction or that a point of law which has been decided by the said Court shall be further considered, the said Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point of law, and thereupon to alter the sentence passed by the Court of original jurisdiction and pass such judgment and sentence as to the High Court shall seem right. It is argued on behalf of the Crown that the Court of original criminal jurisdiction referred to in articles 25 and 26 refer to the Court exercising the ordinary and extraordinary original criminal jurisdiction mentioned in articles 22, 23 and 24 and that the trial in this case was not held in the exercise of either description of jurisdiction. I think there is force in the first part of this argument as both articles 25 and 26 speak of the Court of original criminal jurisdiction, apparently meaning the Court exercising the ordinary or extraordinary criminal jurisdiction of the High Court mentioned in articles 22, 23 and 24. In fact these articles confer such plenary jurisdiction on the High Court that it may well be inferred that it was not within the contemplation of the Letters Patent that the High Court should be called upon to exercise original criminal jurisdiction in any case not covered by these articles. It is, however, conceivable, though very unlikely, that the Indian legislature may confer original criminal jurisdiction on the Madras High Court in cases which do not fall within the ambit of its ordinary or extraordinary jurisdiction. To these cases article 26 would not perhaps be applicable, but I have no hesitation in holding that the contention of the Advocate-General that the present is such a case is clearly untenable. The prisoners are all residents of the Madras Presidency and over them the Court would undoubtedly have jurisdiction under the first part of article 24. It is therefore apparently not a case in which the High Court has no jurisdiction under the Letters Patent but derives its jurisdiction from a special statute. Nor is there anything in the Indian Criminal Law Amendment Act to suggest that the legislature was

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

conscious that it was conferring a jurisdiction on the High Court which it did not already possess. The Act proceeds on the assumption that the magistrate who held the enquiry should commit the persons charged to the High Court to whose superintendence the magistrate is subject (see sections 3 and 5). It no doubt makes a radical change in the procedure to be pursued in the trial at the High Court by enacting that the trial shall not be by a jury and to this extent the change is no doubt one affecting the forum of trial. But it does not purport to affect the jurisdiction of the High Court as conferred upon it by the Letters Patent; it only regulates the manner of the exercise of its jurisdiction. That the question whether a trial should be held by a Judge and a jury or otherwise is not to be treated as one relating to jurisdiction is also amply indicated by the fact that it is not articles 22, 23 and 24 of the Letters Patent, by which jurisdiction is given to this Court in criminal cases, that require that trials should be held by a Judge and a jury; that matter is dealt with by article 38 which regulates the procedure in trials. The argument on which the Advocate-General lays the most emphasis is that the High Court in its extraordinary jurisdiction can only try such persons as are brought before it "on charges preferred by the Advocate-General"—which is not the case here—"or by any magistrate or other officer expressly empowered by the Government in that behalf," and that in this case the magistrate who committed the accused for trial to the High Court could not be taken to have preferred the charges within the meaning of article 24 as he did not derive his authority to do so from the Government but from the legislature. It does not seem to me that there is any force in this contention. The Sub-Divisional Magistrate of Tinnevely who committed this case was undoubtedly appointed to his office by the Government and it was by virtue of that office that he took cognizance of the offence and preferred charges against the accused in accordance with the provisions of the Criminal Procedure Code. Then the Local Government under section 2 of the Indian Criminal Law Amendment Act directed that the provisions of that Act should apply to those proceedings, that is, among other matters, the magistrate who had taken cognizance of the offence should send the accused to the High Court for trial upon charges, to be framed by him. This is therefore clearly a case in which the magistrate was "expressly empowered by the Government" to

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

prefer the charges on which the accused were tried by the High Court, even giving a narrow and literal meaning to these words. But I may observe that the words "expressly empowered by the Government" were not in my opinion intended to be used in a narrow sense. If the contention of the Advocate-General were well founded, there could be no doubt that when a European British subject is charged with an offence punishable with death or transportation for life and the District Magistrate enquires into it and commits the accused to the High Court under the provisions of sections 443 and 447, Criminal Procedure Code, such magistrate would not be deemed to be "expressly empowered by the Government" to prefer charges against the accused within the meaning of article 24 of the Letters Patent but I do not think the application of article 26 to such a case has ever been or can be doubted. I may mention that in *Queen-Empress v. O'Hara*(1), which was a case of that nature, no such objection so far as it appears from the report was taken to the jurisdiction of the High Court to review the case under article 26.

It has further been urged by the Advocate-General that the object of the Indian Criminal Law Amendment Act is to provide for the speedy trial of offences of a particular description and if article 26 of the Letters Patent applied this object would be frustrated. I do not think there is any force again in this argument. The mode in which a speedy trial was to be secured is specified in the Act itself, namely, by providing that the enquiry by the magistrate should be held in the absence of the accused who is not to be represented at all during the enquiry, that the commitment is to be to the High Court instead of to the District Sessions Court so as to obviate an appeal, and the trial is not to be with a jury. If, in addition, the legislature wanted to enact that it would not be open to the Special Bench to obtain the opinion of the High Court on any question of law however vital in its bearing on the trial in which such Bench may entertain a doubt, or that it should not be within the power of the High Court to prevent a miscarriage of justice due to an erroneous decision on a point of law, however manifest, one would expect such a declaration to have been made in absolutely clear and unambiguous language.

I over-rule the preliminary objection.

(1) (1890) I.L.R., 17 Cal., 642.

I purpose to consider the questions raised by the first two paragraphs of the certificate together. The first paragraph requires us to consider what the law is on the subject of an accomplice's evidence and whether the law is correctly stated in the judgment of the majority of the Special Bench, and the second paragraph raises the question whether the majority of the Court are right in their view that the previous statements of an accomplice can be regarded as such corroboration of his evidence in Court as the law requires.

I may observe that these two grounds of the certificate are couched in absolutely general terms but it is clear that the intention of the Advocate-General was not to raise mere abstract questions of law without reference to the circumstances of the case in which the view of law of the majority of the Special Bench which we are asked to reconsider was expressed and applied. I shall therefore briefly state the circumstances in which the various questions of law have arisen. So far as some of the prisoners are concerned, namely, those whom SANKARAN-NAIR, J., alone has acquitted, the evidence of the Crown, apart from evidence relating to the general circumstances of the case, consisted principally of the testimony of three approvers, Arumugam, Somasundram and Ramaswami; and the statements which are said to have been wrongly admitted or used as corroborative evidence are statements made by these men on several occasions before trial. In dealing with the question whether the way in which the learned CHIEF JUSTICE and AYLING, J., approached the consideration of the evidence of these approvers involves an error in law, one has to bear in mind the nature of the crime to which the approvers speak, the part which they themselves played in it and the circumstances in which they have come forward to give evidence for the Crown. As unanimously found by the Special Bench, Nilakantan alias Brahmachari (first accused) who had been engaged for some time in journalistic work of a more or less seditious character, set on foot early in April 1910 the conspiracy, the subject of the first count, for the purpose of overthrowing the British rule "by means of a simultaneous massacre of all Europeans on a day to be subsequently fixed." This plan which was as original as it is startling in conception was thought of, because all other methods which had been tried before by those who have been engaged in the criminal conspiracies against the Government which have come to light in

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

recent years in some parts of India, such as preaching, writing in newspapers and isolated assassinations, had failed. Nilakantan found some co-adjutors; according to the finding of the majority of the Bench his confederates would be about twelve in number including the approvers, besides two or three more men who have not figured in the case, and in the view taken by SANKARAN-NAIR, J., about seven. Of these, the accused Sankarakrishna Iyer (accused No. 2), one Vanchi and the approver, Arumugam, appear to have been the most active adherents of Nilakantan. The evidence of conspiracy consists of the oaths taken by the conspirators at three distinct meetings—the first at a place called Tenkasi on the 10th April 1910, the second at Tuticorin in the middle of July and the third which was held at Punalur after the second meeting—to the effect that they would kill all white men on one and the same day when there was to be a general rising throughout the country and that they would sacrifice their lives and their properties in order to carry out the design. The oath was written in a piece of paper and all who agreed to join the movement, pricked their thumbs and affixed their thumb impressions in blood on the paper. The papers are not forthcoming. But according to the approvers, Nilakantan, Sankarakrishnan, Madathukadai Chidambaram Pillai (accused Nos. 1, 2 and 3) and the approver Arumugam (sixth prosecution witness) took part in the proceedings of the first meeting, the first, second, fourth and fifth accused and the approvers Arumugam and Somasundram took the oath at the second meeting, and the accused Nos. 1, 2, 6, 7, 8, 9 and 14, the approver Ramaswami, Vanchi and five other men took the oath at the third meeting which was held some time in August 1910. Nothing however, so far as it transpires in the evidence, seems to have been done to carry out the seditious design either in the shape of collecting arms or men or in any other way whatsoever. Having regard to the obscure and humble position in life of the conspirators, the absolute lack of any means at their command to carry out a plan which from its magnitude, no less from its character, would be regarded by most people as one impossible of achievement, I think the majority of the Court was justified, if I may be allowed to say so, in regarding the conspiracy as something contemptible, so far as the possibility of its leading to any result is concerned. In all probability the idea would have died a natural death and would not even have been heard of except for

an event which, in the language of the judgment of the majority of the Court, has little or no bearing on the charge of conspiracy. Vanchi who was an ardent follower of Nilakantan's teachings shot down Mr. Ashe, the Collector of Tinnevely, on the 17th June 1911, and himself committed suicide on the spot. The motive of the murder was evidently political but as pointed out in the judgments of the Special Bench, the offence was not committed in pursuance of the conspiracy with which the prisoners are charged, it was in fact an act done in direct violation of the plan decided upon at the meetings. The majority of the Bench observe "the evidence as to the circumstances in which the murder was committed has very little, if any, bearing on the question whether the accused or any of them are guilty under section 121-A of the Indian Penal Code."

Nevertheless, the conspiracy charged against the prisoners is a grave offence against the State and the legislature attaches to it the most serious penalties. The three approvers who admit having taken part in such a conspiracy were permitted to give evidence against the prisoners under pardon granted to them by the magistrate under section 337, Criminal Procedure Code, "on the condition of their making a full and true disclosure of the whole of the circumstances within their knowledge relative to such offence and to every other person concerned whether as principal or abettor, in the commission thereof." These persons, if found not to have complied with the condition of pardon, whether by wilfully concealing anything essential or by giving false evidence may be tried for the very offence in respect of which the pardon was tendered or for any other offence of which they appear to have been guilty in connection with the same matter and the very statements made by them may be given as evidence against them when they are placed on their trial after the pardon has been forfeited. The approvers in this case are therefore men who were giving their evidence with halters round their necks, to use an expressive phrase which I believe occurs in one of the numerous cases cited at the bar on the subject of accomplices' evidence. The probability that persons in their perilous position would attempt to purchase immunity for themselves by falsely implicating innocent men is so great, that, apart from any special rule of law that may or may not exist as to the necessity of requiring corroboration of accomplices' evidence generally, it is obvious to one's common

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

sense that the danger of acting upon such witnesses' word alone against the accused persons must be grave indeed. I would not for my part hesitate in saying that a conviction founded on evidence of this character must be wrong as being based on absolutely unsafe materials unless there are to be found in the case the amplest guarantees of its truth derived from circumstances and evidence altogether independent of these witnesses' statements.

The certificate of the Advocate-General in its first paragraph assumes that the majority of the Special Bench have in fact acted upon Arumugam's and the other approvers' evidence without any corroborative evidence; even if that were so, we should be powerless to interfere unless it was made out that in so acting or in the way they have dealt with that evidence the learned Judges have committed an error in law. It is important at the outset to know in what light they have regarded the approvers' evidence and what use they have made of it. As I read their judgment they are of opinion that this evidence from its very nature must be received with caution and care, and that, though it was not correct to say as contended for on behalf of the defence that it was not open to them in law to act upon it, yet, they would not feel themselves safe in accepting such evidence in so far as it affected the prisoners without corroboration. There are passages in the judgment of the majority of the Bench which go to show that they were prepared to believe the general truth of the approvers' story apart from any corroborative evidence, but none from which it can be reasonably inferred that they would have accepted that evidence alone as sufficient to prove the complicity of the prisoners. On the other hand, they attach the utmost importance to certain previous statements of the approvers as corroborative of their evidence in Court and when they came to consider the case of the Crown against the accused persons individually they take care to state whether the corroborative evidence, such as it is, implicates or does not implicate particular prisoners. As regards the law regarding accomplices' evidence generally the majority of the Special Court lay down that the law does not prohibit the conviction of an accused person on the uncorroborated testimony of an accomplice, but that at the same time in accepting such evidence the Court must act with the greatest possible caution. These are their words: "In the case before us we are judge and jury. We have to direct ourselves. The proper direction seems to us to be—consider the

evidence of the approvers, always bear in mind that it is tainted evidence, scrutinise it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it." So far as these statements go, I do not think they can, in my opinion, be said to contain an erroneous proposition of law. I may observe however that the learned Judges undoubtedly lay emphasis on that aspect of the law according to which a conviction founded upon the uncorroborated testimony of an accomplice is not illegal. But they do so apparently to meet the extreme arguments of the pleaders on behalf of the accused to the contrary and not because they were prepared in the case before them to act upon such evidence.

The *first question* raised by the certificate is stated in these words: "That in my judgment the opinion of the majority of the Court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the Court to convict on the uncorroborated testimony of an accomplice if the Court was satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether section 133 of the Indian Evidence Act read with section 114, illustration (b), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." If we take the two statements independently of each other and the first part of the paragraph to mean that the majority of the Bench were wrong in stating as a general proposition that the law permits of a conviction on the uncorroborated testimony of an accomplice, then there can be no doubt that the Advocate-General's objection is untenable and for this purpose it is sufficient to refer to the clear language of section 133 of the Indian Evidence Act. But I do not think that that is what the Advocate-General meant. Both parts of the first paragraph of the certificate must be read together and so read what the certificate really means is that the Judges' statement that the law permitted of a conviction being based on the uncorroborated evidence of an accomplice is inaccurate inasmuch as it does not add the necessary

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

qualification that, apart from any special circumstances, the Court ought to raise the presumption spoken of in section 114, illustration (b), that an accomplice is unworthy of credit unless he is corroborated in material particulars, and therefore in ordinary cases the conviction would be illegal if based on such evidence. But as I have pointed out the learned Judges were of opinion that the evidence of an accomplice should *primâ facie* be regarded with distrust, otherwise there would be no meaning in their saying that you must accept such evidence with caution. The certificate in this connection apparently proceeds upon a misconception of what is laid down by the learned Judges. In this view of the matter it would have been unnecessary to go further into the first question but for the fact that in my opinion certain statements which were relied upon by the learned Judges as corroborative evidence justifying them in acting upon the evidence of the approvers as against the accused persons have been wrongly so used; and, it will thus be necessary to see whether we can hold that apart from any corroboration this is a case in which there are circumstances which might make the general rule relating to the untrustworthiness of an accomplice's evidence inapplicable. Besides, the whole question as to the proper scope of the law regarding the subject having been raised by the first ground of the certificate and elaborately discussed at the bar, it is right that one should state one's opinion in the matter. The literature on the subject of accomplices' evidence is very large and one with which lawyers are quite familiar. The only point that has any novelty in this case is whether this Court can interfere as a matter of law with a conviction founded upon the evidence of an accomplice in a trial held by a Judge without a jury where there is no corroboration of such evidence or if the evidence which the Court has relied on as corroborative is not such as to meet the requirements of the rule, and if so, in what circumstances?

The decisions on the subject of accomplices' evidence in this country are to be found in cases tried by District and Sessions Judges with a jury or assessors or by a High Court Judge with a jury. When a trial is by a Sessions Judge with the aid of assessors, the High Court, as the appellate court, has plenary powers of review in order to arrive at a decision upon the evidence whether the conviction is right (see sections 418 and 423, Criminal Procedure Code). The Sessions Judge as a Court of appeal is

given similar unlimited powers of review over convictions by magistrates in cases triable by the latter. When there has been an appeal to the Sessions Court from a conviction of a magistrate and it has confirmed the conviction, and in certain cases of summary trial by a magistrate in which the legislature allows no appeal, the High Court has the power of revising the case (see sections 435 and 439, Criminal Procedure Code). These powers are of a very wide character though the usual practice of the High Court is not to interfere in such cases except where the decision in question involves an error in law which has contributed to a miscarriage of justice. In other cases the question whether a conviction based on the uncorroborated testimony of accomplices can be regarded as erroneous in law may be of some practical importance though the fact that the High Court in any particular case did interfere in revision to set aside the conviction would not necessarily mean that it treated the question as one of law. When a case is tried by a Sessions Judge with the aid of a jury the prisoner can appeal to the High Court against the verdict only on a matter of law (see section 418, Criminal Procedure Code); if the trial was held by a Judge of the High Court in the exercise of its original criminal jurisdiction, then, as we have seen, the prisoner has no right of appeal but if the trying Judge has reserved any point of law for the decision of the High Court or the Advocate-General has certified to an error in a decision of law, the High Court is entitled to decide that point of law and pass such judgment as the case may require.

Now, whether the High Court exercises its powers as an appellate Court under section 417, Criminal Procedure Code, in cases tried by a jury or as a Court of error under article 26 of the Letters Patent, in either case it can interfere only when the trial is vitiated by an error in law and there is no substantial difference in the conditions of interference in the two cases. In *Queen-Empress v. O'Hara*(1), already referred to, a question was raised whether the words of article 26 "an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction" are to be understood in a strictly literal sense as being applicable only to cases in which certain questions of law have been expressly raised and decided at the trial, and it was held that the language

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

was wide enough to extend to cases where what is complained of involves a violation of the law or a failure to give effect to the injunctions of law. There can be no doubt in my opinion that this interpretation of article 26 is correct and it has not been contended otherwise in the present case.

I have already said that the contention on behalf of the accused that a conviction is illegal merely because it is based on the uncorroborated testimony of an accomplice is sufficiently answered by section 133 of the Indian Evidence Act. The law has never been otherwise either in India or in England, at least not for a very long time. On the other hand it is equally clear that the law makes special provisions as regards the treatment of an accomplice's evidence; the reception of that evidence stands on a different footing from the evidence of other witnesses. This, because of the fact that this class of witnesses are not only men of an infamous character but are induced to give their evidence by the expectation or hope that they will not be proceeded against for the crime which they are found to have committed if their story is believed as against the prisoners. The natural tendency of men in that position is to make out a case against the prisoner in order to save themselves. Instead of trying them for the offence which they have committed, the State tenders a pardon to them in special cases with a view to obtain full information as to certain crimes which but for such evidence would not have come fully to light. But the law does not say that in such cases, because of the difficulty of detection, the Court may be satisfied with a lower degree of certainty in the evidence than in other cases. On the other hand, the rule of law that the guilt of an accused person must be established beyond all reasonable doubt applies with equal force in all cases, and the more serious the nature of the crime with which a person is charged, the more circumspect the court must be as to the evidence it acts upon. These indeed are truisms of the criminal law of the land; it may nevertheless be useful sometimes to state them, lest they be forgotten.

In one part of the arguments of the learned Advocate-General on behalf of the Crown, he seemed to contend, if I followed him aright, that inasmuch as the legislature by section 133 of the Indian Evidence Act declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, it must necessarily follow that in no case where a

conviction is based on such testimony by a tribunal of facts is such conviction liable to review by a superior authority whose powers of interference are limited to matters of law. There is an apparent fallacy in this argument which treats the declaration that "a conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice" as equivalent to a declaration that "a conviction based on such testimony must necessarily be regarded as legal. It is obvious that the one does not follow as a logical consequence from the other. Section 133 does not purport to deal exhaustively with the question as to whether or when convictions based on an accomplice's testimony are or are not liable to be set aside as a matter of law. For instance, suppose the law imposes on a Judge certain duties as to directing the jury in the matter of an accomplice's evidence short of telling them that the law does not permit of their acting on such evidence, would that be inconsistent with anything contained in section 133? Clearly not. Then if the Judge failed to give such directions, the provisions of this section would not prevent the question of the propriety of a verdict given under these circumstances being treated as a point of law. Now section 133 must be considered along with section 114, illustration (b), and the explanations to that illustration furnish an indication how consideration of the evidence of an accomplice should be approached by the tribunal which is asked to act upon it. Section 114 says, the Court "may presume" the existence of any fact which, it thinks, likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case; in other words it says that the Court may make certain natural presumptions. Illustration (b) to section 114 is an example of such natural presumption. It says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. Then the legislature goes on to state "But the Court shall have regard to such facts as the following in considering whether such maxims do or do not apply" and cites two cases in explanation of illustration (b) suggesting without expressly saying so, that the maxim as to an accomplice being unworthy of credit unless he is corroborated in material particulars might not apply to those cases. Section 4 of the Indian Evidence Act lays down that wherever the phrase "may presume a fact" is used, it means that the Court may regard

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

such fact as proved in law until it is disproved or may call for proof of it, contrary to "shall presume" when the Court shall regard the fact to be proved unless and until it is disproved. Presumptions of this class must therefore be regarded as presumptions of fact and not of law. The argument on behalf of the Crown then is that the question of drawing a presumption as to the untrustworthiness of an accomplice's evidence is left to the discretion of the Court, and if the Court has erred in this respect, it would not be an error in law. Even if it be granted that the law leaves it to the discretion of the trying Court whether the presumption in question should or should not be raised in a particular case, it is undoubtedly a judicial discretion and it would not be correct to say that no improper exercise of such discretion can be set right as a matter of law. To my mind it is quite clear from the nature of the cases cited in the illustration that, except in the special circumstances, examples of which are attached to the section, the legislature requires that the Court should make the natural presumptions referred to in the section. For instance, there can be little doubt that in ordinary circumstances the presumptions mentioned in illustrations (c) and (e), viz., that a bill of exchange accepted or endorsed was accepted or endorsed for good consideration or that judicial and official acts have been regularly performed, should be made. Some indication to this effect is also furnished by the language in which the cases where the presumption may not be raised are introduced treating them as if they were exceptions to an ordinary rule. Whenever therefore the presumption is not raised or acted upon it must appear that special circumstances existed in the case which either negated the presumption or rebutted it. Now the first sub-illustration of illustration (b) of section 114 is that of a case in which the presumption of untrustworthiness which would ordinarily arise from the moral character of an accomplice and the temptation he is under to save himself at the expense of the prisoner is negated by the supposition that the accomplice in question is a man of high and honourable character and any likelihood of his falsely implicating an innocent man in order to save himself is also negated by that fact and by the nature of the offence to which he is speaking. The case cited as the second sub-illustration shows that there need not be anything in the moral character of the accomplice and the nature of the crime which he admits having committed,

to negative the distrust to which his evidence would *primâ facie* be subject and yet extraneous circumstances such as the fact that he and two others of his companions arrested immediately after the commission of the offence gave the same account of the occurrence implicating the accused under circumstances which for all practical purposes precluded the chances of a previous concert may be regarded as vouching for the truth of the accomplice's evidence. The supposed facts of the two illustrations are such as to leave no room for any reasonable doubt as to the truth of the accomplice's story in each case. There may of course be circumstances of a similar nature which would equally clearly negative the ordinary presumption against the reliability of an accomplice's evidence and it is the function primarily of the trying Court to attach due weight to those circumstances. Further, the strength of the presumption when it arises must vary in different cases having regard to the nature of the crime, the strength of the motive that may exist to tell a false story, and other similar circumstances. All this to my mind only shows what has been declared in so many words by section 133 that the legislature did not intend to lay down a hard and fast rule that in every case the accomplice's testimony must be regarded as unworthy of credence, if not corroborated; but it does not follow therefore, as argued on behalf of the Crown, that in no case where the Court refused to raise the presumption can it be said that it has erred in law. For instance, there can be no doubt that in ordinary cases an omission to raise the presumptions mentioned in illustrations (c) and (e) would be an error in law and justify a court of second appeal in interfering with the decree of the lower Courts on that ground. The presumption as to the unreliability of an accomplice's evidence is placed by the legislature on the same footing. No doubt there are cases and cases and while in doubtful cases the position contended for on behalf of the Crown may well be sound there is nothing at least in the Indian Evidence Act or in reason that in other cases in which there could be no two opinions that the presumption that an accomplice is unworthy of credit unless corroborated applies in full force not being either negated or rebutted an omission to raise the obvious presumption should not be treated as an error in law.

On the other hand, as I have pointed out the illustrations to section 114 furnish an indication to the contrary.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Now if the view which I have above indicated of the effect of the provisions be correct there is no foundation whatever for the suggestion that the provisions of the Indian Evidence Act are in any respect different from what is laid down in the rulings of the Indian Courts on the subject, either since the passing of the Indian Evidence Act or before it, or of the English Courts. Before the passing of the present Evidence Act, the question of accomplice's evidence was dealt with in India by section 28 of Act II of 1855 in these terms, "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that require corroborative evidence in support of the testimony of an accomplice." Then it appears that at least in Bengal there was some uncertainty in the decisions of the Courts on the question whether it was legal to convict upon the uncorroborated testimony of an accomplice and the matter was referred in 1866 to a Full Bench of the Bengal High Court. In that case — *Elahee Buksh's case*(1)—Sir Barnes Peacock in his well-known judgment fully investigated the whole question relating to an accomplice's evidence after an elaborate survey of the English and Indian authorities, and what he then laid down has not only been since followed as the law by all the Courts without question, but the Indian legislature when it came to pass the Indian Evidence Act has embodied the important principles enunciated in that judgment in section 133 and the illustrations to section 114 above referred to. In fact at least one of these illustrations is bodily borrowed from the judgment of Sir Barnes Peacock. It would be worse than idle on my part to refer again to the old English and Indian decisions discussed in the judgment of Sir Barnes Peacock. His conclusions are that an accomplice, being a competent witness, a conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law. But as a general rule there is danger in acting upon the evidence of an accomplice who is admitted to give evidence for the Crown for reasons already indicated and that this danger is at least as great here as in England. The danger however disappears if the grounds which give rise to the apprehension are found to be absent in any

particular case and he cites a hypothetical case which is embodied as sub-illustration to illustration (b) to section 114. He further lays down that as a general rule it would be as unsafe to act upon the evidence of more than one accomplice as of one; otherwise two companions in guilt might get off by conspiring and falsely accusing two innocent persons. To this, there may be exceptions, and then he cites a case which has apparently suggested the second sub-illustration to illustration (b) of section 114. As regards the duty of the Judge in dealing with such evidence, he lays down with reference to the provisions of the then Criminal Procedure Code, which in this respect are the same as section 279 of the present Code, imposing upon the Judge the duty of summing up the evidence, and, also upon general principles relating to trials by jury as are to be gathered from the decisions and practice of English Judges, that it is quite as necessary here, as in England, if not more so, that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require, that the giving of improper advice by the Judge or omission by him to give that advice, which the Judge in the exercise of a sound judicial discretion ought to give upon questions of fact or as to the degree of credit to be given to particular witnesses, is an error in law in the summing up. He then gives as an example an omission on the part of the Judge to tell the jury that the accomplices were giving the evidence under a tender of pardon or to explain to them the position in which the witnesses were placed and the danger of acting upon the evidence unless they should find that it was corroborated. He goes even further and says that it is the duty of a Judge to advise the jury not to believe the evidence of an accomplice unless he is confirmed and only so far as he is confirmed and a failure in that respect is an error in law and forms a good ground of appeal against a conviction founded on a verdict of guilty based upon such evidence alone. He also holds that it would be an error in the summing up to tell the jury that the evidence of the accomplices was corroborated by evidence of a fact which did not amount to any corroboration at all. He finally lays down that, where there is an error in the summing up of the evidence, that would warrant the court in setting aside the verdict of guilty, if the Court is satisfied that the prisoner was prejudiced by the error and that there has been a failure of justice. But the

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1866) 5 W. R., Cr. R., 80.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

verdict and conviction ought not to be set aside, if the court be of opinion that it was warranted by the evidence, and upon the evidence, they would have upheld the conviction on appeal, if the trial had been by the Judge with the aid of assessors instead of by a jury.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

In this Presidency the ruling in Proceedings, dated 20th March 1868(1), which was before the passing of the Indian Evidence Act of 1872, lays down that no rule of law prohibits a conviction upon the uncorroborated testimony of an accomplice but as a general rule of practice it is unsafe to convict upon such evidence and it is the duty of a Judge to point out the circumstances if any which would justify the jury in relying upon such evidence. In *Queen v. Nawab Jan and others*(2), KEMP and MACPHERSON, JJ., set aside a verdict on the ground that the Judge did not with sufficient emphasis caution the jury as to the danger of paying any respect to the testimony of the approver in the case, and wholly omitted to guide them as to what amounted to legal corroboration in some material circumstances, such circumstances connecting and identifying the prisoner with the offence. In *Queen v. Nidheeram Bagdee and others*(3), COUCH, C.J., and BAYLEY, J., on the other hand upheld a verdict of a jury since the Judge had properly cautioned them on the point and as the jury still found a verdict of guilty, there was no error in law. It is significant to note that the learned Judges thought that it was a proper case in which an appeal might be made to the Government. In *Queen v. Nunhoo and four others*(4), KEMP and JACKSON, JJ., laid down that the evidence of an accomplice may be of itself evidence, but it should never be admitted as sufficient proof of guilt unless it is corroborated. In Bombay also in a case, *Reg. v. Fattechand Vasta'chand*(5) it was laid down that it was the duty of the Judge to follow the ordinary rule and not to act upon the accomplice's evidence without corroboration in a material part of it.

The first reported case of importance decided after the coming into operation of the present Indian Evidence Act is that of *Queen v. Sailhu Mundul*(6) which was heard by PHEAR and MORRIS, JJ., on

(1) 4 M.H., C.R., Appx. p., VII.

(3) (1872) 18 W.R., Cr. R., 45.

(5) (1868) 5 Bom. H.C.R., C.C., 85.

(6) (1874) 21 W.R., Cr. R., 69.

(2) (1867) 8 W.R., Cr. R., 19.

(4) (1868) 9 W.R., Cr. R., 28.

appeal from a conviction on a charge of murder in a trial by a jury. The learned Judges considered the effect of the enactment and their conclusion was that section 114, illustration (b), contained a legislative declaration that, regard being had to the common course of natural events and human conduct, an accomplice is unworthy of credit so far as his testimony implicating another person is concerned, unless he is corroborated in material particulars in respect of the prisoner, but that in exceptional cases, such as those mentioned in the sub-illustrations, the court might give credit to the accomplices' testimony against the accused, if it sees good reasons for doing so upon grounds other than the personal corroboration. They go on further to observe that it is the nature of an accomplice's evidence that calls for corroboration even though such evidence was given in a process of careful examination or capable of being tested by cross-examination.

The earliest decisions of this Court under the Indian Evidence Act brought to our notice is in *Reg. v. Ramasami Padayachi*(1), where MORGAN, C.J., and KINDERSLEY, J., laid down that it was not the law that the evidence of an accomplice was irreceivable in evidence without corroboration and that sections 133 and 114, illustration (b), coincide with the rule in England. They state the rule to be that the tainted evidence of an accomplice should be carefully scanned and received with caution and may be treated as unworthy of credit, yet if the jury or the court, as the case may be, credits the evidence, a conviction proceeding upon it is not illegal. Some reliance was placed on this ruling on behalf of the Crown, as if it laid down the law differently from the other decisions, but I find nothing to support the suggestion. The judgment does not deal with the question in what cases the manner in which an accomplice's evidence is dealt with by the court, either in directions to the jury or in laying down for its own guidance the principles for testing such evidence, may amount to an error in law. On the other hand they say that the law on this point is the same as the law in England on the point. In *Reg. v. Malapabin Kapana and others*(2), NANABHAI HARIDAS and LARPENT, JJ., in considering the question whether certain evidence can be considered corroborative evidence in the sense in which judges require corroboration of an accomplice's statement

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1878) 1 L.R., 1 Mad., 394.

(2) (1874) 11 Bom. H.C.R., 196.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

within the meaning of section 114, illustration (b), they take it for granted that the rule is to require such corroboration.

As for the more recent decisions of this Presidency, COLLINS, C.J., and MUTHUSAMI AYYAR, J., in *Queen Empress v. Arumuga*(1), laid down that a judge should caution the jury not to accept the evidence of an approver unless it is corroborated and the omission to do so would amount to a misdirection. In *King-Emperor v. Mohiuddin Sahib*(2), DAVIES and MOORE, JJ., held that the evidence of an accomplice ought to be corroborated in some material circumstance and in *Emperor v. Smither*(3), DAVIES and BENSON, JJ. state that an accurate statement of the law on the subject will be to say that as a general rule it is unsafe to act upon the uncorroborated testimony of an accomplice but there may be especial circumstances in which it would not be unsafe to act upon such evidence. In *Ramaswami Gounder v. Emperor*(4), SUBRAMANIA AYYAR, J., said that the Indian Law in this matter was borrowed from the English Law as held in *Queen v. Elahoe Buksh*(5) the judge ought not to direct the jury to acquit if the case against the prisoner rested mainly upon the uncorroborated evidence of an accomplice, but it was sufficient if the judge advised the jury not to convict upon such evidence, as stated in *Reg. v. Boyes*(6). BODDAM, J., however would go further, holding that it would be the duty of the judge in such a case to direct the jury to acquit. The matter on being referred to BASRYAM AYYANGAR, J., he agreed with SUBRAMANIA AYYAR, J., as to the proper scope of the law on the subject and pointed out that it was the duty of the judge to explain to the jury that it was not safe to convict upon the uncorroborated evidence of an accomplice and if there was no corroboration of the accomplice in a material particular to draw their attention to the fact. The Judge ought also to add, he says, that a conviction upon such testimony is perfectly legal, and if a jury bearing in mind the caution still believed the evidence it would be their duty to convict. The learned Judge observes that the practice not to convict upon the evidence of an accomplice unless there is corroboration has been so hallowed by time as to be deserving of respect and that in fact the rule of

law as laid down by section 133 of the Indian Evidence Act is practically rendered nugatory by the rule of practice. In *Queen-Empress v. Kunjan Menon and Sankunni*(1), a Full Bench of this Court consisting of COLLINS, C.J., KERNAN, MUTHUSAMI AYYAR, PARKER, and WILKINSON, JJ., observe that it has now become a general rule of practice that the judge ought to advise the jury to acquit unless the evidence of the accomplice is corroborated; and in *In re Kuppan*(2), BENSON and MILLER, JJ., stated that it was a general rule of practice that it was not safe to convict upon the uncorroborated evidence of an accomplice. The recent rulings of the other High Courts are to the same effect. BINDWOON and JARDINE, JJ., in *Queen-Empress v. Krishnabhai*(3), say that section 114, illustration (b), lays down the ordinary rule that an accomplice is unworthy of credit unless he is corroborated in material particulars and that it was an established rule of practice that the accomplices must be corroborated by independent evidence as to the identity of every person he impeaches. JARDINE and BAYLEY, JJ., in *Queen-Empress v. Maganlal*(4), also enunciate the law to the same effect saying that it is the established practice to require corroboration of an accomplice's evidence and it is for those who want such evidence to be acted upon to allege reasons why the ordinary test of the evidence of accomplices should not be applied in a particular case. In *King-Emperor v. Malhar*(5), FELTON and CROWE, JJ., while admitting the existence of the general rule, point out that all persons coming within the category of accomplices cannot be treated as on precisely the same footing. In *King-Emperor v. Shrinivasa*(6), JENKINS, C.J., and RUSSEL, J., point out that the absolute rule of law on the subject of accomplices' testimony is contained in section 133 of the Indian Evidence Act, there is further a rule of guidance which is embodied in section 114, illustration (b), and that it would be an error of law to disregard the presumption indicated in the latter rule. In Calcutta, RAMPINI and PRATT, JJ., in *Queen-Empress v. Deodhar Singh*(7), point out that the presumption stated in illustration (b) to section 114 has become a rule of practice of almost universal

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1889) I.L.R., 12 Mad., 196.

(3) (1903) I.L.R., 26 Mad., 1.

(5) (1863) 5 W.R. Cr. R., 80.

(2) (1902) I.L.R. 25 Mad., 143.

(4) (1904) I.L.R., 27 Mad., 271.

(6) (1881) 9 Cox's C.C., 82.

(1) (1891) 1 M.L.J., 397.

(3) (1886) I.L.R., 10 Bom., 319.

(5) (1902) I.L.R., 26 Bom., 193.

(2) (1909) 5 M.L.J., 355.

(4) (1890) I.L.R., 14 Bom., 115.

(6) (1906) 7 Bom., L.R., 959.

(7) (1900) I.L.R., 27 Calc., 144.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

application and in *Kamala Prasad v. Sital Prasad*(1) AMIR ALI and PRATT, JJ., observe that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars and the practice, which has been laid down, has become, one may say, a part of the law itself. In *Jumiruddi Masalli v. Emperor*(2), PRINSEP and STEPHEN, JJ., observed that the Sessions Judge ought to have told the jury that though the law permits of a conviction being based upon the uncorroborated evidence of an accomplice, yet it was not the practice of our courts to convict on such evidence. It was a misdirection to tell a jury that the evidence of the accomplice was corroborated by a fact which did not amount to any corroboration at all. In *Deo Nandan Pershad v. Emperor*(3), BRETT, and STEPHEN, JJ., recognise the rule of practice which lays down that it is generally wrong to convict upon the uncorroborated evidence of an accomplice but they agree with the proposition stated in *King-Emperor v. Malhar*(4), that the rule does not apply in equal force to all persons coming technically within the category. In a recent important trial under the Criminal Law Amendment Act, 1908, for an offence under section 121A of the Indian Penal Code in the Calcutta High Court, *Emperor v. Lalit Mohan Chukerbutty*(5), it was conceded before the Special Bench as a proposition which was not open to question that before the approver's testimony could be acted on it must be corroborated in material particulars, that the nature and extent of this corroboration was well settled, there must be corroboration not only as to the crime but also as to the identity of each one of the accused. The learned Judges observe that this is no technical rule but founded on long judicial experience.

In the Allahabad High Court, the law was fully considered by SRAIGHT and TYRELL, JJ., in *Queen-Empress v. Ram Saran*(6), and they held that the law in India as contained in the Indian Evidence Act is the same as in England, viz., that, though a conviction is not illegal, that is, not unlawful if it is based on accomplices' testimony alone, experience teaches us that it is not safe to rely upon such evidence unless it is corroborated, and it is

(1) (1901) I.L.R., 28 Calc., 339.

(3) (1906) I.L.R., 33 Calc., 649.

(5) (1911) I.L.R., 38 Calc., 559.

(2) (1902) I.L.R., 29 Calo., 782.

(4) (1902) I.L.R., 26 Bom., 193.

(6) (1886) I.L.R., 8 All., 306.

the practice of judges both in England and in India when sitting alone to guard their minds carefully against the evidence of approvers. The corroboration, they observe, must extend to the identity of the accused persons. STRAIGHT, J., also points out that the tendency of late years in England is to apply the rule with great strictness, and, as I shall show, the practice of the court of Criminal Appeal is to set aside a verdict of guilty if the judge did not advise the jury not to act upon the testimony of an accomplice. In *Queen-Empress v. Gobardhan*(1), EDGE, C.J., says that as a general rule it would be unsafe to convict an accused person on the uncorroborated evidence of an accomplice and a judge should advise the jury to that effect. It is at the same time not only open to the jury but it is their duty if they believe such evidence in spite of the caution to bring in a verdict of guilty. In *Abdul Karim v. King-Emperor*(2), BANERJI, J. observes that the evidence of an accomplice cannot be acted upon without corroboration in material particulars, unless it is such that the court can unhesitatingly believe it.

I wish to allude very briefly to the rulings in some English cases decided after the date of the judgment of Sir BARNES PEACOCK in *Elahee Buksh's* case as the English decisions prior to that judgment are exhaustively dealt with there. In *Reg. v. Cramp*(3), DENMAN, J., observes that there is no doubt that the evidence of an accomplice requires corroboration. In *Reg. v. Gallagher and others*(4), the Lord Chief Justice COLERIDGE in his direction to the jury observed "if the jury upon the evidence of the approver himself was perfectly satisfied that he was speaking the truth there was no reason in point of law why on his evidence they should not act and find the accused guilty, but the danger of acting upon the uncorroborated statement of an approver was obvious and the wisdom of requiring that some corroborative evidence should be given before such statements are acted upon was perfectly apparent to any intelligent mind. The law was as he had stated and the practice was always to require corroboration." In *In re Meunier*(5), where the question was whether the evidence of an accomplice if uncorroborated was sufficient to justify a committal for surrender to France, CAVE, J., held that it was not the law that a prisoner must necessarily be acquitted in the absence of corroborative

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1887) I.L.R., 9 All., 528.

(3) (1880) 14 Cox. C.C., 390.

(5) (1894) 2 Q.B., 415.

(2) (1904) 1 A. L.J., 110.

(4) (1883) 15 Cox. C.C., 291.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

evidence and there was no power in the court to withdraw a case from the jury on that ground. In *Rex v. Tate*(1), Lord ALVERSTONE delivering the judgment of the Court of Criminal Appeal while pointing out that there was no definite rule of law that a person cannot be convicted upon the uncorroborated evidence of an accomplice as stated by CAVE, J., in *In re Mewster*, observed that he ought to have added 'assuming that the jury was cautioned in accordance with the ordinary practice' and then cites the following passage from Taylor on Evidence, 10th Edition, page 688, as containing a correct exposition of the law: "Judges . . . in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a court of review, its omission will, in most cases, be deemed a neglect of duty on the part of a judge. Considering too the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, excepting under very special circumstances." He also cites with approval a passage from Russel on Crimes, 6th Edition, Volume III, page 646: "It may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' and a deviation from it in any particular case would be justly considered of questionable propriety."

In *Rex v. Everest*(2), the Court of Criminal Appeal (DARLING, BRAY and LAWRENCE, JJ.) laid down that a judge should direct a jury to acquit if the evidence against the accused is that of a person put forward as an accomplice and his evidence is not corroborated in some material particular, that is to say, in some particular that involves the guilt of the accused. In *Rex v. Warren*(3), the Court of Criminal Appeal quashed a conviction on the ground that there was very little, if any, evidence of corroboration proper to go to the jury and that the judge did not adequately direct the jury that they should acquit the appellant if the accomplice's story was not corroborated in some material particular, that is, in some particular that involved the guilt of the accused. CHANNEL, J., observed in his judgment that "The rule was very clear now about the evidence of an accomplice.—It must be

corroborated in some material particular." It seems to me that in the last two cases the words "directing the jury to acquit" should perhaps be understood in the sense of advising the jury to that effect and not in the sense of withdrawing the case from the jury.

It should be pointed out with reference to the judgments of the Court of Criminal Appeal in England that though under 7 Edw. VII, Cap. 23, section 3, the prisoner is given an appeal as of right only on a question of law, the appellate court has the power in certain circumstances to review the verdict and conviction on a question of fact or of mixed law and fact. But they seem to lay down generally that it is the duty of the judge to advise the jury not to convict upon the uncorroborated testimony of an accomplice and a failure to discharge that duty would *ipso facto* make the conviction liable to be set aside. The power of this Court to interfere under article 26 of the Madras Letters Patent is however confined to matters of law and in this respect it is analogous to the power which the Queen's Bench as a court of error has under 11 and 12 Vict., Cap. 78. On the question therefore what would amount to an error in law in dealing with the evidence of an accomplice the decision of the Court of Crown Cases Reserved in *Queen v. Stubbs*(1), is much relied on by the counsel for the Crown. But all that is said there is that it is not a rule of law that an accomplice must be corroborated in material particulars but is only a rule of practice and a question of practice cannot be reserved for the opinion of that court. In that case, the judge had in fact cautioned the jury as to the case of *Stubbs* where there was no corroboration and what the Court of Crown Cases Reserved held was that his failure to advise the jury not to convict was an omission to observe a rule merely of practice. It is clear however that the tendency of the more recent English decisions is to invest the practice with the stringency of law; that in India also, an omission to advise the jury in accordance with the practice would be an error in law is the view of Sir BARNES PEACOCK and many other judges as is apparent from the decisions I have referred to.

My conclusion is that it is well established law that except, in circumstances of an especial nature, it is the duty of the court to raise the presumption that accomplices' evidence is unworthy of credit as against the accused persons unless it is corroborated in

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1908) 2 K.B., 680.

(2) 73 J.P., 269 at p. 271.

(3) 73 J.P., 359.

(1) 25 L.J.M.C., 16.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

material particulars and the failure of the judge to direct the jury to that effect is an error in law. It will none the less in my opinion be an error in law if the trial was held without a jury and the judge or the magistrate misdirected himself on this point and treated an accomplice's evidence like that of any other witness. I do not perceive any principle on which the two cases may be distinguished. The next proposition which is also well recognised is that if there are any especial circumstances which would justify a disregard of this rule, those circumstances in a trial by a jury must be clearly set out in the directions of the judge, and the appellate court is entitled to consider as a matter of law whether those circumstances are such as to justify the exceptional treatment. If, in the opinion of the appellate court, the facts in this connection are such that they in no sense negative the danger of acting upon the uncorroborated testimony of the accomplice but the judge told the jury otherwise, the verdict must be set aside as being due to an error in law; if the especial facts, however, are such as may reasonably be considered to take the case out of the rule even though it is possible to hold a different view, the verdict cannot be interfered with by a court of error. A similar rule would hold good in cases tried by a judge alone. This is substantially how I stated the law recently in *Vyasa Rao v. Emperor*(1).

As regards the nature of corroboration, the law is that corroboration must relate not only to the crime but also to the identity of the prisoner. The question whether it can be said as a matter of law that the view of the trying judge as to whether certain evidence does or does not amount to corroboration within the meaning of the rule is also governed by the same principle as I have just indicated. But the evidence given in court by an accomplice cannot be used to corroborate the evidence of another accomplice, though in exceptional circumstances (such as the second sub-illustration to illustration (b) to section 114 of the Indian Evidence Act) the fact that the accounts given of the crime by different accomplices may be taken as corroboration of the evidence in court. On the other hand if the contention of the counsel for the Crown were well founded that, since the question whether the evidence of an accomplice is to be deemed to be

(1) (1911) M.W.N., I, 327.

untrustworthy unless it is corroborated in material particulars cannot be determined without referring to the facts of the particular case in which the evidence is given, therefore in no case, where a judge of facts has acted upon such evidence, can it be said that in failing to raise such a presumption he has erred in law, however grossly palpable the facts may be which show the danger of acting upon such evidence alone, then all that has been said hitherto by learned judges in England and India on the subject of accomplices' evidence would have no meaning whatever. For it would logically follow from such an argument that the law imposes no especial duty on the court in dealing with accomplices' evidence and the general rule that an accomplice's evidence should not be acted upon unless it is corroborated, the soundness of which, as Lord Chief Justice Coleridge puts it, is obvious to any intelligent mind, would lose all significance in law, if its disregard in any case cannot be set right as a matter of law, because in some cases of rare occurrence the rule may not be applicable.

This brings me to the *second question* propounded in the certificate. It is in these words:—

"That the opinion of the majority of the Court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial should be further considered."

The answer to be deduced from the above discussion of the law is that as a general rule the previous statements of an accomplice do not legally amount to such corroboration as is required to rebut the presumption as to the unreliability of an accomplices' evidence, but there may be cases in which the circumstances in which the previous statement was made by precluding the possibility of the accused having been falsely named therein by the approver would lend corroborative force to the accomplice's evidence. The only direct decision on the point is *Reg. v. Malabarbin Kapana and others*(1) where the rule is stated in unqualified terms and in *Vyasa Rao v. Emperor*(2) in which the question arose before AYLING, J., and myself whether evidence of a co-accomplice was sufficient corroboration within the meaning of the law, I expressed my agreement with what is laid down in the Bombay case. While I still adopt generally what is laid

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1874) 11 Bom. H.C.R., 196.

(2) (1911) 1 M.W.N., 327.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

down in *Reg. v. Malapabin Kapana and others*(1), it seems to me on further consideration that, to be quite accurate, the rule must be stated subject to the qualification which I have suggested, and I may point out that neither the learned Judges of the Bombay High Court nor I were called upon in the cases mentioned above to consider whether the rule was subject to any qualification. Having regard to the fact that the previous statement of an accomplice is admissible in evidence, as is assumed in the second ground of the certificate, and to the nature of the cases cited by the legislature, which shows that corroboration may be furnished by previous statements of accomplices made in certain circumstances, it would be difficult to hold that the rule does not admit of exceptions.

The previous statements mainly relied on by the majority of the Special Bench are those made by the approvers, Arumugam and Somasundaram respectively, to the police, the first, two days, and the second, three days, after the murder of Mr. Ashe and also to some extent on the statements made by them a few days afterwards to Mr. Cox, who made a local enquiry in the case. As regards the statements to the police officer, I am of opinion that they were wrongly admitted in evidence on the ground next mentioned in the certificate and it would not therefore be necessary to consider how far, if admissible, they could be taken as amounting to corroboration of the approver's evidence in court. As regards the statements made to Mr. Cox no objection can be taken to their admissibility but so far as at present advised I fail to see how they can be held to afford corroborative evidence within the meaning of the rule. They were made long after the last meeting at which the criminal oath was taken and several days after the approvers had been in the hands of the police in connection with the murder of Mr. Ashe. The learned Judges who formed the majority of the Special Court do not find that these approvers did not make the statements to Mr. Cox in the hope of being pardoned, nor do they say that the circumstances in which the statements were made precluded the possibility of their acting in concert. On the other hand, it is found by Mr. Justice SANKARAN-NAIR that the evidence points to the probability of their so acting. No doubt the learned Chief Justice and Mr. Justice AYLING say that some of the accused allege that they were strangers to Arumugam and Somasundaram and

(1) (1874) 11 Bom. H.C.R., 196.

therefore their names could not have been mentioned by the approvers unless they participated in the conspiracy. That allegation has been found by the learned Judges to be untrue, but they do not find that in fact these accused came to be known to the approvers only by reason of their being members of the criminal conspiracy: on the other hand it is found in their judgment that there was an association called the Bharata Matha Association which according to them though of a seditious tendency was not actually a criminal association and some of the accused at least were members of that association. The fact that the police could not have concocted the earlier or the later statements of the approvers does not meet the difficulty. I am not prepared to hold upon the facts so far as they appear in the judgments of the Special Bench that the statements to Mr. Cox would be such corroborative evidence as to minimise the danger of acting upon the testimony of the approvers. I may also observe that most of the considerations which I have indicated as applicable to the statements made to the magistrate are also applicable to those made to the police officer four days previously.

The objection taken in the *third ground* to the admissibility of the statements made by two of the approvers to the Inspector of the Criminal Investigation Department is, in my opinion, well founded. Those statements are admitted under section 157 of the Indian Evidence Act, not on the ground that they were made at the time when the fact of seditious conspiracy to which they relate took place, for the last act in connection with the seditious conspiracy spoken to by the approvers had taken place months before the making of the statements, but on the ground that they were made to an "authority competent to investigate the fact." The statements were made in the course of an investigation in the case of the murder of Mr. Ashe. It is moreover the finding of the Special Bench that the murder of Mr. Ashe was not in pursuance of the criminal conspiracy, the subject of the present trial, and the one had no real connection with the other. Now supposing that the officer of the Criminal Investigation Department—prosecution witness No. 31—had authority to inquire into the murder of Mr. Ashe he would have no authority to investigate the fact of a conspiracy dealt with under section 121-A of the Indian Penal Code, which is a non-cognizable offence, without a magistrate's warrant (see section 155, Criminal Procedure Code).

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Neither prosecution witness No. 31 nor Mr. Thomas had any such warrant. Section 157 of the Indian Evidence Act says that the authority must be competent to investigate *the* fact, i.e., the fact to which the statement relates. Here the fact is the conspiracy and this fact the officers concerned in the case had no authority to investigate at the time the statements were made. But it is said that the statements were made in the course of an investigation of an offence which was within the competency of the police officers. I do not however see how that makes the language of section 157 applicable.

One would not in my opinion be justified in construing section 157 in a loose general sense having regard to the fact that it permits a statement, made in the absence of a party to a proceeding which he had no means of testing, to be used in evidence against him. Such departure from the ordinary rule relating to judicial evidence must be confined within the strictest limits.

I may mention that it was argued by the pleaders for the accused that the word "investigate" in section 157 in the Indian Evidence Act is used in the technical sense of the Criminal Procedure Code. But this is clearly not so. The application of that section of the Indian Evidence Act is not confined to criminal cases and the word "investigate" is obviously used in its natural and popular meaning.

It is further urged in support of the third ground that Veeraraghava Aiyar, prosecution witness No. 31, was not even competent to investigate the murder of Mr. Ashe. The question is dealt with in the judgment of the majority of the Special Bench at page 272 and by Mr. Justice SANKARAN-NAIR at page 355. The question is not free from difficulty, but after careful consideration of it, I am inclined to think that the weight of reasoning is decidedly in favour of the view taken by Mr. Justice SANKARAN-NAIR. There is nothing indeed that I can usefully add to his arguments based on the provisions of the Criminal Procedure Code on which the decision of the question depends. I may observe that section 21 of the Police Act XXIV of 1859 throws no light inasmuch as the sections of that Act which defined the powers of a police officer have been replaced by the provisions of the Criminal Procedure Code. Nor does the confidential Government Order (G.O. No. 913, Judicial, dated 2nd July 1908) adduced in evidence on behalf of the Crown make out that an

Inspector of the Criminal Investigation Department is vested with the powers of investigation under the Code.

The department was created to assist the ordinary police force in the detection of certain crimes and neither that fact nor the fact that a member of the Criminal Investigation Department holds the rank of an Inspector would by itself entitle him to exercise the same powers within the Presidency of Madras as an officer in charge of a police station has within the local limits of his station under section 156, Criminal Procedure Code.

The *fourth* question raised by the certificate is whether previous statements of the two approvers, Arumugam and Somasundram, are not inadmissible in evidence against the accused persons by virtue of section 25 of the Indian Evidence Act. That section runs thus: "No confession made to a police officer shall be proved as against a person accused of any offence." I agree with the contention of Mr. Govindaraghava Aiyar that the words "a person" there mean "any person," but the real point in connection with the applicability of the section to the statements of the approvers is, what is the meaning in which the word "confession" is used in that section? It could not have been used in the wide and popular sense in which it is used in every day conversation as meaning an acknowledgment of some fault, for that would make the section ridiculous, and there can be little doubt that it is to be understood in the technical sense of the criminal law. This is apparent from the fact that the word is used in connection with criminal inquiries and trials in all the sections in which it occurs, namely, sections 24 to 30. What then is that meaning? It is suggested that "confession" in criminal law means an admission of certain facts which constitute an offence or lead to an inference of guilt. Yes, but admission by whom? When the word is used in the technical sense of the criminal law, does it not always mean such an admission as above referred to when made by a person who is charged with the offence which is the subject matter of the statement? That is at least how I have always understood the word. One does not talk of the confession of a witness except in a popular sense. If the word as used in section 25 be understood with reference to the question whether the person making it was ever tried or not for the offence to which he confesses, then it would follow that any statement by a witness to a police officer which leads to an inference of guilt under the general

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

provisions of any act however unconnected with the offence under inquiry would be inadmissible by reason of this section. Suppose A who does not possess the necessary license sent his servant with a quantity of opium for sale and the servant returning after having sold the opium is robbed of the money, could it be said that in a trial of persons charged with the robbery the statement of the master made to a police officer immediately after the occurrence that he had sent the servant to sell opium could not be received in evidence under section 157 of the Indian Evidence Act, because the witness' statement would amount to a confession of an offence under the Excise Act? I think not. There could be no good reason for excluding such statement on the mere ground that it was made to a police officer. The fact is, whether a statement is to be called a confession or not, depends not merely upon the nature of the statement itself, but also on the use that is sought to be made of it. Whenever the evidentiary value of a statement as against the person making it is in question, it is then that it would be properly called an admission or confession according as the proceeding in which the question arises is of a civil or criminal nature, but not when it is intended to be used as evidence against a third person. For it cannot be disputed that an admission or confession means a statement amounting to an acknowledgment of certain legal liability or of facts which give rise to such liability against the person making the acknowledgment; then how can such statement be called either admission or confession in a case where the only question for consideration is, how far the liability of a third person and not of the person making the statement, is established thereby. Much stress is laid on the fact that in section 25 confession is not expressly mentioned as of an accused person while it is so used in section 24, but if the word has a well-known meaning in the criminal law, as I think it has, then this argument has no force. I am fortified in the interpretation I have put on the word "confession" in section 25 of the Indian Evidence Act by the definition of "confession" given in Stephen's Digest Article 131, which was adopted by MAHMOOD, J. in *Queen-Empress v. Babu Lal*(1). On this point, therefore, I agree with the majority of the Full Bench.

The last ground of the certificate is that section 162 of the Criminal Procedure Code, which lays down "No statement made

by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence," forbids not only the use of the writing as evidence of the statement, but of the statement itself even if it is sought to be proved without the writing. But the contention is hopeless in face of the language of the legislature. Supposing the statements made by the approvers were admissible under section 157 of the Indian Evidence Act, could it be said that section 162 of the Code of Criminal Procedure stands in the way? According to the ordinary rule of interpretation the two enactments must be reconciled with each other if possible and if we confine the declaration of the legislature in section 162 of the Criminal Procedure Code to what is expressed there, it may well stand with section 157 of the Indian Evidence Act. I therefore agree with the view of the Special Bench on this point which is also the view taken by MACLEAN, C. J., and CARNDUFF, J., in *Fanindranath Bannerjee v. Emperor*(1) and of KARAMAT HUSSAIN, J., in *Rustam v. King-Emperor*(2).

The result of what I have said is that those prisoners, in my opinion, must be acquitted and discharged, whose convictions rest on the testimony of the approvers without any corroboration, independently of the previous statements of these witnesses made to the police officer Veeraraghava Aiyar or to Mr. Cox, unless the learned counsel for the Crown wishes to argue that there are facts and circumstances not mentioned in the judgment of the majority of the Special Bench, which, by themselves or if considered along with those noticed in the judgment of the Bench, take the case out of the general rule that an accomplice must be deemed unworthy of credit unless he is corroborated in material particulars, or that there is evidence apart from that relied on by the majority of the Special Court, which furnishes the necessary corroboration within the meaning of the rule as I have stated it. In that event, the case must be argued further, for, under section 26 of the Letters Patent as I read it, a sentence is not to be set aside simply because there is an error of law involved in the direction of the judge to the jury or in the judgment of a judge sitting without a jury if such error has not occasioned a miscarriage of justice.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1884) I.L.R., 6 All., 509 at p. 539, F.B.

(1) (1909) I.L.R., 36 Calc., 281.

(2) 7 A.L.J., 468.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

SUNDARA AYYAR, J. (*Preliminary objection*).—With regard to the preliminary objection that the Advocate-General had no power in this case to make a certificate under clause 26 of the Letters Patent, there can, in my opinion, be no doubt that it is unsustainable. The conviction of the accused was under the Criminal Law Amendment Act, XIV of 1908. That statute entitles the Governor-General in Council or the Local Government to direct that the special procedure proscribed therein should apply to the proceedings in respect of any offence of which a magistrate has taken cognizance. According to the special procedure enacted by the Act, a magistrate who arrives at the finding that the evidence adduced before him is sufficient to put the accused upon his trial for an offence specified in the schedule to the Act should commit him for trial to the High Court. Section 11 of the Act provides that "all persons sent for trial to the High Court under the Act shall be tried by a Special Bench of the Court composed of three Judges." Section 14 lays down that "The provisions of the Code of Criminal Procedure, 1898, shall not apply to proceedings taken under this part, in so far as they are inconsistent with the special procedure proscribed in this part."

Mr. Napier contends that cases under the Act must be governed only by the special procedure laid down therein and that there is no provision in it for any review by this Court, either upon any reservation of a point or points of law by the Bench trying the case, or on a certificate by the Advocate-General that in his judgment there is an error in the decision of a point or points of law decided by the Special Bench, or that the point or points of law which has or have been decided by it should be further considered. But it is quite clear that Act XIV of 1908 does not purport to lay down any complete rule of procedure and that the ordinary criminal procedure is applicable to proceedings under the Act, except so far as it is inconsistent with the special procedure proscribed in the Act. Obviously, certification by the Advocate-General under clause 26 of the Letters Patent is not inconsistent with the special procedure proscribed in Act XIV of 1908.

Mr. Napier next contends that the Advocate-General's jurisdiction to make a certificate extends only to cases coming within the purview of clauses 23 and 24 of the Letters Patent and that these clauses do not include a case of conviction on a committal

to the High Court under Act XIV of 1908 by a mofussil magistrate, of persons beyond the ordinary original jurisdiction of the High Court. I shall presently examine whether clauses 23 and 24 would include such a case or not. But it is clear to my mind that, assuming they would not, clause 26 is wide enough to cover the case. This clause gives power to the High Court to review (on the Advocate-General's certificate) in every case mentioned in clause 25. The latter clause refers to "any criminal trial before the courts of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court." There is no reference in the clause to clauses 23 and 24 and there is nothing in the words limiting its operation to the cases comprised in clauses 23 and 24. There can be no doubt that a trial under Act XIV of 1908 is a trial before "a court of original criminal jurisdiction" "constituted by one or more Judges of the said High Court." The committal under Act XIV of 1908 is to the High Court as such and a Court of three Judges of the High Court is constituted for the trial by the Chief Justice of the High Court, acting under section 14 of the High Court's Act, 24 and 25 Viet., Cap. 104. The fact that Act XIV of 1908 was passed long after the Letters Patent is no reason for holding that clauses 25 and 26 do not apply to a trial before a Court of original criminal jurisdiction constituted by Judges of the High Court under that Act. They are clearly applicable to all original criminal trials by the High Court, whether under an Act existing at the time of the Letters Patent or an Act passed subsequently. Clause 23 refers to the trial of persons within the local limits of the High Court's ordinary civil jurisdiction, and of other persons beyond its limits over whom the High Court had criminal jurisdiction at the date of the publication of the Letters Patent. Clause 24 ordains that the High Court "shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any court now subject to the superintendence of the said High Court and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General or by any magistrate or other officer specially empowered by the Government in that behalf." It is admitted by Mr. Napier that the power in this section will extend to cases where the magistrate or other special officer referred to therein prefers charges under authority which they

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

possess under any law, whether existing at the time of the Letters Patent or coming into existence subsequently. There is no reason for not placing a similar construction on clauses 25 and 26. This would be a sufficient ground for holding that the preliminary point must fail.

I am, however, also of opinion that it is not shown that clauses 23 and 24 would not cover this case. Clause 24, as already mentioned, gives power to the High Court to try any person brought before it on charges preferred by any magistrate or other special officer empowered by the Government in that behalf. For the decision of this case there are two points for consideration as to the meaning of this sentence. Does the expression "specially empowered" refer only to "other officer," or also to "any magistrate"? And secondly, what is the meaning of the expression "charges preferred by any magistrate" or other officer specially empowered by the Government? The non-repetition of the word "by" before the words "other officer" is relied on as showing that *both* the magistrate and other officer referred to in the clause should be persons specially empowered by Government. There is, no doubt, force in this argument, but it seems to me to be doubtful whether it is sound in this case. The powers of magistrates are usually determined by general provisions in the Criminal Procedure Code or other statutory enactments. It does not appear that there was any provision of law at the time of the Letters Patent empowering the Government to give *special* authority to particular magistrates to prefer a criminal charge. The non-repetition of the word "by" before "other officer" may be due to the fact that the legislature intended to put the Advocate-General under one category and "magistrate and other officer" under another and distinct category. After all, it would only be a matter of caution to repeat the word "by" to show clearly that the qualification "specially empowered" did not apply to the noun before it. Then with respect to the expression "charges preferred by," the contention on behalf of the Crown is that it means, as applied to a magistrate, commitments made by him to the High Court. This is not the usual meaning of the expression. The preferring of a charge generally means the laying of a charge or complaint in order that it may be enquired into and not a committal based on enquiry already made. This is certainly the meaning of the expression in this very sentence as applied to Advocate-General. There is no

apparent reason for giving it a different meaning in applying it to a magistrate. The clause seems to authorize the High Court to try a person brought before it on a charge preferred by any magistrate having authority to prefer it (without being specially empowered to do so by Government). There is nothing in the clause to show that the charge must be preferred directly to the High Court. Magistrates and other officers generally have no power to do so, though the Advocate-General has and always had. See section 194, Criminal Procedure Code, and Cyclopædia of the Laws of England, Vol. I, under the heading "Attorney-General," page 624, second edition. It is not shown that any magistrates or other officers besides the Advocate-General had, at the date of the Letters Patent, the power in any case to prefer a charge directly to the High Court. The clause does not seem to require more than that the charge in the case should have been preferred by a magistrate having legal authority to do so and that the accused in the case should also be brought before the Court in a lawful manner. The charge against the accused in this case was admittedly preferred by a magistrate. The accused were admittedly brought before this Court in a lawful manner.

I am not therefore satisfied that Clause 24 does not apply to the cases. But it is unnecessary to decide this question, as it is clear to me, for the reasons already mentioned, that clauses 25 the 26 are applicable to *all* cases of original criminal trials before and High Court under whatever provision of law that trial may be held.

The first point.—The first point that the Advocate-General's certificate states should be further considered by the Court is "the opinion of the majority of the Court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the court was satisfied that the evidence was true." This would seem *prima facie* to be opposed to the very words of section 133 of the Indian Evidence Act which lays down in positive terms that "a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." The Advocate-General's meaning however is explained by the further statement in the certificate that "it requires to be further considered whether section 133 of the Indian Evidence Act, read with section 144, illustration (b),

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." But again it is hardly possible to suppose that the Advocate-General meant to suggest that the presumption referred to is one which the court is directed by law to make in all cases of the testimony of an accomplice and requiring to be rebutted by other evidence. For, that would be directly contrary to the definition of "may presume" in section 4 of the Act, according to which "whenever it is provided by this Act that the court 'may presume' a fact it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it." The argument for the accused at the hearing was, and I take it the view suggested by the Advocate-General also was, that, notwithstanding the liberty given to the court not to regard a fact referred to in section 114 as not proved and to call for proof of it, the meaning and intention of the section must be taken to be that *ordinarily* the presumption referred to in illustration (b) to section 114 must be made and that special circumstances must be found by the Court whenever it does not do so. It need hardly be observed that it is not strictly correct to express this meaning by saying that the presumption of untrustworthiness must be found *to be rebutted* by special circumstances. Understanding the certificate in the sense just mentioned, I may, before dealing with the question raised therein, observe that it is not clear to my mind why the learned Advocate-General considered it necessary to make a certificate on the point in this case. The majority of the Special Bench—the learned CHIEF JUSTICE and AYLING, J.—no doubt observe that it would be open to them to convict the accused on the uncorroborated testimony of the accomplices, even if it stood alone, if they were satisfied that that evidence was true and they do not expressly say that special reasons must exist for not presuming its untrustworthiness. But the conviction is not based by them, as far as I am able to see, on the testimony of the accomplices alone. After laying down the proposition of the law above mentioned, the learned Judges proceed to consider the nature of the corroborative evidence that is required in the case of accomplices' testimony. They then refer to the former statements of two of the accomplices to prosecution witness No. 31 as strongly corroborating their evidence given at the trial.

They deal with the objections raised by the accused to the admissibility of former statements of accomplices in evidence. They then say that the previous statements of the two approvers, Arumugam and Somasundaram, which they hold to be admissible in evidence show that the defence theory that the evidence given by the approvers was the result of tutoring by the police or was concocted by the approvers themselves was quite unsustainable, and that, even apart from the previous statements to prosecution witness No. 31, it is impossible to accept the theory of tutoring or concoction. They say "the impression left in our minds of the three approver witnesses was favourable to the general truth of their story" and give reasons in support of that impression. They afterwards proceed to deal with the nature of the other corroborative evidence adduced in the case and of the defence set up by the accused. They then proceed to deal with all the evidence on record against each of the accused persons including both the testimony of the approvers and the corroborative evidence adduced by the prosecution, and with the evidence let in by each of the accused on his behalf, and come to a conclusion with respect to the guilt or innocence of each of the accused, on the whole of the evidence let in both for the prosecution and for the defence. The learned Judges do not say, as indeed it was unnecessary for them to say, whether they would convict any of the accused on the evidence of the approvers alone. Even if we should now come to the conclusion that the general proposition enunciated by the majority of the Special Bench that it was open to them to convict the accused on the uncorroborated evidence of the approvers is not sound, this conclusion would not affect their judgment which is not based on such uncorroborated accomplices' testimony alone. In my opinion, it would be open to us, sitting as a Court of review, to decline to express any opinion on the point raised in the Advocate-General's certificate. I may further point out that the counsel for the accused did not, during the arguments before us, question the soundness of the proposition laid down by the majority that they had the power, as a matter of law, to convict the accused on the uncorroborated evidence of the approvers if they believed that evidence. They could hardly venture to do so. The argument before us was that the learned Judges should have presumed the untrustworthiness of the evidence of the accomplices unless they could refer to special circumstances justifying their not doing

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

so, and that no such special circumstances are referred to in their judgment. They have therefore, it is urged, committed an error of law in not making the presumption. But assuming this argument is well founded, it is, as already pointed out, altogether irrelevant as the conviction is not based on the testimony of the accomplices alone.

Although for the reasons mentioned above, it is open to the Court to decline to deal with the question raised in the certificate, I consider it desirable to state my opinion on it as it has been discussed at great length, both on behalf of the accused and the Crown. The arguments traversed a wide field dealing with the English law relating to the evidence of accomplices from very early times and the law in India both before and after the enactment of the Indian Evidence Act I of 1872. The law in India at the present day must be found in the provisions contained in the Indian Evidence Act. It is a complete code of the law of evidence applicable to this country. It purports not only to consolidate and to amend, but also to define the law of evidence. See *Rajib Panda v. Lakhan Sindh Mahapatra*(1). If the language of the provisions of the code is clear, then that language is decisive of the law. See *Bank of England v. Vagliano*(2), and *Norendra Nath Sircar v. Kumalbasini Dasi*(3), though, where the words are not clear, light may be derived as to their meaning from an investigation of the law as it was understood prior to its enactment. See *Brown v. McLachlan*(4), *Robinson v. Canadian Pacific Railway Company*(5) and *Jogendra Chandra Roy v. Shyam Das*(6). The principle laid down in *Rex v. Abrahams*(7), with regard to the construction of statutes which purport merely to consolidate the previous law on a subject does not hold good in the interpretation of a statute which codifies a particular branch of law. If, then, the provisions of sections 133 and 114 of the Indian Evidence Act express with clearness and certainty the law to be enforced with respect to the testimony of accomplices, it would be of little use to investigate whether those provisions are in accordance with the previous law either in England or in India.

(1) (1930) I.L.R., 27 Calc., 11.

(3) (1896) I.L.R., 23 Calc., 563.

(5) (1892) A.C., 481 at p. 487.

(7) (1904) 2 K.B., 859.

(2) (1891) L.R., App. Cases., 107.

(4) (1872) 4 P.C., 543 at p. 550.

(6) (1909) I.L.R., 34 Calc., 543.

It was urged on behalf of the accused that the majority of the Special Bench take the law in this country to be in accordance with the English law on the subject; and the opinions of judges in other cases to the same effect are also cited to induce us to hold that the question should be decided in accordance with the English law. It is not however denied that the proper conclusion on the question should really be arrived at by the construction of the provisions to be found in the Indian Evidence Act. My investigation of the English case law has not helped to make the conclusions to be arrived at on this point more certain than they would otherwise be. The counsel for the accused rest the strength of their case on section 114, illustration (b), of the Indian Evidence Act, which, they say, materially qualifies, section 133, which declares that the conviction of an accused on the testimony of an accomplice alone is legal. There can be no doubt that section 114 should be read along with section 133 in order to determine the manner in which testimony of an accomplice should be dealt with before basing a conviction on his evidence alone.

The Indian Evidence Act recognizes two classes of presumptions, corresponding to what are known as rebuttable presumptions of law and presumptions of fact in English law. Irrebuttable presumptions under the English law are also recognized in the Act in sections 112 and 113, which make certain facts conclusive proof of other facts. All the three classes are explained in section 4 of the Act. It is impossible to attach weight to any argument which is calculated to confound the two classes of presumptions which are clearly distinguished in the Act. It is not possible to countenance the view that the court is absolutely bound to regard a fact as proved, which, according to the positive language of section 4, it may either regard as proved or may call for proof of. On this point it is useless to appeal to the rules of English law to justify a departure from the provisions of the Indian Act. In English law it is by no means clear what presumptions are regarded as presumptions of law and what are regarded merely as presumptions of fact. The same presumption is regarded, sometimes as one of law and sometimes as one of fact. Another class of presumptions is also recognized in "Best on Evidence" as "mixed presumptions" or "presumptions of mixed law and fact," or, "presumptions of fact recognized by law." The learned author says:—"These hold an intermediate place between the

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

two former, and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law; and from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice." He also observes, "Unfortunately, however, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, and sometimes as one which it was obligatory on them to make" (page 280, 10th Edition). To give only one illustration, the author regards the presumption that legal acts have been performed with the solemnities required by law as a presumption of fact—see page 308. But in "Taylor on Evidence" the same presumption is regarded as one of law. According to section 114 of the Indian Evidence Act, the presumption is only one of fact. Sir James Fitzjames Stephen observes, with regard to section 114 of the Act, "Finally, it declares in section 114 that the court may in all cases whatever, draw from the facts before it whatever inferences it thinks just. The terms of the section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the courts in their discretion, a large number of presumptions to which the English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration." In applying the English law to this country it must be remembered that in England the law of evidence had a long and laboured development. Several classes of persons were at one time regarded as incompetent to testify at all. An accomplice was one of the classes of persons regarded with disfavour as a witness. Wigmore in his learned treatise on Evidence (1904) points out (see section 526) "It was frequently urged against an accomplice, during the 1600s and 1700s, that since by his own confession he was guilty of crime, this turpitude thus acknowledged made him as incompetent as if it were proved by conviction for the crime. This argument is only broadly related to the above maxim, (*i.e.*, *allegans turpitudinem suam allegans audiendus est*) and yet, this relation is frequently noticed in the

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

opinions dealing with the other instances. It must be distinguished from the argument of disqualification as a co-indictee and of disqualification by reason of a promise of pardon. The argument, however, was judicially repudiated from the very beginning, —partly on the ground of necessity, partly on the ground that turpitude, though self-confessed, was no hindrance unless there had been a conviction of crime." At common law again when two or more persons were tried upon the same charge, each was naturally disqualified to give evidence on account of their interest. This ground of disability was also in time swept away. With regard to the value of an accomplice's testimony, Wigmore observes (section 2056): "Through the 1600s and 1700s it had to be ruled again and again that they were to be received as witnesses. But for a long time no question was made as to the sufficiency of their testimony when admitted. The quantitative conception of an oath tended to keep this question in the background. An oath, in the notions of the time, had a certain dead-weight of its own; one oath was as good as another oath. Should a witness once get in, the harm (they thought) was done; for there would be little weighing of the comparative quality of different persons' oaths. The struggle, therefore, was made at the threshold. As time went on, and the modern conception of testimony developed, the possibility of admitting a witness and yet discriminating as to the qualitative sufficiency of his testimony became more apparent; and the way was open for the consideration of this question. In a few instances, as the 1700s wore on, and even before then, judicial suggestions are found as to the feasibility of such a discrimination. But not until the end of that century does any Court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated. In 1784 in *R. v. Smith and Davis*(1), the Court thought it too dangerous to suffer a conviction under such unsupported testimony." In 1788, however, it was established in *R. v. Atwood*(2), that such a conviction was perfectly legal. but although the question of the admissibility of the evidence of an accomplice had been long settled and the legality of a

(1) (1784) 1 Leach Cr. L., IV Edn., 479 (note). (2) (1787) 1 Leach Cr. L., 464.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

conviction based on the sole testimony of an accomplice was established in *R. v. Atwood*, the sentiment against placing reliance on such evidence could not die out. It was bound to live and to remain strong under a system of law where questions of fact, both in civil and criminal matters, were left to the determination of juries. Reforms advocated by advanced thinkers no doubt succeeded in abolishing both artificial rules of admissibility and antiquated conceptions of the quantitative appraisal of evidence. But so long as the settlement of facts was left to juries, judges could not but be impressed with the necessity of guiding their untrained appreciation of evidence and restraining their vagaries both by advice and directions deemed necessary for rendering justice in individual cases. The legislature itself found it necessary to enact that the evidence of highly interested witnesses should be materially corroborated by independent evidence in particular classes of cases. In the case of an accomplice, moreover, he could be called as a witness only with the sanction and under the orders of the court after complying with certain legal formalities; the opinions of individual judges regarding the unreliability of accomplices without corroboration could be enforced by refusing permission for their examination as witnesses. The result is that we find much variety and uncertainty in the manner in which accomplice evidence was treated in decided cases, while at the same time the principle is reiterated from time to time that there is no rule of law restraining the action of judges and juries in dealing with such evidence, and judges ostensibly refrained from any attempt to set up any presumption of law against its trustworthiness. The danger of ordinarily convicting on the uncorroborated testimony of an accomplice being manifest, it came to be regarded as the duty of the presiding judge to draw their attention to the danger, in the same manner as it was his duty also to make such other comments on the evidence adduced as the nature of the case required. An examination of the decisions, however, shows much diversity in the actual practice of judges in the manner in which this duty was discharged. In 1848, in *Reg. v. Mullins*(1), MAULE, J., observed as follows:—"The truth of the matter is, there is no rule of law at all that an accomplice cannot be believed unless he is confirmed

It is an observation addressed, not to the court to exclude the evidence, but addressed to the jury who have to weigh the evidence, and it is for them to say whether the confirmation will satisfy them or whether they will be satisfied without any. If they are satisfied without any confirmation, they may be, and their verdict may be an honest and just and true one. . . . The directions of judges given to juries in that respect are not directions in point of law which juries are bound to adopt, but observations respecting facts, which judges are very properly in the habit of giving, because, with respect to matters of fact, the judge, as well as the counsel upon both sides, endeavour to assist the jury." The principle laid down in the above case was not always observed. Permission to examine an accomplice as a witness was sometimes refused on the ground that no corroborative evidence was forthcoming. "Where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required, Gurney, B. refused to permit one of the principals to become a witness [*R. v. Mellor*(1)]. So in *R. v. Saunders*(2) on a motion to admit an accomplice, PATTERSON, J., said "I doubt whether I shall allow him to be a witness. If you want him for the purpose of identification, and there is no corroboration, that will not do." In *R. v. Sal*(3) where there was no corroboration of an accomplice, WIGHTMAN, J., refused to allow him to become a witness. And again, in *Reg. v. Sparks*(4) where counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, HILL, J. refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice." (Roscoe's Criminal Evidence, 13th Edition, p. 108). These cases proceeded certainly on the footing that the accused should not be convicted on the evidence of an accomplice alone and that there was a legal presumption against its trustworthiness. In *Reg. v. Farler*(5), ABINGER, C. B. observed that the practice of requiring confirmation of such testimony has obtained so much sanction from legal authority that it deserves all the reverence of law. The learned judge, however, did not direct the jury to acquit the

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1848) 7, St. Tr., N.S., 1111, Appx. A (3 Cox C.C., 526).

(1) (1833) *Vide* Roscoe Cr. Ev., Ed. XIII, p. 108.
(2) (1842) *Vide* Roscoe Cr. Ev., Ed. XIII, p. 108.
(3) (1843) *Vide* Roscoe Cr. Ev., Ed. XIII, p. 108.
(4) (1858) L.F. & F., 388. (5) (1837) 8 C. & P., 106.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

accused. He said "I would suggest to you that the circumstances are too slight to justify you in acting on the evidence." This was no more than an expression of his own opinion on the facts of the case which a judge is always justified in giving. LORD ELLENBOROUGH in *Rex v. Jones*(1) treated the advice to be given by a judge against acting on the testimony of an accomplice as resting in his discretion. In 1861 in *Reg. v. Boyes*(2) WIGHTMAN and CROMPTON, JJ., took the same view, WIGHTMAN, J., observing, "The application of that rule, however, is a matter for the discretion of the judge by whom the accused is tried and here he appears to have drawn the attention of the jury to the point." The learned judges approved of the ruling of the Court of Crown Cases reserved in *Reg. v. Stubbs*(3) where the learned judges held that the practice of requiring corroboration of an accomplice is not a rule of law. In *Reg. v. Gallagher*(4) the judge's statement to the jury regarding the practice is spoken of as a recommendation to them. In *Queen v. Avery*(5) the judge refused to withdraw the case from the jury on the ground that there was no corroboration of the accomplice. In *Rex v. Hastings*(6) the judge in giving directions on the application of the prosecution said that the evidence in the case must be adduced though it was admitted that there would be no evidence forthcoming to corroborate the accomplice in the case. Further the rule regarding the necessity for corroboration was often relaxed in the case of misdemeanours—See Archbold's Criminal Pleading, 23rd Edition, page 391. On the other hand, PATTESON, J., in *Reg. v. Jellyman*(7) and LITLEDAL, J., in *R. v. Wells*(8) told the jury that they ought to acquit unless they were convinced that there was sufficient corroboration. One rule alone may be regarded as established in the long run, that a judge is bound to caution the jury against the danger of acting on the testimony of an accomplice without corroboration. In *Rex v. Tate*(9) Lord ALVERTSON, C.J., while agreeing that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice, said that in his opinion "it was of the highest

(1) (1809) 2 Camp., 131.

(3) 25 L.J.M.C., 16.

(5) (1845) 1 Cox C.C., 206.

(7) (1838) 8 C. & P., 604.

(2) I.B. & S. 311.

(4) (1883) 15 Cox C.C., 291 at p. 318.

(6) (1835) 7 C. & P., 152.

(8) (1829) 1 M. & M., 326.

(9) (1908) 2 K.B., 680.

importance that the jury should be cautioned against accepting the evidence of an accomplice without corroboration." There is nothing supporting a contrary view in *In re Meunier*(1). In that case, where the question was whether a magistrate was right in passing an order for the surrender of the accused to the French Government under the Extradition Act, on the ground that there was no proper corroboration of the evidence of an accomplice, CAVE and COLLINS, JJ., held that the absence of corroboration was no ground for holding that the case was not to be laid before the jury. CAVE, J., observed, "The magistrate has a discretion in each case as to whether the evidence is, or is not, sufficient to justify a committal." Cases are not wanting however even in recent years in which judges have regarded the presumption against accomplices as one of law. WILLS, J., in 1895, "withdrew from the jury one of the counts in an indictment upon which there was very clear and unshaken evidence by the accomplice but nothing else." And Baron Bramwell is stated to have followed a similar course in another case. See "Wills on Circumstantial Evidence," page 365, also "Roscoe and Granger on Criminal Evidence," p. 156. In *Rex v. Beauchamp*(2), it was held only that the jury should be cautioned. But in *Rex v. Everest*(3), DARLING, J., is reported to have said that "the direction should be to acquit unless there was corroboration connecting the accused with the offence." And in *Rex v. Warren*(4), CHANNEL, J., is said to have expressed himself in similar terms.

A review of the English cases shows the uncertainty of the law in that country as to the nature and extent of the presumption. The learned editors of "Roscoe on Criminal Evidence," 13th Edition, observe, at page 110, "Thus the law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that if the accomplice were uncorroborated a judge would be wrong who did not advise the jury not to convict, whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a judge who did not

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1894), 2 Q.B., 415.

(3) (1909) 73 J.P., 269.

(2) (1909) 73 J.P., 223.

(4) (1909) 78 J.P., 359.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

advise them was right." The learned editors of "Russell on Crimes" 6th edition, vol. III, p. 645, point out that it is only by holding that the practice of requiring corroborative evidence must rest on the discretion of the judge that it can be reconciled with the doctrine that the legal conviction may take place upon the unsupported evidence of an accomplice. This statement is scarcely in accordance with *Rex v. Tate*(1).

It seems to me that having regard to the condition of the case law in England it would be safe to proceed to determine the law in this country by a consideration, mainly, if not solely, of the provisions of the Indian Evidence Act. We start with the fact that the presumption that an accomplice is unworthy of credit unless he is corroborated in material particulars is one which the court may or may not make. It is impossible to hold that the court is in all cases bound to make the presumption without regard to the particular facts and circumstances of each case; for, in that case, the legislature would have said that the court "shall presume" the untrustworthiness of an accomplice. If the case is tried by a jury the judge cannot tell them that they are bound to make the presumption. It would be his duty to inform them that they are at liberty to make it or not. Taking it that it is his further duty to draw their attention to the facts which would make it proper that the presumption should be made and that he is entitled to express his own opinion that in the particular case the presumption would be a proper one, it cannot be denied that he is equally entitled to say that, in his opinion, it would be proper not to make the presumption in any particular case. If the case is tried by the judge himself without a jury, it would then be left to him whether in the circumstances of the case he would make the presumption or not. But he is of course bound to exercise his judicial discretion to presume or not to do so in a judicial and legal manner. "A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved" (Lawson on the Law of Presumptive Evidence, page 639). On an appeal from his decision it would be open to the court of appeal to consider when he was right or wrong in not making the presumption in the circumstances. If the question be whether there is any error of

(1) (1908) 2 K.B., 680.

law in his judgment, the court is entitled to consider whether the rule embodied in section 114 was present to his mind and whether he exercised his discretion after considering the materials on record. His judgment will be examined for the purpose of enabling the court of law to decide whether the discretion was exercised in a legal manner. If he has not made the presumption and has given no reasons for not doing so, it would be open to a Court of review or revision to arrive at the conclusion that the discretion has not been exercised in a legal manner. The decision of the question would depend on the consideration of his judgment as a whole. In a jury case it is the duty of the Judge in charging the jury to sum up the evidence for the prosecution and the defence and to lay down the law by which the jury are to be guided, section 297, Criminal Procedure Code. This will include the duty to draw attention to the presumptions mentioned in section 114 of the Indian Evidence Act and also to the circumstances in the particular case having a bearing on the application of the rule. Up to this point I think there is not much room for doubt. But can it further be laid down that it is the duty of a judge deciding the facts to make the presumption that an uncorroborated accomplice is unworthy of credit unless there be special reasons which would justify the refusal to make it? On this point I am of opinion that there is room for the growth of judiciary law. Judges are entitled to lay down a rule that although the legislature has given the court the discretion to make a particular presumption or not, according to the circumstances, the proper course for the court to follow is to make the presumption unless there be special occasion for not doing so. This does not deprive the Court of the right given by the legislature to exercise its discretion. Whether a rule should be laid down guiding and controlling the exercise of the discretion must depend on the nature of the presumption of fact in question. If there be a course of decisions with respect to any of the nine presumptions mentioned in the section, it would be wise not to depart from what has been consistently laid down by the courts. It must be recognised that the illustrations to the section embody presumptions which are regarded as of great value in English law and some of them are regarded as presumptions of law there. Thus illustration (a) is treated as a presumption of law in England. So also illustration (e). Illustration

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR

(i) relates to a case where the onus would be regarded as shifted in consequence of the fact referred to therein. Illustration (g) also embodies a presumption of much weight. Illustration (c) has been converted into a presumption of law in the Negotiable Instruments Act. With regard to illustration (b) where the accomplice has not already been convicted of the offence in which he took part and is giving evidence in the hope of a pardon, his evidence is of a particularly unworthy character. There may no doubt be circumstances in any particular case which would justify the Court in not making the presumption. But I think it would be reasonable to hold that there must be some good reason given for not making the presumption in such case. The same observation will hold good with regard to illustration (e) which refers to the presumption that judicial and official acts have been regularly performed.

When we examine the case law on the point we find that though the rule of law embodied in section 114 and 133 of the Indian Evidence Act appears reasonably simple and clear, the sentiment against the testimony of accomplices has led to some extent to the importation of the indefinite practice of English judges in charging juries and to a tendency on the part of some judges to make the desirability of corroborative evidence in such cases a rule of law, notwithstanding the refusal of the legislature to treat it as such in the Indian Evidence Act. In the leading case of *Elahee Buksh*(1), the Calcutta High Court held that it was the duty of a judge, in summing up to the jury, to make such observations as to the credit to be attached to particular witnesses as the circumstances of the case rendered necessary. PEACOCK, C.J., observed, "That the omission to follow a practice which is universally adopted by the judges in England would be a ground of appeal against a conviction upon a verdict of guilty and would be an error of law." The learned judge could not be taken to have meant that the judge should advise the jury not to convict on accomplice evidence, if his own opinion is that in the particular circumstances of the case it was trustworthy. In 4 M.H.C.R., Appendix, page vii, this Court laid down the proper course in such cases to be to tell the jury or the assessors "that, as a general rule of practice, it is considered unsafe to convict

(1) (1866) 5, W.R., Cr.R., 80.

upon such evidence and to point out any circumstances in the particular case which in the opinion of the judge afford a sufficient reason for relying upon the evidence in that case." In *Reg. v. Ramasami Padayachi*(1), MORGAN, C.J., and KINDERSLEY, J., held that "the court or jury is required by section 114 to take into consideration certain facts with the view to ascertain the probability of the story told. . . . And the rule in this section is thus brought to coincide with the rule observed in England that though the tainted testimony of an accomplice should be carefully scanned and received with caution and may be treated as unworthy of credit, yet, if the jury in the one case or the court in the other credits the evidence, a conviction proceeding upon it is not illegal." It will be observed that all that is required according to the learned judges is that the probability of the story should be ascertained and the evidence of the accomplice should be scanned and received with caution. In *Queen-Empress v. Arumuga*(2) COLLINS, C.J., and MUTHUSAMI AYYAR, J., set aside a conviction on the ground that "the Sessions Judge should have cautioned the jury not to accept an approver's evidence unless it was corroborated." This observation in my opinion went too far unless it was based on the facts of the particular case. The learned judges could hardly have meant that it was not equally the judge's duty to tell them, if he considered it proper to do so, that in the circumstances of the case the accomplice's evidence was trustworthy without corroboration. In *King-Emperor v. Mohiuddin Sahib*(3) reference is made to the English decisions laying down that the testimony of the approver ought to be corroborated in material particulars. It was held that such corroboration existed in that case. In *Emperor v. Smither*(4) DAVIES and BENSON, JJ., stated with more caution that a judge ought not to omit to caution the jury with respect to the credit to be attached to accomplices. In *Ramaswami Gounden v. Emperor*(5) SUBRAHMANIA AYYAR, J., observes that the rule laid down in section 114 of the Indian Evidence Act is only a precept of caution. He says, "To claim for it greater potency, in the face of section 133 of the Indian Evidence Act, would be to introduce an artificial scale of credit; and 'nothing can be more absurd' to borrow from the language of Lord DENMAN in *King v.*

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1878) I.L.R., 1 Mad., 394. (2) (1889) I.L.R., 12 Mad., 196.
(3) (1902) I.L.R., 25 Mad., 143. (4) (1903) I.L.R., 26 Mad., 1.
(5) (1904) I.L.R., 27 Mad., 271.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Harborne(1) 'than that there should be any rigid presumptions as to matters of fact where the only questions ought to be what evidence is admissible and what inferences may fairly be drawn from it.' BHASRYAM AYYANGAR, J., said "I am however unable to agree with BODDAM, J., that if the first witness was in law an accomplice 'it would be the duty of the judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty' and with all respect I should say that this would be a misdirection. In *Reg v. Boyes*(2) COCKBURN, C.J., adverting to counsel's argument that MARTIN, B., ought to have directed the jury not to act upon the uncorroborated testimony of an accomplice, protested against it being the duty of the judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated and added that the judge ought not to have told the jury to acquit if the witness was uncorroborated. It may be that except under very special circumstances the settled course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the judge, there are no special circumstances which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony he may no doubt, under sub-section 2 of section 298 of the Code of Criminal Procedure, express such opinion to the jury and in that sense advise them to acquit the prisoner."

The latest decision of this Court seems to be *Vyasa Row v. Emperor*(3). I do not think that my learned brother ABDUR RAHIM, J., has laid down in that case any hard and fast rule that it is not open to a judge in any case to act on the uncorroborated testimony of an accomplice. He no doubt points out the danger of doing so and refers to the practice on the part of judges in general requiring corroborative evidence. In *Queen v. Sadhu Mundul*(4) PHEAR, J., held that the omission to give the usual caution to the jury was a misdirection and that the judge was wrong in the particular case in saying to the jury that it was not proper or necessary for him to tell them that the evidence of the accomplice was to be received with caution. The learned judge said, "that it is

(1) 2 A & E, 540.

(3) (1911) 1 M.W.N., 327.

(2) (1881) 9 Cox, C.C. 32.

(4) (1874) 21 W.R. Cr. R., 69.

the duty of the court which in any particular case has to deal with accomplice testimony, to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though, at the same time, the court may rightly in exceptional cases, notwithstanding the maxim, and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration." This passage seems to show that the judge must, in order to avoid making the presumption, find good reason for doing so. In *Queen-Empress v. Deodhar Singh*(1), it is stated that the practice of requiring corroboration is a rule of almost universal application, and in *Kamala Prasad v. Sital Prasad*(2) it is stated to be almost a part of the law itself. The question however in both those cases was whether certain witnesses were really in the position of accomplices. In *Jamiruddi Masalli v. Emperor*(3) PRINSEP and STEPHEN, JJ., held that the jury should have been told that it was not safe to convict on the uncorroborated testimony of an accomplice, though the Sessions Judge had charged them that corroboration was necessary. *Emperor v. Lalit Mohan Chuckerbutty*(4) cannot be regarded as throwing any light on the question. JENKINS, C.J., says that admittedly the testimony of accomplices required to be corroborated in material particulars and no question arose as to whether the court was bound to make the presumption mentioned in section 114, illustration (b). In *Queen-Empress v. Ram Saran*(5), STRAIGHT, J., merely observed that it is a practice of judges both in England and in India to guard their minds carefully against acting upon such evidence when uncorroborated and, when trying a case with a jury, to warn the jury that such course is unsafe. In *Queen-Empress v. Gobardhan*(6), EDGE, C.J., points out (at p. 554) that a jury being bound to convict on the uncorroborated evidence of an approver if they believe it, a judge cannot direct them to acquit the accused in the absence of corroborative evidence. He says, "A judge would advise a jury that it would be unsafe to act upon, in other words, to believe, the uncorroborated evidence of an accomplice, as he

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1900) I.L.R., 27 Calo., 144.

(3) (1902) I.L.R., 29 Calo., 782.

(5) (1888) I.L.R., 8 All., 308.

(2) (1901) I.L.R., 28 Calo., 339.

(4) (1911) I.L.R., 38 Calo., 559 at p. 579.

(6) (1887) I.L.R., 9 All., 528.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

would advise the jury not to act upon the evidence of any other witness whose evidence might, from any cause, be open to suspicion, but in either case he would have to tell the jury that if they believed the evidence they might legally convict the prisoner." I entirely agree with this statement of the law, with this addition, that, it is the duty of the judge to draw the attention of the jury to any circumstances either in favour of or against the credibility of the accomplice. In *Queen-Empress v. Maganlal (and Motilal)*(1), SCOTT, J., observes, with respect to cases tried by a judge himself, "But it must clearly appear to the court sitting in revision that the character of the witnesses was present in his mind when the judge or magistrate came to such a conclusion." (That is, that the evidence of the accomplice was trustworthy.) "But, if that is so, there is no ground for interference of a revisional character." JARDINE, J.'s observations are not inconsistent with this. He observes "These reasons for requiring independent corroboration, so strongly insisted upon by Sir BARNES PEACOCK, are not expressly mentioned by the Magistrate." BAYLEY, J., would seem to have gone further. He said "He had nothing before him but the corrupt evidence of confessed accomplices. His omission to consider the necessity that such evidence *should be corroborated* by that of one or more other and untainted witnesses is, in my opinion, an error by which the accused have undoubtedly been prejudiced." It is not quite clear, however, whether the learned judge intended to lay down any general rule that corroboration was necessary in all cases. In *Queen-Empress v. Chagan Dayaram*(2), BIRDWOOD, J., was of opinion that the High Court could in revision consider whether there were good grounds to warrant the lower court in not making the presumption that an accomplice witness was untrustworthy. JARDINE, J., said "The rule in section 114 and that in section 133 are part of one subject, and both are found in most of the great judgments mentioned in our judgments in *Queen-Empress v. Maganlal*(1) and neither section is to be ignored in the exercise of judicial discretion. The illustration (b) is, however, the rule, and when it is departed from, I think the Court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case." No other case of importance has been brought to our notice at the arguments. The

(1) (1890) I.L.R., 14 Bom., 115.

(2) (1890) I.L.R., 14 Bom., 331.

observations of the Bombay High Court in *Queen-Empress v. Maganlal*(1), and *Queen-Empress v. Chagan Dayaram*(2) of Phear, J., in *Queen v. Sadhu Mundul*(3) and of BHASHYAM AYYANGAR, J., in *Ramaswami Gounden v. Emperor* (4) are authorities for the position that it would be right to require that judges should ordinarily presume the untrustworthiness of an accomplice. When a case is tried without a jury the judgment should contain certain materials to show to a court of appeal or revision that this presumption was borne in mind by the judge and the reasons that weighed with him for not making the presumption. I would not put it, as suggested in the Advocate-General's certificate, that the presumption of untrustworthiness should be made in all cases and that a conviction, without independent corroboration, can be sustained only where the presumption is rebutted by special circumstances. I do not think that there is really anything in the judgment of the majority of the Special Bench to show that the learned judges really took a different view though they do not consider the question whether special reasons should be exhibited for not requiring corroboration. Their Lordships say that it should be borne in mind that the evidence of the approvers is tainted evidence, scrutinized with the utmost care and accepted with the greatest caution and considered in the light of the circumstances in which it is given and in the light of all other circumstances in the case of which evidence is legally admissible, then, if it is found to be trustworthy, it must be acted on. As I have already pointed out, the certificate of the Advocate-General on the question does not raise any question of practical importance in the case. The learned judges have in fact given plenty of reasons which in their opinion were sufficient for considering the evidence of the approvers in the case generally trustworthy. This court, dealing, as a court of review, with the question whether there is any error of law in the view taken by the majority, is not concerned to consider whether those reasons were, as a matter of fact, sufficient to justify the acceptance of the approvers' evidence as generally true. That is entirely a question of fact and we have not, at this stage of the case, at any rate, to deal with it further.

Mr. Govindaraghava Aiyar raised a further contention on the first point in the Advocate-General's certificate, that the majority

(1) (1890) I.L.R., 14 Bom., 115.

(2) (1890) I.L.R., 14 Bom., 331.

(3) (1874) 21 W.R.Cr. R., 69.

(4) (1904) I.L.R., 27 Mad., 271.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAB, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

of the Special Bench were wrong in their view as to what constitutes '*material particulars*' in respect of which corroboration of an accomplice's testimony is required. But this question is not raised in the certificate of the Advocate-General. The certificate says that the opinion that the evidence of an accomplice need not be corroborated in material particulars requires to be further considered. It does not state that the opinion of the majority as to what are *material particulars* requires to be further considered. Mr. Govindaraghava Aiyar then claimed to argue this question apart from the certificate of the Advocate-General. His argument is that once the Advocate-General certifies that the decision of the court on any question of law arising at the original trial is in his opinion wrong or that any question of law requires in his opinion to be further considered, the whole case is open before the court reviewing the judgment. Clause 26 of the Letters Patent provides that "on its being certified by the said Advocate-General that in his judgment there is an error in the decision of a point or points of law decided by the court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." It is contended that the clause gives power to the court, whenever a certificate has been granted by the Advocate-General, to review the case or any part of it that the court may seem fit to review and that practically the whole case becomes open when a certificate is granted. This will make the review practically an appeal, while clause 25 provides that "No appeal shall lie from any sentence or order in any criminal trial of the High Court in its original criminal jurisdiction." Mr. Govindaraghava Aiyar admits that this would be the result, with the difference that the court has a discretion to decide how much and what portion of the judgment it would review. But this is not the language of the clause. The statement in it is that "the court shall have power and authority to review the case or such part of it as may be necessary," not as the court may think fit. Now what is the meaning of the expression '*necessary*'? Necessary for what? Obviously, I think, for deciding the point or points

of law reserved or certified as requiring consideration. No other meaning can, in my opinion, be suggested. This is rendered clearer by what follows, "and finally determine such point or points of law." The clause clearly means that the court should finally determine the points of law and for that purpose shall have power to review the whole or any part of the case that may be necessary. Then the clause proceeds to state what the court is to do after determining the point or points of law. It has then power "to alter the sentence passed by the court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." If the court confirms the decision passed at the trial on the point or points of law, then nothing further remains to be done. If, on the other hand, it reverses the decision on any point or points of law, then it has to consider what judgment it should pass. The power given to the court under clause 26 is similar to the power given to the court of Crown Cases Reserved by 11 & 12 Vict., Cap. 78, with an important modification. It was considered that according to that statute if the decision of the trying court on a material point of law was reversed by the "Court of Crown Cases Reserved" that court had no power to consider whether the judgment could be upheld, notwithstanding its opinion on the question of law, and was bound to quash the conviction. Clause 26 of the Letters Patent, on the other hand, empowers the court to pass such judgment as it shall deem right—a power similar to what is conferred on courts of appeal by section 167 of the Indian Evidence Act. The court is entitled to consider whether, notwithstanding that it may reverse the opinion of the trying court on any question or questions of law, the conclusion of that court on the case as a whole should be disturbed, or what is the proper judgment to be passed in the case. The question of law might possibly affect only the sentence to be passed on the accused and in such a case it would be sufficient for the court of review to alter the sentence passed by the court of original jurisdiction. In other cases it would be necessary to consider whether the remaining evidence is sufficient to justify the conviction. Mr. Govindaraghava Aiyar was not able to cite any precedent in support of his contention. On the other hand, the observations of DEVAI, CHANDAVARKAR and BEAMAN, JJ., in *Emperor v. Narayan Raghunath Patki*(1) are against his contention. He

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAB, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

referred to an observation in the judgment of this Court in *Subrahmania Ayyar v. King-Emperor*(1). That was also a case under clause 26 of the Letters Patent. An objection to the admissibility of an approver's evidence was allowed. But the Crown contended that, notwithstanding the validity of the objection, the evidence was otherwise admissible. The question was, whether the Crown was entitled to raise that question. The point was one which arose as the result of the view taken by the court on a question raised in the Advocate-General's certificate. Such a question would certainly come within the purview of the court's jurisdiction on review. The case is not similar to the present one. It was further urged that the clause empowering the court to review the case or such portion of it as might be necessary was referred to in certain decisions as empowering the court to consider what course should be pursued when it reverses the finding of the court of trial on a question of law. I do not feel pressed by this argument. It is really the latter clause empowering the court to pass such judgment as might be necessary, that in my opinion entitles it to consider the merits of the case when the result of its opinion on a point raised in the certificate renders this course necessary. Assuming that it was stated in the decisions relied on that the court had the right to review the case in support of the contention that it could examine the merits, I would understand such language as used in the broad sense of the term "review" and not as placing reliance on any power of review expressly conferred by the clause. I am of opinion that it is not open to the accused at this stage of the case to raise any question of law not included in the certificate of the Advocate-General.

The second point—The second point in the certificate of the Advocate-General is that the opinion of the majority of the judges that the previous statement of an accomplice can legally amount to corroboration of the evidence given by him at the trial should be further considered. These previous statements are of two kinds, (1) the statements made by the approvers, prosecution witness No. 6 and prosecution witness No. 12, to Veeraraghava Aiyar, prosecution witness No. 31, (2) the statements made to the Magistrate, Mr. Cox, and recorded by him under section 164, Code of Criminal

(1) (1902) I.L.R., 25 Mad., 61.

Procedure. It appears from the statements made by counsel on both sides that no objection was taken at the trial to the admission of the previous statements of the approvers, Arumugam and Somasundaram, on the ground that they were not receivable at all as relevant under section 157 of the Indian Evidence Act for any purpose. The objection raised at the trial on the score of relevancy appears to have been that the statements were not admissible as furnishing corroboration of the accomplices in *material particulars* in the sense in which that expression is used in section 114, illustration (b). The certificate of the Advocate-General appears to be wider in terms and raises the question of the admissibility of the former statements of the accomplices as corroborative of their testimony at the trial in any manner.

From the judgment of the majority of the Special Bench it appears to me to be clear that the former statements of the accomplices were admitted as corroboration within the meaning of section 114, illustration (b) of the Indian Evidence Act. The learned Judges say, "In addition to the oral testimony of independent witnesses and the documentary evidence in the case, which will be considered later, the Crown relies on certain facts as corroboration of the evidence of the informers. Among these are the facts that certain statements were made by the approvers, Arumugam and Somasundaram, to Veeraraghava Aiyar, prosecution witness No. 31, an Inspector of Police attached to the Criminal Investigation department, statements which were substantially in accordance with the evidence before this court. . . . It was contended that the evidence as to the making of these statements was not admissible, and that, if it was, it did not corroborate the evidence of Arumugam given at the trial." The reference to the oral testimony of independent witnesses and the documentary evidence in the case is certainly made as corroborative evidence within the meaning of illustration (b) to section 114 and I have no doubt that the learned Judges treated the previous statements of the approvers also as corroborative evidence according to that section. I cannot therefore agree with the contention of Mr. Napier that the judgment does not show that the learned Judges treated the previous statements in question as supplying corroboration within the meaning of section 114, illustration (b). Putting aside for the moment the question whether Veeraraghava Aiyar was an authority legally competent

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

to investigate the fact, section 157 of the Indian Evidence Act certainly enacts a general rule that the former statement of a witness may be proved in order to corroborate his testimony. No exception is expressly made of the testimony of a witness who is an accomplice. The question is whether section 157 should not be taken with reference to its scope to be qualified by illustration (b) to section 114. According to ordinary canons of interpretation, I think it must be taken to be so qualified, the rule in section 157 being a general provision with regard to the corroboration of the testimony of a witness and illustration (b) to section 114 being a special rule as to the testimony of an accomplice. If, therefore, that illustration means that an accomplice should be corroborated by independent evidence of the facts spoken to by an accomplice, it follows, in my opinion, that a previous statement of the accomplice, assuming it for the moment to be admissible in evidence at all under section 157 (a question which I shall presently consider), cannot be admitted as corroboration of the accomplice within the meaning of illustration (b) to section 114. On this point it is proper to consider in what sense the expression "corroboration in material particulars" was understood prior to the enactment of the Indian Evidence Act. Mr. Napier does not deny that such an enquiry is proper. Section 114 itself states that if three accomplices between whom there was no opportunity of previous concert corroborate each other, that would be a circumstance which would justify the conclusion that the accomplice is not unworthy of credit in the particular case. But the previous statement of the same accomplice witnesses is not referred to as corroboration of the testimony given by him at the trial, though under the previous Evidence Act II of 1855 the general rule with regard to the admissibility of a previous statement of a witness to corroborate his testimony was the same as under the present Act. There is no decided case which has treated the previous statement of an accomplice as affording corroboration of his testimony within the meaning of illustration (b) to section 114. On the other hand, in *Reg. v. Malapabin Kapana*(1) and *Queen-Empress Bepin Biswas*(2) the contrary view was held. Section 157 was considered in both the cases. In the former case, the learned Judges who decided it say that the previous statement of

(1) (1874) 11 Bom. H.C.R., 196. (2) (1884) I.L.R. 10 Cal., 970.

an accomplice "can scarcely be said to answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed. From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent, reliable evidence. But his statement, whether made at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition. The force of any corroboration by means of previous statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true, what becomes of the virtue of previous consistent statements? One may persistently adhere to falsehood once uttered, if there is a motive for it." It may no doubt be said, with reference to the observation that the statement of an accomplice does not improve by repetition, that the previous statement in addition to proving the consistency of the witness might be of value if it was made before any pardon was tendered to the accomplice as it might weaken the suspicion attached to his testimony as being given under the temptation created by the offer of a conditional pardon. But it can hardly be said that the infirmity attaching to his evidence is thereby satisfactorily removed. In the latter case, PRINSEP and MACPHERSON, JJ., observed, "The mere repetition of the same statement of facts without contradiction or material discrepancy is, no doubt, recognised by section 157 of the Evidence Act, as some corroboration of the truthfulness of that statement, but the Judge has lost sight of the fact that, from the position occupied by an approver witness, his evidence is necessarily regarded with very great suspicion as being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person that his evidence should be accepted with the greatest caution." The learned Judges express their approval of the decision in *Queen v. Nawab Jan*(1) that the corroborative testimony should be that of an independent witness or of facts which show the connection of the accused with the commission of the offence with which he is charged. In *Abdul Karim v.*

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1867) 8, W.R.Cr.R., 19.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

King-Emperor(1) it was held that the corroboration must be independent of the accomplice or of a co-confessing prisoner. But the question did not relate to the admissibility of previous statements of an accomplice as corroboration either in that case or in some other cases where similar opinions were expressed. In the judgment of ABDUR RAHIM, J., in *Vyasa Row v. King-Emperor*(2) the previous statement is stated to be not proper corroboration of an accomplice—see page 332. According to English law, previous statements of a witness are not generally receivable in evidence for corroborating his testimony. But such statements seem to be admitted where a witness is charged with a design to misrepresent in consequence of some motive or interest or friendship, the previous statement being used in such a case to show that he made a similar statement before such motive existed; and also where the witness is charged with having recently fabricated the story. But the previous statement, it is stated, is admissible in these cases, not to prove the truth of the facts stated, but merely to show that the witness is consistent with himself. See *The Queen v. Coll*(3). Previous statements are also admissible on charges of rape and similar offences against females. The fact that the prosecutrix made a complaint very shortly after the outrage, together with the particulars of the statement, is admissible to confirm her testimony and disprove consent. In *The Queen v. Lillymen*(4) the Court of Crown Cases Reserved held that a previous statement is admitted in such a case, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negating consent on her part. HAWKINS, J., referring to the ruling of HOLROYD, J., in *Rex v. Clarke*(5) said, "He only ruled, and in our opinion he correctly ruled, that they were not evidence of the truth of her complaint or of the statements of fact on which it was based." See also *Rex v. Osborne*(6). The admission in evidence of a previous statement is strictly limited to the class of cases mentioned above. It appears to be settled that it is not admissible in an action for assault by performing a surgical operation, *Beatty v. Cullingworth*(7). It is

(1) (1904) 1 A.L.J., 110.

(3) (1889) 24 L.R.Ir., 522.

(5) (1817) 2 Stark, 241.

(2) (1911) 1 M.W.N., 327.

(4) (1896) 2 Q.B., 167.

(6) (1905) 1 K.B., 551.

(7) 60 J.P., 740.

remarkable that there is really not a single case where the previous statement of an accomplice was admitted as corroborative to prove the consistency of the accomplice or for any other limited purpose or to prove that his story was not recently concocted although an accomplice would be seldom called upon to give evidence at the trial without having made a previous statement about the facts.

It was held by the Courts in England before the enactment of the Indian Evidence Act that the accomplice should be corroborated by independent evidence as to the person of the prisoner against whom he speaks. See *Rex v. Addis*(1), *Rex v. Webb*(2) *Rex v. Wilkes*(3), *Reg. v. Farler*(4), *The Queen v. Stubbs*(5). And the corroboration of the evidence of one accomplice by that of another without the testimony of untainted witnesses was also regarded as insufficient in law, *Rex v. Noakes*(6). See Archbold's Criminal Pleadings, Evidence and Practice, 23rd edition, page 391. It is perhaps doubtful whether this last rule about the corroboration of an accomplice by other accomplices can be held to be applicable in India having regard to the explanation to illustration (b) to section 114 already referred to above. But the evidence of another accomplice is still independent evidence although it is that of a tainted witness. It cannot be said that a previous statement of the same accomplice stands on the same footing. If admissible, it may possibly deserve considerable weight in particular cases, but the question whether it should be admitted must be settled by considerations applicable to the large majority of cases. In *Elahee Buksh's case*(7), Sir Barnes Peacock treated the law in this country on the question of corroboration as generally identical with the English law. It is hardly likely that the Indian Evidence Act intended to depart from the English law as to the nature of the corroborative evidence required. In *The Queen v. Mohesh Biswas*(8), decided immediately after the passing of the Indian Evidence Act, PHEAR and AINSLIE, JJ., held that independent evidence of corroboration was necessary. Mr. Napier placed much reliance on *R. v. Ellsom*(9), where DARLING, J., observed that the previous statement of one of the

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1834) 6 C. & P., 388.

(3) (1836) 7 C. & P., 272.

(5) 25 L.J.M.C., 16.

(7) (1868) 5 W.R.Cr.R., 80.

(2) (1834) 6 C. & P., 595.

(4) (1837) 8 C. & P., 106.

(6) (1832) 5 C. & P., 328.

(8) (1873) 19 W.R.Cr.R., 16.

(9) (1911) 76 J.P., 38.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

witnesses in the case, if in accordance with his testimony at the trial, would be strong corroboration of his evidence. The witness however was not an accomplice but an accessory after the fact. His evidence no doubt was regarded as tainted. But the corroboration desirable of the testimony of *all* tainted witnesses cannot be placed on the same footing.

In *Ramaswami Gounden v. Emperor* (1), SUBRAHMANIA AYYAR, J., dealing with the evidence of a witness who assisted in the removal of the dead body from the place of murder to the pit in which it was buried, observed: "But this being all the complicity that can be attributed to him, it seems to me that that could not make his evidence against the accused that of an accomplice; for though the witness might be indictable under section 201 of the Indian Penal Code for the concealment of the body, yet such offence on the witness's part being one perfectly independent of the murder, the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly." The learned Judge refers to the observations of Baron Martin in *Reg v. Boyes* (2), where that learned Judge distinguishes between the evidence of accessories properly so called and that of other witnesses whose evidence might also be regarded as tainted. BASHYAM AYYANGAR, J., concurred in the observations of SUBRAHMANIA AYYAR, J. He observed that there was no authority whatever in English law which warrants the extension of the maxim that the testimony of an accomplice should be corroborated in material particulars to witnesses who are not accomplices in the proper sense of the word. He said: "I do not think it will be in furtherance of justice to regard another class of witnesses as *quasi* accomplices and to extend the maxim to them."

I cannot therefore regard *R. v. Ellsom* (3), as authority for the position that the previous statement of an accomplice would be regarded in England as evidence corroborative of his testimony in material particulars. On the other hand, in *R. v. Dimes* (4), where the evidence of corroboration of an accomplice who had made a previous statement was referred to, no reference was made by the same learned Judge, DARLING, J., to his previous statement as furnishing corroboration of his evidence at the trial.

(1) (1904) I.L.R., 27 Mad., 271.

(3) (1911) 76 J.P., 38.

(2) (1861) 9 Cox C.C., 32.

(4) (1911) 76 J.P., 47.

Mr. Napier contends that the question "what is corroboration in material particulars" is entirely a question of fact and must depend on the circumstances of each case. This proposition is undoubtedly in one sense quite true, but requires explanation. A question may be one of fact, but there may be a rule that a certain class of evidence is required to prove it, or that a certain class of evidence is not admissible to prove it. Or again some particular kind of evidence, though admissible, might be regarded as legally insufficient. The evidence of a co-accomplice belongs to the last class. A previous statement of the same accomplice would belong to the second class. The necessity of corroboration connecting the accused with the offence belongs to the first class. Subject to these rules of law with regard to evidence, the question whether the evidence of an accomplice has been properly corroborated is no doubt one of fact. The cases cited by Mr. Napier do not in my opinion substantiate his contention that there are no legal rules at all governing the question of corroboration of an accomplice. In *re Meunier* (1), merely laid down that the question whether there was sufficient corroboration to prove a *prima facie* case justifying the extradition of the accused was one of fact for the magistrate. There was no question raised as to the kind of evidence legally necessary for corroboration. The Court found that there was a good deal of corroborative evidence adduced by the prosecution. *Reg v. Boyes* (2), and *Reg. v. Gallagher* (3), are only authorities for the position that a conviction without corroborative evidence is not illegal. *Rex v. Tate* (4) has no bearing on the question what kind of corroboration is legally required under the law. The only question as to the nature of the evidence necessary that we have to decide is whether independent evidence is not required. It is therefore unnecessary to discuss the question what other rules of law are applicable in determining whether there is proper corroborative evidence in any particular case. Section 114, illustration (b), seems to a large extent to have been based on the views propounded by Sir Barnes Peacock in *Elahee Buksh's* case. Subject to the possible exception with respect to the evidence of co-accomplices that learned Judge accepted the English law as applicable to India and I think the Indian Evidence Act also did the same.

(1) (1894) 2 Q.B., 415.

(3) (1883) 15 Cox C.C., 291.

(2) (1861) 9 Cox C.C., 32.

(4) (1908) 2 K.B., 680.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Mention must perhaps be made of the case of the *Queen-Empress v. Kunjan Menon and Sankunni*(1), in which an application was made to the Privy Council for leave to appeal against the conviction of the accused, a Subordinate Judge, on the charge of abetment of bribery (section 161 of the Indian Penal Code). The accused died before the application was disposed of. At the first hearing of the petition, there was some discussion as to the nature of the corroboration required of the evidence of an accomplice. Sir Richard Couch made an observation that the question was not one of pure law. The question however was not further discussed, as Mr. Mayne then urged that there was no legal evidence of the bribery itself except the testimony of the accomplice. I do not think that the observation of Sir Richard Couch can be regarded as indicating that that learned Judge was of opinion that the question whether any class of evidence was admissible as corroboration would always be one of fact.

I am of opinion therefore that the previous statement of an accomplice cannot legally amount to corroboration within the meaning of illustration (b) to section 114 of the Indian Evidence Act. The question whether it is admissible at all as corroborative evidence under section 157 for any other purpose is not free from doubt. It is possible to hold that it is admissible for proving his consistency and as disproving a suggestion that it was recently concocted by him. But I am inclined to think that it would be dangerous to admit it even for this limited purpose of proving his consistency. To do so would lead to the danger of its being relied on to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence of corroboration. The safer rule in my opinion would be to hold that section 114, illustration (b), requires the rejection of the previous statement altogether. It is however not necessary to decide this point here. I am clear that at any rate it cannot be relied on as corroborative evidence of the truth of the statements made by him at the trial. I am of opinion that the majority of the Special Bench committed an error of law in admitting the statements of the approver witnesses to prosecution witness No. 31 under section 161, Criminal Procedure Code, and to Mr. Cox under section 164, Criminal

(1) (1891) 1 M.L.J., 397.

Procedure Code, as corroboration within the meaning of illustration (b) to section 114 of the Indian Evidence Act.

The third point.—The third point raised in the certificate of the Advocate-General is whether the previous statements of prosecution witness No. 6 and prosecution witness No. 12 to prosecution witness No. 31 were made to an authority legally competent to investigate the facts within the meaning of section 157 of the Indian Evidence Act, i.e., whether Veeraraghava Aiyar, prosecution witness No. 31, was legally competent to investigate the facts of which evidence was given at the trial by prosecution witness No. 6 and prosecution witness No. 12, that is, the existence of a conspiracy between the accused in the case and others within the meaning of section 121 A of the Indian Penal Code. This objection, it is stated, was not specifically taken on behalf of the accused while Veeraraghava Aiyar was being examined as a witness by the prosecution but only at the time of the arguments. Mr. Napier asks us on this ground to refuse to deal with the objection, but he admits that no objection was raised to the consideration of the point by the Special Bench when it was raised by the accused. It was for the Special Bench to consider whether the objection should be entertained at a later stage of the case or not. The learned Judges allowed it to be raised and dealt with it in their judgments. We cannot hold that the accused are not entitled to have the question decided. Prosecution witness No. 31 was as a matter of fact cross-examined by the accused at considerable length with a view to show that he had no authority to investigate the facts in question. At the same time the evidence on the record relating to the question is meagre and the facts have not been placed beyond dispute so as to enable us to deal with the point satisfactorily. The prosecution was bound to prove the facts necessary to show that Veeraraghava Aiyar's testimony as to the previous statements made to him by prosecution witness No. 6 and prosecution witness No. 12 would come within the purview of section 157 of the Indian Evidence Act. The section requires that the previous statements should have been made "before any authority legally competent to investigate the fact." The expression "investigate" is not defined in the Indian Evidence Act. The ordinary meaning of the word is to "enquire into." It is defined in the present Criminal Procedure Code; and chapter 14 of the Code is headed "information to

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER.
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

the police and their powers to *investigate*." The corresponding chapter in the Criminal Procedure Code of 1861 (Act XXV) was headed "Preliminary *enquiry* by the police." The investigation referred to in section 157 of the Indian Evidence Act is not however confined to investigation in criminal cases under the provisions of the Criminal Procedure Code. The prosecution may be justified in contending that the word should not be interpreted in the technical sense that it bears in the Criminal Procedure Code. Understanding it in the broad sense of "making enquiry into," the section requires that the statement should have been made before an *authority legally competent* to inquire into the fact. "*Legally competent*" must, I think, mean, "having power under some law, statutory or otherwise." The power need not be derived from an *express provision* of the law, as stated by the majority of the Special Bench, if by that expression he meant "some definite statutory enactment," but it must be shown that there is power under some law or other to investigate. The words "*authority*" and "*competent*" support this view. The prosecution had therefore to prove that Prosecution witness No. 31 was empowered by some law to enquire into the conspiracy. Mr. Napier has tried to show this in two ways. He relies first on section 21 of the Police Act, XXIV of 1859, which provides as follows:—"Every police officer shall, for all purposes in this Act, be considered to be always on duty and shall have the powers of a police officer in every part of the general police district. It shall be his duty to use his best endeavours to prevent all crimes, offences, and public nuisances; to preserve the peace; to apprehend disorderly and suspicious characters; to detect and bring offenders to justice, etc." Reliance is placed on the fact that it is the duty of a police officer "to detect and bring offenders to justice." The expression "general police district," would embrace, under the definition given in the Act, the whole Presidency. The section, it is contended, invests every police officer with the powers of a Police officer in every part of the Presidency. These powers are defined in sections 22 to 43 of the Act. But these sections were repealed by Act XVII of 1862; and the powers of a police officer are now regulated by the Criminal Procedure Code. The Act therefore cannot be relied on to show that a police officer has any specific powers. But it is contended that as section 21 is still in force which makes it the duty of a police officer 'to detect and bring offenders to justice' he must be taken to have all powers necessary

for the purpose and therefore to investigate offences, and that every police officer has these powers throughout the Presidency. I am entirely unable to accept this argument as sound. A law making it a person's duty to use his best endeavours "to detect and bring offenders to justice" would not by itself give him any power which he could exercise over other persons. The "endeavours" must be made by him by means of power given to him by the law. Some endeavours to detect and bring offenders to justice might no doubt be made by every citizen. If a police officer wishes to do anything more requiring the exercise of power over individuals, he must get the authority to do so from some law giving him the power. Act XXIV of 1859 accordingly did confer various powers on police officers, but those sections have been repealed. The result is that they must now discharge their duties under the powers given to them by the Criminal Procedure Code or by some other law. It is quite impossible to hold that the mere imposition of duties of a comprehensive nature would authorise a person on whom they are imposed to restrain the rights and liberties of individuals or to exercise any specific powers over them. The case would be different where a statute commands a person to do a particular act, as such a command would be sufficient authority for him to do it even though it may affect other persons. The learned judges who formed the majority of the Special Bench do not rest their judgment on section 21 of the Police Act. I must hold that prosecution witness No. 31 was not empowered by that section to investigate *the fact* in question in this case.

Mr. Napier then argues that apart from section 21 of Act XXIV of 1859, prosecution witness No. 31 had authority to investigate. The witness was an Inspector of the Criminal Investigation Department. It is urged that in that capacity he was competent to make the investigation. This argument is put in two ways. An officer in charge of a police station has the power to investigate cognizable cases which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try; and section 551 of the Code of Criminal Procedure gives the power of investigation to police officers superior in rank to an officer in charge of a police station in cases throughout the local area to which they have been appointed. It is contended that prosecution witness No. 31 obtained his competency under section 551. Very little

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

information has been placed before the court on this point. It would appear from G.O. No. 913, Judicial, dated 2nd July 1908, that the officers of the Criminal Investigation Department are placed under the control of the Deputy Inspector-General of Police, Criminal Investigation Department. It is stated that the Deputy Inspector-General of Police "should have free discretion in sending his agents" (i.e., the Criminal Investigation Department officers) when and where he chooses "but that he should, except in the case of following up some special crime, promptly inform the District Magistrate and the District Superintendent of Police of the enquiries he is making in the district and should keep them fully informed of the progress of his *investigation*." It is contended that having regard to this provision in the Government Order, whenever the Deputy Inspector-General of the Criminal Investigation Department sends out any of his agents to any local area, such an agent, if superior in rank to an officer in charge of police station, is competent to investigate crimes within that area. The functions of the Criminal Investigation Department are described in the Government Order to be 'generally speaking, to watch wide-spread and dangerous movements, to collect and disseminate information regarding organised crimes and gangs and to assist in the investigation of crimes which are of such a special nature that the local officers are unable to deal with them adequately without help.' So far as investigation of crimes is concerned, their function is stated to be to assist in the investigation in case where the local officers require help. It is not stated that they are themselves to be investigating officers. Probably the object was to maintain the responsibilities and powers of the local officers as stated in paragraph 3 of the Government Order and to make the Criminal Investigation Department officers merely their assistants. The reference to enquiries and investigations of the Criminal Investigation Department officers in paragraph 3 cannot therefore be assumed to import that they are themselves to be investigating officers. At any rate, a mere reference to investigations to be made by them can at best show only that the Government Order contemplates the possibility of the investigations being made by them and cannot dispense with proof of the fact that any particular officer was appointed to a certain local area within the meaning of section 551 of the Criminal Procedure Code. The act of the Deputy

Inspector-General of the Criminal Investigation Department in sending out an officer superior in rank to a station-house officer to a certain district or place cannot be regarded as tantamount to an appointment of that officer to a definite local area. No evidence has been adduced in this case that prosecution witness No. 31 was appointed to any local area by competent authority within the meaning of section 551. The majority of the Special Bench observe that "as a member of the provincial Criminal Investigation Department his (i.e., prosecution witness No. 31's) local area is the Presidency of Madras." The learned judges go on to say that the absence (if it be a fact) of a formal order of appointment is immaterial. With all deference I am unable to accept this view. It assumes that all officers of the Criminal Investigation Department are appointed to the whole Presidency within the meaning of section 551 simply because they are members of the Criminal Investigation Department. It assumes that every officer superior in rank to an officer in charge of a police station must be deemed as appointed to some certain local area. I cannot but regard this assumption as unfounded. The contention on behalf of the accused is that the Criminal Investigation Department officers are really a number of men at the disposal of the police department available for being deputed to do special duties. This view is quite as likely as that accepted by the learned judges. It was for the prosecution to show that prosecution witness No. 31 was competent to investigate and I am constrained to hold that it failed to do so. Prosecution witness No. 31, when examined as a witness, did not state that he was appointed to any local area. He merely said that he was ordered to search the houses of prosecution witnesses Nos. 6 and 12. He says he inferred from that fact that he had powers of investigation. Surely his inference was entirely unwarranted. Mr. Thomas, his superior officer, also did not say that he was appointed to any local area (under section 551). The majority of the Special Bench observe that prosecution witness No. 31 was sent to Tuticorin for the specific purpose of making certain searches. Search parties were sent out and prosecution witness No. 31 belonged to one of the parties. From this specific evidence, I find it impossible to draw the inference that the party and all the members of it were appointed as investigating officers, assuming that an appointment to investigate a specific crime could be made by the Inspector-General of Police or by the Deputy Inspector-General.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

There is again another difficulty which the prosecution has to overcome. The facts deposed to by prosecution witnesses Nos. 6 and 12 at the trial related to the existence of a conspiracy under section 121-A of the Indian Penal Code; an offence under that section is not a cognisable one and a police officer has no power under sections 157 and 551, Criminal Procedure Code, to investigate such an offence without the orders of a magistrate in that behalf. See section 155. The search parties were sent out to investigate the offence of the murder of Mr. Ashe, Collector of Tinnevely. This would not, it is contended, empower any one to investigate a different offence, a non-cognisable one, without the magistrate's order. It is admitted that in this case there was no such order of a magistrate. But taking it that prosecution witness No. 31 had no power under the Criminal Procedure Code to investigate the offence of conspiracy under section 121 A of the Indian Penal Code, the question arises, whether, if he had authority to investigate the murder of Mr. Ashe, he had not power to investigate facts which might have a connection with the murder; not as disclosing another non-cognisable offence, but as facts which might have a possible bearing on the murder. I think it is possible to hold that he had such power. But as I have held that the prosecution failed to show that prosecution witness No. 31 had legal power to investigate any facts, this objection to the admissibility of the statements of prosecution witnesses Nos. 16 and 12 must be upheld, and I abstain from deciding the question whether the absence of a magisterial order is an insuperable objection. I have considered this objection to the reception of the former statements of prosecution witnesses Nos. 6 and 12 anxiously on the ground that prosecution witness No. 31 was not an authority competent to investigate the facts, and I am obliged to come to the conclusion that the objection must be upheld. It is possible that all the evidence available on the point was not adduced, but the objection having been allowed to be entertained by the Special Bench, a decision has to be arrived at on the evidence on record.

The fourth point.—The fourth point raised by the Advocate-General is whether the statements made by prosecution witnesses Nos. 6 and 12 to Veeraraghava Aiyar, prosecution witness No. 31, were not rendered inadmissible in evidence by reason of the provisions of section 25 of the Indian Evidence Act. It is a course conceded for the prosecution that in those statements prosecution

witnesses Nos. 6 and 12 admitted they themselves were guilty of the offence under section 121 A of the Indian Penal Code charged against the accused in the case. The question is whether they are inadmissible against the accused on the ground that they are confessions made to a police officer, prosecution witness No. 31. The finding of the majority of the Special Bench is that section 25 makes a confession to a police officer inadmissible only against the person making it, and that the statements are therefore admissible against the accused under section 157. The learned Judges are of opinion that the mischief aimed at is the same in section 26 relating to a confession made by a person in police custody as in section 25 and as section 26 makes the confession under that section inadmissible only against the person making it, the expression in section 25 "against a person accused of any offence" must also be held to "mean against the person making the confession." The argument for the prosecution at the hearing before us is briefly as follows. Sections 24 to 27 must be taken to lay down rules of admissibility only with regard to a confession made by a person charged with an offence at the trial. One reason for so holding is stated to be that a confession is generally admissible only against the person making it though the legislature has made an exception by making it admissible also against a person who is being tried jointly with such person when the confession has been already put in evidence against the maker. The soundness of this latter proposition is unquestioned. [A confession could be used only against the accused in England—See Taylor on 'Evidence,' X edition, section 904. Phipson on 'Evidence,' page 246, IV edition. That was also the law in this country until the Indian Evidence Act of 1872 was passed.]

But what inference follows from this proposition? The accused in this case were not tried jointly with prosecution witnesses Nos. 6 and 12. Therefore the confessions of the latter should not be admissible against them. The reason given for the argument seems to me effectually to destroy the argument. It comes to this: Because a confession is admissible only against the person making it, or one who is jointly tried with him, therefore, under section 25, the confessions of prosecution witnesses Nos. 6 and 12 were admissible against the accused who were *not* jointly tried with them—an apparently absurd conclusion. But it is contended that there is no such absurdity because apart from this reason the word

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

confession has a well understood meaning, viz., an admission of guilt by a party to the criminal proceeding before the court, and therefore the previous statements of prosecution witnesses Nos. 6 and 12 who were not such parties were not confessions at all. This is not the reason given by the Special Bench for admitting the statements. The learned Judges treat them as admissions but say that section 25 does not prevent their reception as evidence against the accused. This argument does not appear to have been urged before the learned Judges so far as their judgments show. I shall presently examine this argument as to the meaning of the word, but it is well to realise the effect of it. It amounts to this: An admission of guilt to a police officer by a party to the proceeding cannot be proved against another accused person unless both are being jointly tried; but an admission of guilt by one who is not a party to the proceeding may be proved against such a person. *Primâ facie* this contravenes the principle that an admission of guilt is admissible only against the person making it or one tried for an offence jointly with him. I cannot help thinking that the argument at the back of this contention, though it was not put forward directly in so many words, is that sections 24 to 26 make an admission of guilt inadmissible only as substantive evidence. But can it be held that it may be used for corroborating the testimony of a witness as a previous statement made by him? I am clearly of opinion that it cannot. In the first place, the language of the section is too clear to admit of such interpretation. It says (as also does section 26) that the confession cannot be *proved*. If it cannot be proved, how can it be admitted in evidence for any purposes? Secondly, when it is intended that anything not admissible under one section of the Act is not to be excluded if it be relevant under some other section, the Act has expressly taken care to say so. Thus section 21 while enacting that an admission cannot be proved by, or on behalf of, the person making it, states in exception (3) that it may be proved "if it is relevant otherwise than as an admission." Section 43 provides that "Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act." Similarly section 8, explanation I, says that a statement of a party to a proceeding not admissible under that section "is not to affect the relevancy of statements under any other section of the Act."

But section 25 does not say that an admission of guilt not admissible under that section may be admitted under any other section. Thirdly, the reason why a confession made to a police officer should not be admissible is to my mind equally applicable whether it is to be used as substantive evidence or for the purpose of corroboration.

I must now examine the main argument for the prosecution that the word *confession* means an admission of guilt by a party to the proceeding before the Court.

In section 148 of the Criminal Procedure Code of 1861 which contained the rule of evidence afterwards embodied in the Indian Evidence Act of 1872, the provisions were exactly the same as in section 25 except that the phrase "or admission of guilt" was used after the word "confession." The omission of the phrase was, I think, due to its being considered unnecessary as it merely conveyed the well-known meaning of the word "confession" and not to any change of intention on the part of the legislature as to the sense in which the word should be understood. Any such change would have been clearly indicated by means of a definition. The section certainly did not show that an "admission of guilt" to constitute a confession, should be by a party to the proceeding before Court. The Century Dictionary states that at Common Law "a confession" means "an acknowledgment of guilt." The same explanation is given in "Field on Evidence," see page 82. In Bouvier's Law Dictionary, the following explanation is given:—(1) "the voluntary declaration made by a person who has committed a crime or misdemeanour to another, of the agency or participation which he had in the same; (2) an admission or acknowledgment by a person, when arraigned for an offence, that he committed the crime with which he is charged." It will be observed that an extrajudicial confession does not connote according to this definition that the statement was made by a party to the trial before the Court. According to American Cyclopaedia of Law and Procedure, volume VIII, a confession in criminal law is "the voluntary declaration by a person, who has committed a crime or misdemeanour to another, of the agency or participation he had in the same; an acknowledgment of guilt; the acknowledgment of a crime or fraud." No doubt a confession is used in evidence only against a person charged with a crime in the case before the Court and only against the person making it or

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAB, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

a co-accused, but this does not justify the view that the word *confession* itself means an admission of guilt by such a person. In *Queen-Empress v. Jagrup*(1), where the question was whether an inculpatory admission which falls short of an admission of guilt would amount to a confession, Stephen's Digest of Evidence was cited where that learned author defines a confession as "an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime." STRAIGHT, J., was asked, on the authority of that definition, to hold that an admission need not amount to a complete admission of guilt. While holding that there was nothing in the definition against his view that an admission which does amount to an acknowledgment of the commission of a crime is not a confession, the learned Judge deprecated the use of a definition adopted for the purpose of an intended Code in England as a guidance in construing the Indian Evidence Act. The definition is relied on by Mr. Napier to show that an admission to be a confession, must be a statement "by a person charged with a crime." I do not think that the learned author means by that expression "charged in the proceeding before the Court" but "charged with a crime" (that is) "accused of a crime" "at the time of the admission." But assuming that he used the expression in the former sense, I agree with STRAIGHT, J., that the author's definition is of little use in construing the Indian Evidence Act. Our attention was drawn to MAHMOOD, J.'s citation of Stephen's definition in *Queen-Empress v. Babu Lal*(2), but the definition is referred to only for the purpose of considering the question whether a confession should be a complete admission of guilt or not.

I cannot but think that if a confession was intended to refer only to an admission made by a party to the proceeding before the Court, the legislature would have said so. Moreover, there would be much redundancy in the language of sections 24 and 25 if we adopt the meaning contended for by the prosecution. The reference in section 25 "to a person accused of an offence" would be unnecessary as the word confession, by itself imports, according to the contention, a statement by the accused before the Court. Similarly the expression "in a Criminal proceeding" would be unnecessary in section 24.

(1) (1885) I.L.R., 7 All., 646. (2) (1884) I.L.R., 6 All., 509 at p. 539.

Apart from the fact that the Act does not say that a confession is a statement by a party to the trial before the Court, I think it makes it clear that it need not be made by such a person. Section 24 renders irrelevant in certain cases "a confession made by an accused person." Section 25 makes certain confessions inadmissible against a person accused of any offence. The person accused of an offence in section 25 refers of course to a party to the proceeding before the Court against whom the confession is sought to be used. But what is the meaning of the expression "made by an accused person" in section 24? Does it mean made by a person accused in the proceeding before the Court? I think not. The meaning is in my opinion that the person must be "an accused person" at the time of the confession. This was the meaning put on the expression in *Empress v. Jadab Das*(1) where the Court held that a person making an admission may be "an accused person" though he might not be under arrest at the time. No doubt the accused person making the admission would also ordinarily be a party to the proceeding before the Court; but it cannot be inferred from that fact that the accused person making the confession should be the accused in the proceeding before the Court. What section 24 therefore requires is that the admission should be by a person then accused of a crime not that he should be the accused before the Court. Moreover the words "by an accused person" would be a mere surplusage, if a confession is always a statement made by the accused in the case. The expression "made by an accused person" means by one then an accused person just as "proving against a person accused of an offence" means "proving against one who is then an accused person." It must be remembered that confessions coming under sections 25 and 26, in order to be excluded, need not have been made by an accused person at all as those words are omitted in the sections. It was regarded apparently that it was necessary to shut out all admission of guilt made to a police officer whether the person making it was then accused of an offence or not. I am therefore of opinion that the word confession does not import that the admission of guilt should be by a party to the criminal proceeding before the Court.

Thus far I have dealt with the arguments on behalf of the prosecution. An examination of the sections leaves no doubt in

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTYAB, JJ.
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1899) 4 C.W.N., 129.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

my mind that an admission of guilt made to a police officer by any person cannot be proved as against any person accused of any offence whether he be the person who made the admission or not. Under section 24 a statement which appears to the Court to have been caused by an inducement, threat or promise, is inadmissible both against the person making it and against others such as his co-accused. A confession which was not voluntary within the meaning of section 24 cannot be used against a co-accused while it is inadmissible against the person making it. This is really not denied, but it is argued by Mr. Napier that the exclusion is not directed by the words of section 24, but by the provisions of section 30. He contends that the language "when a confession is proved" in that section means "when it is admitted in evidence." I do not think so. That is not the ordinary meaning of "proved." A statement is proved when it is shown to the satisfaction of the Court that it was made. If the statement is in writing, the writing is proved in the manner in which the execution and contents of documents are required to be proved by the subsequent sections of the Act. Such proof does not include showing that the statement was not made owing to any threat of promise or inducement. It could not mean this, because the onus of proving this would not be on the prosecution but on the accused against whom it is sought to be used. Sections 24 and 30 show that the Act makes a clear distinction between the proof of a confession and its relevancy. See also the definition of the word "proved" in section 4. I must hold that so far as section 30 goes, when a confession is proved, it is admissible under that section against a co-accused also. It is by means of section 24 that a confession which is an improper one is excluded both against the person making it and against others. If this conclusion is right, it affords a strong argument in favour of holding that under section 25 also the confession is inadmissible against any accused person and not merely against the maker of the confession. For my part, I require no such support from section 24. The words are perfectly clear. The mischief of the section clearly extends to the admissibility of the confession against all persons. The one and only argument adduced against this plain construction is that section 26 makes a confession made not to a police officer but by a person in police custody inadmissible only against him and not against others, and it is urged that there is no sufficient reason for

not excluding it against others also if a statement made to a police officer is excluded against others. It may be that the legislature thought the probable extent of police pressure in the one case was likely to be less than in the other and that the fact of the maker of the statement being in police custody did not require its being excluded against others. I do not say this reason is convincing but this is not the only case where a Court is unable to find convincing reasons for distinctions made by the legislature. I am bound to attach more importance to the fact that very different language has been used by the legislature in two consecutive sections; there is no difficulty in finding a reason for the comprehensive language used in section 25. I have no hesitation in arriving at the conclusion that the statements of prosecution witness No. 6 and prosecution witness No. 12 to prosecution witness No. 31 are inadmissible in evidence. My opinion is in accordance with the view taken by the Bombay High Court in *Emperor v. Harisingh Ganpatsingh*(1). I agree with BATCHELOR, J., that a confession which is inadmissible against the person making it is *a fortiori* inadmissible against another person implicated by it. *Queen-Empress v. Tribhovan Manekchand*(2) was cited by Mr. Napier in support of his contention. The question admittedly did not arise for decision in that case. The question was whether a confessional statement was admissible against the maker in an inquiry under section 523, Criminal Procedure Code, as to whom certain stolen property should be returned. The Court held that the word confession has reference only to criminal proceedings, that section 25 excluded the use of the statement in question in that case only in such proceedings and that the statement was receivable in evidence as an admission in the enquiry made by the Court as to the person entitled to the return of the property. Reliance is placed on the observation of WEST, J., that "confession" in section 25 as in section 24 means "a confession made by an accused person, which it is proposed to prove against him to establish an offence." No doubt, a confession would generally be made by an accused person and would be generally also used against him. The point made by the learned Judge was that section 25 did not refer to the use of a confession in other than a criminal proceeding. I do not think he addressed himself to the question whether a confession should always be a statement by a party to the proceeding.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1910) 12 Bom. L.R., 899.

(2) (1885) I.L.R., 9 Bom., 131.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

Our attention was drawn to the state of the law on the point before the enactment of the Indian Evidence Act. That law was contained in sections 148 and 149 of the Code of Criminal Procedure of 1861, which are in substantially the same terms as sections 25 and 26 of the Indian Evidence Act. They throw no useful light on the point. We are moreover bound to construe the sections in the Indian Evidence Act, which is a complete code according to the plain meaning of the words, without reference to the previous law on the subject. It has been suggested that any imperfection in the drafting of sections 24 to 26 must be attributed to the fact that sections 148 and 149 of the Criminal Procedure Code of 1861 were bodily imported into the Indian Evidence Act. But this does not help us, for there is the same obvious difference between the languages of sections 148 and 149 of the Criminal Procedure Code. On the other hand the explanation of the word "confession" in section 149 is against the contention for the prosecution. Our attention was drawn to the fact that JENKINS, J., commented strongly against the prosecution in *Emperor v. Lalit Mohan Chuckerbutty*(1), not producing the previous confessional statements made by certain approver witnesses to police officers and it is urged that the learned Judge must have regarded them as admissible. The observations do not show that JENKINS, C.J., was of opinion that the statements in question could be put in by the prosecution as corroborative evidence. The accused were entitled under section 162, Criminal Procedure Code, to ask the Court to call for them and to give them copies (if the Court thought fit to do so) to be used for cross-examining the approvers. The failure of the prosecution to produce them would be good cause for the strictures passed by the learned Judge. The case does not help the prosecution. My conclusion is that the previous statements in question were inadmissible on account of the provisions of section 25 of the Indian Evidence Act.

The fifth point.—The fifth and last point raised in the certificate is the question whether the evidence of prosecution witness No. 31 of the previous statements made to him by prosecution witness No. 6 and prosecution witness No. 12 is inadmissible because the statements made by them to him were reduced to writing and the writing is declared to be inadmissible in evidence on behalf of the

prosecution by section 162 of the Criminal Procedure Code. I am clearly of opinion that the evidence of prosecution witness No. 31 is not inadmissible on this ground. Section 161 of the Criminal Procedure Code empowers an officer making an investigation under chapter XIV of the Code to examine orally any person supposed to be acquainted with the facts and circumstances of the case and makes it obligatory on such person to answer questions put to him by the officer; section 162 then enacts that "the statement made by any person if taken down in writing shall not be signed by the person making it, nor shall such writing be used as evidence." The language of section 162 is too clear to my mind to justify the adoption of the argument that because the writing is declared inadmissible it must have been the intention of the legislature to shut out oral evidence also of the statement made to a police officer. Perhaps it is a sufficient answer to this argument to say that the legislature has not said so, but has deliberately restricted the inadmissibility to the writing. It is urged that the expression "such writing" is used in the section really to denote the statement made to the police officer which he is not prevented from taking down in writing. But why did not the legislature say "nor shall such *statement* be used as evidence" instead of using the word *writing*. Section 161 authorizes oral statements being taken, and there is no provision in that section that such oral statement cannot be proved. If the oral statement, when not reduced to writing, may be proved, why should its being taken down in writing be a reason for making it inadmissible? It is not contended that in consequence of its being reduced to writing the oral statement would be inadmissible on account of any general rule of evidence. The statement is not one required to be reduced to writing and section 91 of the Indian Evidence Act would not therefore prevent oral evidence of the statement being given. Oral evidence in such a case is not adduced to prove the contents of the writing. It is adduced to prove what statement the witness made to the police officer. It is contended that there could be no reason for allowing oral evidence to be adduced while the writing is excluded. But I think there was good reason for the legislature contenting itself with a provision that the writing should not be used. According to section 35 of the Indian Evidence Act, the entry by a police officer in any record of statements made to him in the discharge of his official duty under sections

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
ATTAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1911) I.L.R., 38 Cal., 559 at p. 582.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

161 and 162 of the Criminal Procedure Code would itself be relevant. The object of the legislature in section 162 was, I think, to make an exception to the rule contained in section 35 of the Indian Evidence Act in the case of statements made to police officers by persons examined by them at a preliminary investigation. It was apparently considered unsafe to assume that a police officer making an investigation would correctly record statements made to him. It is therefore provided that the statements should not be signed by the witnesses and should not be admissible in evidence. At the same time it was regarded as proper to make the police officer's record of such statements available to the accused at the Judge's discretion for the purpose of cross-examining any witness called for the prosecution. Mr. Govindaraghava Ayyar attempted to show that the exclusion of the writing alone while admitting oral evidence would lead to hardship to the accused in some cases. I do not consider it necessary to deal with them. I can easily conceive of cases where the admission of oral evidence would be a positive advantage to the accused. The non-exclusion of the written record might also lead to serious disadvantage to the accused. For instance, when it is desired to prove the statement made by a witness to the investigating officer, the prosecution might simply put in the written record without calling the officer. This it would be open to the prosecution to do according to section 35 of the Indian Evidence Act. The result would be that the accused would be deprived of the opportunity of cross-examining the officer and proving that the statement of the witness was not correctly taken down by him. Mr. Govindaraghava Ayyar referred to *Isab Mandal v. Queen-Empress*(1) as authority for the position that the police officer's record would not be admissible as evidence under section 35 of the Indian Evidence Act even apart from the exclusion. But with all deference to the learned Judges who decided that case, I am unable to agree with them. The decision of the case was really rested on the ground that the record in question was not admissible under section 162 of the Criminal Procedure Code. They go on to observe: "We are unable to see that section 35 of the Indian Evidence Act has any application in the matter, for we do not consider that a document of this nature, which moreover is not necessarily a part of the

(1) (1901) I.L.R., 28 Cal., 348.

official duty of a police officer to prepare at all, comes within the description of a 'record' within the meaning of that section." But section 35 does not require that the record in question should be one which it is the duty of the public officer to make or prepare. It is quite sufficient that the entry is made by him *in the discharge* of his official duty. I am unable to entertain any doubt that a record made by an investigating officer of statements made to him by witnesses is one prepared in the discharge of his official duty. Clause 2 of section 162 of the Code of Criminal Procedure provides that the record made by a police officer of a dying declaration shall not be inadmissible on account of anything contained in the section. I am unable to see under what section of the Indian Evidence Act the record of dying declaration would be admissible except under section 35. From the necessity of the case, the legislature considered it desirable to exclude dying declarations from the general rule making the police officer's record of statements inadmissible. *Fanindranath Banerjee v. Emperor*(1) is a distinct authority against the contention of the accused. I agree with the opinion of the learned Judges who decided that case, and with KARAMAT HUSAIN, J., in *Rustam v. King-Emperor*(2) that an examination of the corresponding sections in the previous Codes of Criminal Procedure shows that the legislature deliberately restricted itself to making the writing alone inadmissible. Mr. Govindaraghava Ayyar relied on the observations of BEAMAN, J., in *Emperor v. Narayan Rayhunath Patki*(3). That learned Judge draws his conclusions from the history of the legislation on the subject. He takes it that the object of the change in the present Procedure Code was merely to confer an advantage on the accused by making the written record made by a police officer of statements made to him available to the accused for cross-examination. But the learned Judge can get over the alteration in the section in making the writing alone inadmissible in evidence, only by assuming that the word "writing" is not used in the section in contradistinction to the word "statement" used previously in it. This assumption is, I think, not permissible. He points out that "as the law stands, the prosecution might have an advantage over the accused in some cases." But apart from

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
MUTHU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

(1) (1909) I.L.R., 36 Cal., 281 at p. 286.

(2) 7 All.L.J., 468.

(3) (1908) I.L.R., 32 Bom., 111 at pp. 142 & 143.

BENSON,
WALLIS,
MILLER,
ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

MUTRU-
KUMARASWAMI
PILLAI
v.
KING-
EMPEROR.

this not being a sufficient reason for refusing to give effect to the plain words of the section, I can easily think of cases in which the adoption of a contrary view might result in disadvantage to the accused. I have no hesitation in concurring with the Special Bench in the view taken on the question by all the learned Judges who constituted the Bench.

The result of my findings is that, in my opinion, the statements of the approvers, Arumugam and Somasundaram, to prosecution witness No. 31 and to Mr. Cox ought not to have been admitted in evidence. With regard to the earlier statements I have entertained some doubt whether the majority of the Special Bench have clearly stated that their conclusions from the evidence would be the same even if they were rejected, but I am not prepared to dissent from the view that such is in substance the effect of the judgment of the learned Judges. With regard to the statements to Mr. Cox, however, they do not state that their conclusions would be unaffected by their exclusion. Consequently it is in my view necessary to consider whether excluding those statements there is sufficient evidence on record to sustain the conviction of the accused.

By the Court.—The result of our judgments is that the petitions are dismissed.

	Generally.	Preliminary objection.	First point.	Second point.	Third point.	Fourth point.	Fifth point.
Benson, J.	418	418	421	426	432	434	432
Wallis, J.	436	436	437	441	443	448	445
Miller, J.	...	...	451	453	454	455	458
Abdur Rahim, J. ...	{ 458 to 467 }	459	467	485	487	489	490
Sundara Ayyar, J. ...	...	492	495	518	525	530	538

J.C.A.

PRIVY COUNCIL.

IN THE MATTER OF KRISHNASAMI AIYAR.

[On appeal from the High Court of Judicature at Madras.]

* P.C.
1912.
June 20.

Pleader—Suspension of vakil from practising—Functions of Pleader and duty to the Court and to client—Rule 95 of Appellate Side rules of Madras High Court—Non-payment by vakil of printing charges for appeal though paid to him by client—Misconduct of vakil in management of appeal—Letters Patent of High Court, section 10—Legal Practitioners' Act (XVIII of 1879)—Section 13.

Under section 95 of the Appellate Side rules of the Madras High Court, pleaders "are responsible to the Registrar for all translations and printing charges incurred by him on their behalf." To that extent, therefore, the vakil must co-operate in the conduct of the suit with the Registrar, and with the Court under those regulations; and vakils have also the general function, applicable not only to the bar in general but also to solicitors at large, that they must in the conduct of all suits entrusted to them co-operate with the Court in the orderly and pure administration of justice.

In a proceeding in the High Court to restore an appeal which had been struck off for non-payment of the printing charges, it appeared that the vakil for the appellant, though the money for that specific purpose had been received in his office from his client, had omitted to pay it to the Registrar, had not made any true and proper explanation to his client of the cause of the appeal being struck off, but had allowed letters written by his clerks to go from his office to the client, and had even written one himself, which would lead him to believe that the appeal had been heard and dismissed in due course, and had also not given the Court, on the earliest possible opportunity any reason for his absence when the appeal was called on, except that other professional engagements had prevented him from being present, nor had he ever offered to the Court any explanation or apology concerning his conduct of the case nor expressed to the Court any regret for its effect. The vakil, after being called on to show cause why he should not be punished under the Letters Patent of the High Court, or the Legal Practitioners' Act (XVIII of 1879) for professional misconduct, was, whilst personally acquitted of any fraudulent or criminal act, suspended from practising for six months.

Held, on an appeal to the Judicial Committee, that the vakil had in his acts, and omissions to explain, regret, or apologise for them, utterly failed to perform what his honour and duty to his client and to the Court made it incumbent upon him to do; and their Lordships while not interfering with his acquittance of direct and personal fraud, did not see their way to acquit him of conduct in the management of the appeal, and of his client's affairs, which caused the procedure of the Court to be the very opposite of what it should be, namely,

* *Present*:—Lord SHAW, Sir JOHN EDGE, and Mr. AMEER ALI.

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

responsible, orderly, and pure; and they were of opinion that there was "reasonable cause" under section 10 of the Letters Patent, for the sentence pronounced by the High Court, which was justified both in its pronouncement, and the extent of the suspension.

APPEAL from an order (28th February 1912) of the High Court at Madras whereby the appellant, a vakil of the High Court, was suspended from practice for six months on the ground of professional misconduct.

The facts of the case sufficiently appear from the judgment delivered by the High Court (Sir CHARLES ARNOLD WHITE, C.J., and SANKARAN NAIR and AYLING, JJ.) which was as follows:—

"In this matter a vakil of this Court has been called on to show cause why he should not be suspended or removed from practice by reason of his conduct in connection with Second Appeal No. 1045 of 1907 in which he was retained. Notice was issued to the vakil in pursuance of an order made by this Court with reference in the judgment in Civil Miscellaneous Petition No. 498 of 1910. The application is made by the Advocate-General, and the question we have to consider is whether 'reasonable cause' within the meaning of section 10 of the Letters Patent has been shown for the removal or suspension of the vakil.

"On the hearing of the application Mr. Rangaohariar and Mr. K. Srinivasa Ayyangar appeared for the vakil. We have considered the judgment of this Court in Civil Miscellaneous Petition No. 498 of 1910. Two affidavits have been relied on by the vakil, one in support of the application to restore the second appeal, dated February 14th, 1910, and another, dated December 6th, 1911. There are also affidavits by the vakil's manager Latchmiah and his clerk Bhashyam. An unsworn statement by the vakil was handed to us. We have considered this statement though, as it is not on oath and the vakil is represented before us, we were under no obligation to do so. We are anxious, however, that any point which may tell in favour of the vakil should not be overlooked.

"The facts are as follow:—

'A bill for printing the pleadings in the appeal amounting to Rs. 48 was issued by the Court in November 1907. Several applications for payment made to the client by the clerk Latchmiah were not attended to. On or about May 5th, 1908, a bill for printing documents amounting to Rs. 60 was issued. Further letters to the client demanding payment were written by or on behalf of the vakil. On or about January 6th, 1909, the client sent to the vakil a money order for Rs. 40.'

"On March 5th, 1909, the appeal was posted for dismissal by reason of the non-payment of the printing charges. Time for payment was extended by two weeks and the bill was reduced from Rs. 108 to Rs. 68. On that day the client paid Rs. 28 to the vakil. The vakil states that the client was present when the order was made for the extension of time and for the reduction of the bill. He also states—and we accept the statement—that although the client had paid Rs. 68 to the vakil, the vakil had only some Rs. 54 or 55 to the credit of the client, as he had made some small payments in connection with the appeal out of his own pocket.

"On March 15th, 1909, Latchmiah wrote to the client as follows:— 'Received the letter written by you and learnt its contents. When you were here, the printing bills were amended and it was found that Rs. 48 had to be paid for one bill and Rs. 20 for the other; up till now, exclusive of the sum of Rs. 40 you sent to Aiyar, you paid me Rs. 28 and went away. On my now asking Aiyar for the money he said that the money received by him from you was spent and asked me to get the money from you and pay Rs. 40 for the bill. Therefore as soon as you see this letter, remit to my address Rs. 40 by money order, and then attend to other affairs. If you fail to send, the case will be spoilt and there will be no use in blaming us.' Latchmiah says in his affidavit he wrote this letter on his own responsibility so as to be on the safe side, and that, so far as he remembers, he had no such conversation with his master as is stated in the letter. The letter is headed with the name of the vakil and with his office and private address. It is signed by Latchmiah.

"The letter is a most extraordinary one. It gives no particulars of the alleged spending of the client's money and demands another Rs. 40. The vakil repudiates all knowledge of this letter and he says it was not until the 25th of January, 1910, that he came to know that the client's printing charges had not been paid.

"What action, if any, the client took on receipt of this letter of March 15th we do not know as the letters written by the client to the vakil or his clerks have not been produced. It is not suggested that the demand for payment of a further Rs. 40 was complied with. On July 15th, 1909, a clerk, Bhashyam, wrote to the client, after referring to letters written by the client, 'your appeal is being printed. We shall let you know the date of hearing.' On July 17th, the same clerk wrote again, after referring to letters written by the client, 'The papers in the said appeal are being made ready. You need not in any way be anxious. We shall let you know if there be anything particular.' On 26th January 1910 the appeal was posted for dismissal for non-payment of printing charges. No one appeared for

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

the appellant, and the appeal was dismissed for default. Two days later, on January 28th 1910, the clerk Bhashyam wrote to the client as follows:—‘Your second appeal referred to above was posted on 26th instant for hearing, and decided against us, that is, the appeal was dismissed.’ This letter is headed with the name and address, business and private, of the vakil and is signed, ‘By order, Bhashyam.’ The vakil says in his affidavit that this letter was written without his knowledge. Bhashyam, the clerk, says in his affidavit he understood from the manager Latchmiah that the case had been dismissed but he did not know the details. The manager Latchmiah in his affidavit says nothing about it.

‘The vakil did nothing until his client appeared on the scene and put in an application for restoration on February 14th 1910. The application to restore is signed by another vakil, Mr. G. S. Ramachandra Aiyar, as well as by the vakil whose conduct is the subject of this enquiry. In support of the application to restore the appeal the vakil put in an affidavit. The affidavit is as follows:—

“‘I, G. Krishnasami Aiyar, son of P. S. Ganapathi Aiyar, a Hindu Brahman of the age of about 34 years, High Court Vakil, residing at No. 3, North Tank Square, Mylapore, Madras, do hereby solemnly and sincerely affirm and say as follows:—

“‘(1) That I am the vakil for the appellants herein.

“‘(2) That Visvanatha Chetti, one of the appellants herein, paid my clerk V. Latchmiah a sum of Rs. 28 on or about the 5th March 1909 for paying the printing charges hereof; he had sent me also a sum of Rs. 40 by money order towards the expenses of this appeal on or about 6th January 1909 after the time for the bill had expired.

“‘(3) That by mistake my clerk V. Latchmiah entered the said amounts paid by the appellants to the credit of a different second appeal from the same, South Arcot district, namely, Second Appeal No. 49 of 1907, and the printing charges of this appeal were not paid

“‘(4) That this case was posted on the evening of 25th January, 1910, for order under rule 100 of the Translation and Printing Rules and my clerk Bhashyam Aiyangar brought it to my notice then; I had a recollection that the party had paid the printing charges after time and that time had been extended by the Court and on looking over the account I found that a mistake had been committed. I wanted to bring this matter to the notice of the Court on the 26th January 1910 and on that day this case was posted as fourth case in the list.

“‘(5) That on the 26th day of January, 1910, I had three fresh Small Cause Suits posted before His Honour the Third Judge, Small Cause Court, for trial and two Original Suits Nos. 208 of 1908 and 199 of 1908 before His Lordship Justice WALLIS.

“‘(6) That as this case was the fourth case in the list I waited for a few minutes at my chambers, made some arrangements for the Small Cause Court work, and went to the Original Side to see when my said original cases were likely to be reached and then came to this Court.

“‘(7) That when I reached the doors of this Court it was about a few minutes after this case had been called on and dismissed for default.’

‘The statement in paragraph 3 of the affidavit that the amounts paid by the appellants were by mistake credited to a different second appeal is admittedly inaccurate. The books only purport to show that Rs. 40 was so credited.

‘According to the vakil’s own case, by a mistake of his clerk moneys paid by the appellant in Second Appeal No. 1045 of 1907 were credited to another client and as a result of this mistake the appeal was dismissed for default. The case was posted not on account of any default of the client but on account of a mistake, or something worse than mistake, in the office of the vakil. In this state of things, the onus was heavy on the vakil to explain the true state of affairs to the Court and to his client. So far as the Court is concerned he does nothing. His failure to be in Court when the case was called on may have been accidental. But one would have thought in a case where a grave injustice had been done to his client by a mistake in his office of which the vakil was personally aware, he would have been specially careful to attend and explain how things stood. It was a duty which he owed to the Court. It was a duty which he owed to his client, who had suffered a serious injustice. It was a duty which he owed to himself since the mistake might well give rise to questions involving the personal honesty of the vakil or his clerks. There may be an explanation of the vakil’s failure to appear. It seems to us there can be no satisfactory explanation of his conduct in not bringing the matter before the Court at the very earliest opportunity. In our opinion, the *gravamen* of the charge is not that the vakil failed to appear when the case was called on (this, as we have said, may have been an accident) but that having failed to appear, and the appeal having been dismissed, he did not give a full explanation to the Court at the earliest opportunity. His excuse that he was under the impression that he could not mention the facts till the same Bench sat again seems to us to be idle.

‘As regards the client, whatever may have been the practice of the vakil’s office as to allowing his clerks to write letters which did not come before him the vakil seems to have entirely misconceived the nature of his duty and responsibilities in not taking steps to see that

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

the real circumstances in which the appeal had been dismissed were brought to the notice of his client. He did nothing until the client appeared upon the scene. To make matters worse, the letter of January 28th to which we have referred was written by the clerk Bhashyam. This letter is a deliberate lie. The object with which it was written was obviously to deceive the client and make him think there was nothing more to be done. We cannot shut our eyes to the fact that if this letter had accomplished the object with which it was written, the clerk or the vakil might have got the benefit of the client's money, and nothing more would have been heard of the case. The suggestion that the object of the clerk in writing the letter was to 'gain time' is not worth serious consideration.

"As regards the accounts all we need say is that there are very strong reasons to suspect that the day-book and the ledger have been altered in order to support the case that Rs. 40 were credited to the wrong Second Appeal.

"On January 17th, 1910, the clerk Bhashyam wrote 'Second Appeal No. 1045 of 1907 I have written to you on several occasions that the sum of Rs. 40 sent for the printing charges in connection with the above case is insufficient.'

"This goes a long way to show that the suggestion that the Rs. 40 had been credited not to Appeal No. 1045 but to Appeal No. 49 was an after-thought and that the entries in the books which bear date January 6th, 1909, had not been made when the letter of January 17th, 1909, was written. The way in which the credit of Rs. 40 in Appeal No. 49 is entered in the day-book strongly suggests that it was made at some time after the date which it purports to bear. Latchmiah's letter of 15th March, 1909, and Bhashyam's letters of 15th and 17th July 1909 are all inconsistent with the suggested mistake. The fact that after July, 1909, no further efforts were made to get money from the client although the case was not posted for orders till January, 1910, is also inconsistent with the suggestion.

"In the statement which has been handed to us, the vakil states that Rs. 68 was refunded to the client in February 1910. This payment does not appear in the ledger, but we find in the day book under date February 18th, 1910 'To client in Second Appeal No. 1045 of 1907 Rs. 75.' This was after the client had come to Madras and the application for restoration had been put in.

"The letters of March 15th, 1909, and January 28th, 1910, were written by Latchmiah and Bhashyam respectively on paper headed with the vakil's name and address. The vakil tells us, in effect, that these letters were written without his knowledge or approval.

It was suggested that there was nothing unusual in this. If a practice of vakils' clerks being allowed to write letters on behalf of their masters without their masters' knowledge really exists, it seems to us that the practice is altogether unbusiness-like. The letter of January 28th, 1910, contains a false statement, a false statement—as it seems to us—made deliberately with a definite object in view. The vakil cannot protect himself from responsibility by saying he knew nothing about this letter. We must hold him responsible for it. If this letter was in fact written with the vakil's knowledge and approval the case would be an extremely bad one. We assume, in his favour, that the letter was written without his knowledge. We also assume, in his favour, that what appear to be the obvious alterations in the books made, as it seems to us, with the object of supporting the very doubtful story as to the Rs. 40 having been credited to the wrong second appeal by mistake, were made without the knowledge of the vakil. Then remains the fact that when the appeal was dismissed for default in circumstances which made it the duty of the vakil to offer a prompt and full explanation to the Court and to his client he did nothing till his client appeared on the scene. He did not write to the client himself. He gave no instructions to his clerk to write. The matter was one of special delicacy and importance and in our opinion it was the duty of the vakil either to give express instructions to his clerk in the matter or to satisfy himself that any communication which his clerk sent to the client was a true statement. As we have said, the clerk's statement was untrue and we must hold the vakil responsible for it. We cannot take the view that the facts show nothing more than negligence on the part of the vakil and we do not think his conduct can be excused on the ground of want of experience or ignorance of practice.

"The order of the Court is that Mr. G. Krishnasami Aiyar, a vakil of this Court, be suspended from practice for six months from this date."

On this appeal which was heard *ex parte DeGruyther, K. C.*, and *Kenworthy Brown* for the appellant contended that at the most the evidence showed that he had been guilty of negligence, but not of professional or other misconduct. The Judges of the High Court cleared him of anything fraudulent or criminal. There was, it was submitted, no fraudulent misconduct on the part of the appellant sufficient to make him liable to the punishment inflicted on him. Reference was made to the Letters Patent of the High Court, 1865, section 10; Legal Practitioners' Act (XVIII of 1879) section 13; Corderry on Solicitors, page 180;

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

and *In the matter of Southekal Krishna Rao*(1). No specific charges of misconduct were formulated against the appellant, nor was he called upon to answer or defend himself against any specific charges, and he had been prejudiced by this course. The case against him, and particularly the charge of failing to send to his client a full explanation of the circumstances under which the Second Appeal No. 1045 of 1907 was dismissed did not sufficiently appear from the judgment of 3rd January 1912, in the Civil Miscellaneous Petition No. 498 of 1910, in reference to which the notice to the appellant to show cause was issued. He trusted in the honesty and capacity of his two clerks, and even if that was negligence he did not thereby become guilty of professional misconduct, or render himself liable to punishment under the Letters Patent of the High Court, or the Legal Practitioners' Act. There was no evidence that the clerks desired to deceive the client in the matter, and even if they did the appellant had no part in any such design. At the worst he was only guilty of not explaining to the Judges of the High Court on 26th July 1910 his non-payment of the charges in the Appeal (No. 1045 of 1907), and clear himself of any suspicion of misconduct. That non-payment he now stated was due to a mistake in crediting the amounts received on that appeal to another appeal from the same district. Under the circumstances the heavy punishment incurred was not wholly merited, and as he now expressed very sincere regret at what had occurred some leniency, it was submitted, might be shown towards him by Their Lordships.

1912, June 20th.—The judgment of Their Lordships was delivered by

Lord SHAW.—This is an appeal against an order of the High Court of Judicature at Madras. The order is dated the 28th February 1912. Under that order the appellant, who was a vakil of the Court, was suspended from practice for six months on the ground of professional misconduct.

The circumstances of the case have been reviewed in very careful judgment by the learned Judges of the Court below. Their Lordships only review them further for the purpose of

(1) (1888) I.L.R., 15 Cal., 152; (1887) L.R., 14 I.A., 154.

illustrating the one point which appears to them to be conclusive of the present appeal.

In the year 1907 the present appellant, the vakil, was employed to file a second appeal in the High Court against a decree of the District Court of South Arcot. The condition of matters with regard to a vakil, and his relation to the procedure of the Court, which bears upon this case, are set out in section 95 of the Appellate Side Rules of Madras. By that section pleaders "are responsible to the Registrar for all translation and printing charges incurred by him on their behalf" under those rules. To that extent the vakil must co-operate in the conduct of the suit with the Registrar, and with the Court, under these regulations. And they have the other general function, applicable not only to the Bar in general, but to solicitors at large, that they must, in the conduct of all suits entrusted to them, co-operate with the Court in the orderly and pure administration of justice.

In the present case a certain advance was made, or required to be made, in order to enable printing to be done as Court printing. A correspondence accordingly ensued between this vakil and his client; and it is a well-founded observation made in the anxious argument presented to Their Lordships from the Bar that that correspondence was mainly conducted by a manager and a clerk of the vakil, and not by the vakil personally. That, however, is not completely true, because one of these letters, an important one, of the 8th September 1908, was written by the vakil himself. Further, the vakil in the present case, the present appellant, was, of course, charged with the knowledge that it was necessary, not only that the moneys should be received from his client, but that in common honesty that money should be paid to the Registrar for the discharge of the printing dues. This was not done. Statement after statement is made by the manager and clerk in the course of this correspondence containing a false narrative of what had been proceeding, and constituting fraudulent deception of the client.

Matters, however, culminated in a visit paid by the client on the 5th March 1909, when a payment of Rs. 28—making up the full amount to which the printing charges had accumulated at that date—was made by the client to one of the clerks in the vakil's office. The full sum amounted to Rs. 68, that is to say, a payment of Rs. 28 on the spot, added to a previous payment of Rs. 40.

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

That being done, what followed? The client naturally expected that his case would be proceeded with. He was falsely informed on the 15th July, by a letter written by the clerk, that certain progress was being made. Nothing, however, had been done, on account of the initial withholding from the Registrar of the Court of the whole of the money received from the client.

On the 25th of January matters were in this position: that the case was listed for the following day, the 26th, and, as is admitted in a most fatal document for the appellant in this case, namely his own affidavit, the appellant then personally knew of the transactions in the interim. His knowledge must have included the knowledge that the moneys received for a specific purpose from the client had not been so applied. When the vakil arrived at the Court on the morning of the 26th January 1910 he was aware that he was accordingly bound, as a responsible vakil, in honour and in duty to his client, to himself, and to the Court, to explain that the cause, which would in the natural course be dismissed for want of payment of the printing dues, was exposed to this peril by reason of a circumstance for which he apologised publicly to the Court, and expressed his regret. His affidavit, however is to this effect: "When I reached the doors of this Court it was about a few minutes after this case had been called on and dismissed for default." In short, he makes to the Court below, and at this Bar, an excuse that, being engaged elsewhere, he did not appear to discharge that duty of honour, which on all sides plainly rested upon him. Having made that mistake a further course was open to him, and that was to wait until an interval in any procedure of that Court, or till the Court was about to adjourn, and instantly to make his honourable explanation. He did not do so. He allowed matters to drift for about 18 days, as aftermentioned; and the Court below having considered the excuses put forward for not sooner making application to notify what had occurred think these excuses to be idle.

He apparently returned to his office, and what did he then do with his staff? His staff by that time had been convicted of most fraudulent and improper conduct in keeping of the client's money, in sending lying letters to a client, and in giving, in the interval, an untrue account of the proceedings in the appeal. This vakil, who

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AIYAR.

has been acquitted of personal fraud by the Court below, an acquittance with which their Lordships do not in any degree interfere, was guilty of the regrettable conduct of permitting a staff who had previously been guilty of such deception, to continue in correspondence with his client. It was for him to say whether he should retain such persons in his service, but at all events he was honourably bound to disclose to his client the mishap that had occurred on the morning of the 26th January. Instead of that the staff was continued as before, and on the 28th January the client was written to by Bhashyam in these terms: "Your second appeal aforesaid came on for hearing on the 26th instant, and was decided against us, that is the appeal was dismissed." That implies two falsehoods. The case did not come on for hearing. It was never heard. It was not decided against them in the sense of a decision having been pronounced *in foro contentioso*. It was dismissed simply in consequence of the improper non-payment of moneys due. Accordingly, so far as the client was concerned, nothing was done to wipe out the mistake which had been made by the vakil. So far as the Court was concerned nothing was done for a period of about 18 days.

In the interval the client had appeared in Madras, and, no doubt, made his determination plain to have the matter brought before the Court as one at least of mischance. Accordingly, an application had to be made, and it was not made until the 14th of the following month of February—an application for restoration of the case to the Roll. Then, the Court apprehending the gravity of the situation, instituted this enquiry. Every conceivable point has been taken against the regularity of that enquiry in the Court below; but at the Bar, where the case was anxiously and ably argued, these points have not been insisted upon. For they were without substance.

The main issue in this case is, what was the conduct, relative to the Court, relative to the client, and relative to his own professional position, which this vakil perpetrated on or about the 26th January? Their Lordships while not interfering, as stated with his acquittance of direct and personal fraud, do not see their way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, first responsible, secondly orderly, and thirdly pure. In all these

SHAW, EDGE
AND
AMEER ALI,
P.Cs.

IN THE
MATTER OF
KRISHNA-
SAMI AYYAR.

respects there has been a violation of the proprieties which attach to legal procedure.

That being so, the Court made this enquiry. Its powers seem to be those contained in section 10 of the Letters Patent creating the Court and containing, *in gremio* thereof, the rules with regard to advocates, vakils, and attorneys-at-law. Amongst the rules is rule 10, which empowers the Court in these terms: "to remove, or to suspend from practice on reasonable cause the said Advocates, Vakils or Attorneys-at-Law."

The sole question which Their Lordships have to consider in the present case is: the Court being apprised of the procedure which has been briefly described, can it be said to have acted without reasonable cause in making an interim suspension of the appellant from practice as a vakil for a period of six months? Their Lordships think that there was reasonable cause in the present case, and they further think the Court below was justified both in the pronouncement and the extent of the suspension.

With regard to the appeal very properly made by *Mr. Kenworthy Brown* as to his client, Their Lordships can only express the hope that in the management by those under him of affairs committed to his charge, he will, in future, see to it, that such improprieties as those referred to do not recur; and, if that is done, there seems no reason to doubt that, after this discipline, he will be able to resume an honourable professional career.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*
J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

KOTA SUBBAYYA GUPTA GARU

(PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA AND OTHERS
(FIRST DEFENDANT AND THIRD DEFENDANT'S LEGAL REPRESENTATIVES),
RESPONDENTS.*

1911.
January
26, 27.
February 3.

Revenue Recovery Act (Madras) II of 1864, ss. 3, 4, 5 and 26—Defaulter, who is—Registered Proprietor is "defaulter" in respect of arrears accrued before registry.

The Madras Revenue Recovery Act lays the obligation to pay the revenue including all the arrears on every landholder irrespective of the time when he becomes the holder and if he does not do so, he becomes a defaulter.

A person, on being registered as the holder, becomes a defaulter in respect of arrears accrued before the registry, as if he were the registered owner when the arrears fell due.

APPEAL against the decree of D. Venkoba Rao, Subordinate Judge of North Arcot in Original Suit No. 10 of 1906.

The facts for the purpose of this case are fully set out in the judgment.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for appellants.

The Hon. Mr. *L. A. Govindaraghava Ayyar* for second and third respondents.

JUDGMENT.—The suit in this case was instituted to set aside the sale of the village of Gopalapuram in the Karvetnagar zamindari for arrears of Government revenue due for faslis 1309 to 1311, and for a portion of the revenue due for fasli 1312. The village was sold in Court auction in execution of a decree against the Karvetnagar Zamindar in 1886, and was purchased by one Ramasami Chetty who transferred it to the plaintiff on the 26th May, 1890. The village was separately registered in the plaintiff's name by the Collector of the district on the 5th August, 1901, till which date the registry had remained in the name of the zamindar.

* Appeal No. 4 of 1908.

BENSON AND
SUNDARA
AYYAR, JJ.
—
KOTA
SUBBAYYA
GUPTA GARU
v.
THE SECRETARY OF
STATE FOR
INDIA.

The arrears for faslis 1399 and 1310 accrued due therefore while the zamindar was the registered proprietor. The sale was held for the realization of a sum of Rs. 1,344-3-6 out of which more than Rs. 1,000 was due for faslis 1309 and 1310. The sale was impeached as illegal and irregular on various grounds, and the plaintiff alleged that, in consequence of the irregularities complained of, the village which he says is worth Rs. 20,000 was sold for the very inadequate price of Rs. 6,260. The lower Court found that there was no illegality in the sale, that there was one bad mistake in the sale proclamation in that the assessment imposed on the village was stated to be Rs. 1,902-0-10 while it was really only Rs. 322-8-0, but that no loss resulted from the mistake as the price fetched at the sale was fair, and that bidders who attended the sale were informed of the mistake in the proclamation and of the correct amount of the assessment imposed on the village.

At the hearing of the appeal three points were argued by Mr. Ramachandra Ayyar who appeared for the appellant—(1) that there were no arrears of revenue due on the village, (2) that in consequence of the gross misstatement regarding the assessment—the village was sold for a low price, its real value being much more than Rs. 6,260, (3) that the plaintiff was not the defaulter with respect to the revenue for 1309 and 1310, that he was the owner of the village, at the time of the sale, that only the defaulter's land could be sold for arrears under Act II of 1864 and that the sale of the village was therefore illegal.

The first contention, we think, the appellant has entirely failed to establish. Exhibits F, F¹, L, and M which were relied on for the purpose do not support the contention at all. The substance of the appellant's complaint appear to be that in previous years when the registry had not been separated, the owner of Gopalapuram had paid a larger amount than was properly leviable on the village, and that therefore there was money to his credit in the hands of the Collector which should have been appropriated for the revenue of subsequent years. But no separate credit could be claimed for a single village of the zamindari before the change of registry. Moreover no attempt is made to show what amount had been previously paid in excess of what was due. The second contention also in our opinion has not been properly substantiated. The plaintiff is admittedly in possession

of accounts showing the actual income of the village for ten years. He has withheld them from the Court, and no good reason has been assigned for their non-production. His fourth witness, his own agent, is not able to state the beriz with any definiteness. His third witness, a monegar, who says he attended the sale and intended to bid at the auction on behalf of one Kandappa Mudali, took only Rs. 1,000 with him to be used if necessary as a deposit which at 15 per cent. would not enable him to offer appreciably more than Rs. 6,260. We agree with the lower Court in the reasons given for not accepting the evidence of the second witness. The village was sold at Court auction in 1896 for Rs. 6,205 and we are not satisfied that the lower Court was mistaken in saying that the plaintiff admitted in his deposition that there was nothing payable then on account of a mortgage on this, and some other villages. The sale might have been made subject to a mortgage but that cannot be assumed to mean that any money was then actually due on it. In this view we do not think it necessary to consider whether any one was or could have been misled by exhibit I to suppose that the assessment fixed on the village was Rs. 1,902-0-10.

It remains for us to deal with the third and most important contention urged by the learned pleader for the appellant, namely that the Collector had no power at all to sell on the 26th September, 1903, the village of Gopalapuram of which the plaintiff was then the registered proprietor for arrears due for faslis 1309 and 1310 as he was not a defaulter with respect to those arrears. He relies on section 26, which provides that the Collector "shall proceed to recover the arrears by the attachment and sale of the defaulter's land", i.e., according to the argument, land of which the defaulter is the registered proprietor at the time when the Collector takes steps to bring it to sale. Our attention is drawn also to section 5, which enacts that arrears of revenue are to be recovered "by the sale of the defaulter's moveable and immoveable property." A careful consideration of sections 3 to 5, has led us to the conclusion that the contention that the plaintiff was not a defaulter with respect to the arrears of faslis 1309 and 1310 is not sound. It is now well established that the word "defaulter" for the purposes of Act II of 1864 means the registered owner of the property with respect to which arrears of revenue are due, see *Boja Sellappa Reddy v.*

BENSON AND
SUNDARA
AYYAR, JJ.
—
KOTA
SUBBAYYA
GUPTA GARU
v.
THE SECRETARY OF
STATE FOR
INDIA.

BENSON AND
SUNDARA
ATTYAR, JJ.

KOTA
SUBBAYYA
GUPTA GARU
v.

THE SECRETARY OF
STATE FOR
INDIA.

Vridhachala Reddy(1) and *Subramania Chetty v. Mahalingasami Sivan*(2) and the still more recent case of *Sahasranama Iyer v. The Secretary of State for India*(3) in which the previous cases are reviewed. It is unnecessary to refer to earlier cases in support of this position and the appellant does not contest it. According to section 2 of the Act every landholder is bound to pay the revenue due upon his land on or before the day on which it falls due. According to section 4 "when the whole or a portion of a kist shall not be so paid the amount of the kist or of its unpaid portion shall be deemed to be an arrear of revenue." It need hardly be pointed out that an arrear of revenue remains an arrear until it is paid, and the landholder or registered proprietor is liable to pay it. When plaintiff became the registered proprietor, there were arrears of revenue due on the village and he as the landholder became liable to pay it to the Collector, and, on failure to pay it, he became in our opinion a defaulter. We may refer to section 2 of Act I of 1890 (Government of India Act) which defines a "defaulter" as "a person from whom an arrear of land revenue is due." We are of opinion that a landholder-purchaser is bound to pay not only the revenue falling due on the land after he has become the holder, but all revenue due on the land including arrears that accrued due before he became the purchaser and that on failing to do so he becomes a defaulter with regard to them. Section 2 fixes the time at which each kist of the revenue is payable, but cannot reasonably be taken to mean that the landholder is not bound to pay it afterwards. Such a contention cannot be urged if the holder at the time when a kist falls due continues to be the landholder after it has become an arrear. The Act in our opinion lays the obligation to pay the revenue including all arrears on every land holder irrespective of the time when he becomes the holder, and, if he does not do so, he becomes a defaulter. According to section 5, when revenue is in arrear the Collector has power to recover the arrears by the sale of the defaulter's moveable and immoveable property. Our construction of sections 3 to 5 is in accordance with the interpretation placed on them by the Board of Revenue. Standing Order No. 28, clause (2), lays down that when the

(1) (1907) I.L.R., 30 Mad., 35.

(2) (1910) I.L.R., 38 Mad., 41.

(3) S.A. No. 201 of 1904 (unreported).

transfer of any land is registered "the transferee takes the land subject to payment of any arrears of assessment or other legal charges on it, and to the same obligations and conditions, special or general as the transferor held it on," our attention is not drawn to any authority against the construction we put on these sections. Ordinarily no doubt, a transferee of property is not *personally* liable to perform the obligations incurred by his transferor before the date of the transfer, but we do not see any hardship in the enactment in a statute intended to provide a summary process for collecting the public revenue, of a provision that every transferee choosing to get himself registered as the owner should be liable to all the obligations of his transferor in the same manner as if he were the registered owner when the arrears accrued due. The consequences of putting a different construction on the sections would lead to much inconvenience. We hold that the plaintiff was defaulter with respect to the arrears of faslis 1309 and 1310, as well as with respect to those of faslis 1311 and 1312. Notice of demand of the arrears was sent to the plaintiff (Exhibit II) as well as the attachment and sale notices (Exhibits G₂ and H). We do not think that he has any real ground for complaint.

The appeal fails and must be dismissed with costs.

BENSON AND
SUNDARA
ATTYAR, JJ.

KOTA
SUBBAYYA
GUPTA GARU
v.

THE SECRETARY OF
STATE FOR
INDIA.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

BHOGARAJU VENKATRAMA JOGIRAJU AND OTHERS
(PLAINTIFFS), APPELLANTS,

v.

ADDEPALLI SESHAYYA AND OTHERS (DEFENDANTS),
RESPONDENTS. *

Hindu Law—Widow and Reversioner—Debt contracted by widow for constructing buildings not binding on estate—Compromise by widow not binding on reversioners, when advantage is secured at serious risk to estate—Decree on such compromise stands on no higher footing than the compromise—Dealing by reversioner with his reversionary right during life of widow, invalid—minor not bound by admissions of guardian not connected with management of estate—Decree on compromise cannot be assumed to direct anything forbidden by law.

Where a Hindu widow borrows money for constructing a house, which is not necessary for the management of the estate and which is situate outside the premises of the estate, the debt will not be binding on the reversion.

The question whether the holder of a woman's estate will be justified in building a house so as to bind her reversioners, assuming that she could do so at all, will depend on the income of the estate and her means of repaying the debt so as not to injure the reversion.

A compromise by a widow of a valid claim against the estate will not bind the reversioners when a larger amount than is due, is agreed to be paid in instalments, the whole of the larger amount however being payable on default of any instalment.

An adjudication against a widow after a fair contest with respect to a matter relating to the estate represented by her, will be binding on those who succeed her as owners: but a decree passed on a compromise into which she enters will have no higher effect against her successors than a contract entered into by her.

The reversioner, during the life of the female heir, has only a *spes successionis* or chance of succeeding if he survive her. Any transfer by him of such interest, is invalid.

The power of a guardian is restricted to the management of the minor's property and he cannot bind the minor by admissions which have no connection with the present management of the property, especially when made without receipt of any consideration on behalf of the minor.

It cannot be assumed that a court in sanctioning a compromise and passing a decree in pursuance of it, intended to do what was unlawful. Where such a decree directs the sale of a minor's property in which the minor had only a *spes*

* Appeal No. 121 of 1908.

successionis as reversioner, it must be assumed that it directed the sale only of such interest as the minor then possessed in the property, which in the eye of law, was nil.

APPEAL against the decree of N. Lakshmana Row, the Sub-ordinate Judge of Kistna at Ellore in Original Suit No. 39 of 1906.

The facts of this case are fully set out in the judgment.

V. Ramesam for appellants.

P. Narayanamurti for first to fifth respondents.

JUDGMENT.—The plaintiffs who have preferred this appeal against the decision of the Subordinate Judge's Court of Ellore, are the sons of the sixth defendant who inherited the lands in suit and other property from her father Ramjogi; after the death of her mother Seshamma, in 1883, Ramjogi himself having died in 1873. The suit is for a declaration that the decree in Original Suit No. 540 of 1903 on the file of the District Munsif of Ellore was not binding on the first plaintiff who was the second defendant in that suit, and for a declaration that in any event, the decree and the Court sale in execution thereof of the land in suit could not affect the reversionary right of the plaintiffs after the death of the sixth defendant. Original Suit No. 540 was instituted by the first defendant against the sixth defendant, her husband Venkiah and her elder son the present first plaintiff on a bond (exhibit II, dated 6th October 1902) which was itself a renewal of an earlier bond (Exhibit III, dated 3rd April 1894). Exhibit III was executed by the sixth defendant for Rs. 1,200 mortgaging about 18 acres of land as security for its repayment with interest at 1½ per cent. per mensem, in eight instalments before 10th March 1902. The purpose of the loan was stated to be for erecting a house (Rs. 1,035) and the discharge of sundry small debts. Exhibit II was executed by the sixth defendant and by the first plaintiff who was then a minor and was represented by his father. The rate of interest provided was seven-eighths per cent. per mensem, and repayment was to be made within a year after the date of the bond. Default having been made in payment, the first defendant sued both these executants. An *ex parte* decree was first passed in first defendant's favour, but it was subsequently set aside and finally the case was compromised between the parties. Exhibit B was the razi petition put in by all the parties to that suit. Although the amount claimed in the

BHOGARAJU
VENKATRAMA
JOGIRAJU
v.
ADDEPALLI
SESHAYYA.

BENSON AND
SUNDARA
AYYAR, JJ.

BHOGARAJU
VENKATRAMA
JOGIRAJU

v.
ADDEPALLI
SESHAYYA.

suit was only Rs. 2,098-1-7 the compromise provided for the payment of Rs. 3,600, but it was to be made in 18 years in equal instalments without interest, on the 15th February of each year, it contained, however, a provision that "in case of default of payment of any one or two of the instalments the plaintiffs should recover the whole amount remaining due at the time through Court irrespective of the instalments that have yet to expire, by means of sale of the said mortgage properties, by means of other property belonging to the defendants and on their own personal liability, together with costs of sale." None of the instalments was paid and the first defendant brought part of the mortgaged property to sale. 26½ acres out of it realised Rs. 1,635, the first defendant himself being the purchaser. The remainder of the mortgage property had not been sold at the date of this suit.

The plaint alleges that the compromise and the decree in pursuance of it were the result of collusion between the first defendant and one Venkataramiah, the plaintiff's third witness, who acted as first plaintiff's next friend in that suit.

Defendants Nos. 2 to 5 are impleaded as the undivided brothers of the first defendant. The first defendant contended that there was no collusion between him and Venkataramiah, that the compromise was a fair settlement of the suit and beneficial to the first plaintiff and was sanctioned by the Court. He alleged that the debt itself was binding on the estate represented by the sixth defendant as it was borrowed for the payment of Rs. 200 kist due on the suit lands and for the reconstruction of a house which belonged to the plaintiff's maternal grand-father, and in which the plaintiffs were residing.

The third issue framed by the lower Court refers to the question of the binding character of the debt on the estate; and the first issue refers to the question whether the decree in Original Suit No. 540 was bad on account of fraud or gross negligence on the part of Venkataramiah. The Subordinate Judge decided both these issues against the plaintiffs and dismissed their suit.

The appeal has been argued by the learned Vakil for the appellants on the assumption that the decree in Original Suit No. 540 was not invalid on account of any fraud or collusion as alleged by the plaintiffs. The position of the two plaintiffs in this suit is not exactly similar as the first plaintiff was a party defendant to Original Suit No. 540, while the second plaintiff was not. Both of

them are still minors and have instituted this suit through their next friend. As far as the second plaintiff is concerned, the question is whether the bonds (Exhibits III and II), are binding on the reversioners of the sixth defendant and whether, assuming them to be so, the compromise decree is binding on them. We are of opinion that both these questions must be answered in the negative. There is absolutely no evidence on record to show that there was any necessity for borrowing this sum of Rs. 1,200 at the time of Exhibit III. The defendant's fifth witness, who is a relation of sixth defendant's husband, said that at the time of Exhibit III Ramjogi's estate was yielding an income of Rs. 200 or 300 a year and that the present income would be Rs. 700 or 800 a year. The sixth defendant had succeeded to the estate more than ten years before the execution of Exhibit III. What portion of the income that was received during that period had been spent and whether there were any savings on the date of Exhibit III, there is absolutely no evidence to show. There is no satisfactory evidence as to whether the sixth defendant's husband had any means of his own. It is stated, no doubt, by one of the witness that he had given up his share in his own family property and taken up his residence in his father-in-law's house where he continued to live until that house became dilapidated and unfit for occupation. But we cannot accept this evidence as sufficient to show that he had no means of his own, or to justify the inference that the whole of the income from Ramjogi's property had been spent by the sixth defendant for the maintenance of her family. Mr. Ramesam contends that even if her husband was without means the sixth defendant would not be entitled to borrow so large a sum as Rs. 1,000 for the purpose of building a house so as to bind the reversioner, though she might be entitled to rent a house for the residence of the family. We are inclined to agree with his contention. Some attempt was made to show that the old house of Ramjogi was in a state of disrepair and that it was the duty of the sixth defendant to repair it and to put it in a tenantable condition. But there is no good evidence to support this view. The defendant's own witnesses support the appellant's contention that the house had completely fallen down and that there was only a vacant site in existence. The question whether the holder of a woman's estate would be justified in building a house so as to bind her reversioners, assuming that she could do so at all, would depend

BENSON AND
SUNDARA
AYYAR, JJ.

BHOGARAJU
VENKATRAMA
JOGIRAJU

v.
ADDEPALLI
SESHAYYA.

BENSON AND
SUNDARA
AYYAR, JJ.

BHOGARAJU
VENKATRAMA
JOGIRAJU
v.
ADDEPALLI
SESHAYYA.

on the income of the estate and her means of repaying the debt so as not to injure the reversion. Mr. Narayanamurti contends that as the house would belong to the reversion the reversioners are bound by the debt borrowed for building it; but the limited owner has no right to force the house on her reversioners at the risk of the estate itself, or a portion thereof, being brought to sale for discharging the debt. The construction of the house cannot be said to be an act necessary for the management of the estate. There is no evidence in this case that it was required for its proper management, nor was it built within the premises of the estate. It is urged that the plaintiffs have taken the benefit of the building and that they are still residing in the house. There is no evidence, however, that they were doing so at the time of the suit. The plaintiffs are, moreover, minors and cannot, therefore, be held to have elected to keep the house for their own benefit. They would not, of course, be entitled to do so, as they repudiate the debt. A person in the position of the sixth defendant is not entitled to incur debts for an object which may be intended to be beneficial but is risky in its character. See *Indar Kuar v. Lalta Prasad Singh*(1), *Radha Pershad Singh v. Mussamut Talook Raj Koor*(2), *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*(3). Of course, the sixth defendant was at liberty to make use of the income during her life for building a house or for any other purpose she pleased and she might be entitled to charge her future income for any such purpose; but we cannot hold that she was justified in mortgaging the estate so as to bind her reversioners.

We must also hold that even if the bond itself could bind the reversioners the compromise decree could not be held to do so. It secured the payment of a much larger sum than was due on the mortgage in order to give the defendants in Original Suit No. 540 the benefit of paying the amount by instalments; but this advantage was secured at the very serious risk of making the whole of the large amount payable at once in case of default in the due payment of the instalments with the result that the whole of the mortgage property became saleable for the very large sum which the first defendant obtained under the compromise decree. A decree passed against the holder of a woman's estate on

(1) (1882) I.L.R., 4 All., 532.

(2) (1873) 20 W.R., 88.

(3) (1869) 13 M.I.A., 209.

compromise between her and her creditor would be binding on the reversioners only in cases where the contract of compromise itself entered into by her would bind them. An adjudication against her by a Court, after a fair contest, with respect to a matter relating to the estate represented by her would no doubt be binding on the estate and all who succeed her as its owners: but a decree passed upon a compromise into which she enters can have no higher effect against her successors than a contract entered into by her; *Timmaji Amma v. Javvaje Subbaraju*(1), *Subbammal v. Avudaiyammal*(2), *Roy Radha Kissen v. Nauratan Lall*(3); Appeal 193 of 1907 decided by this bench. We are therefore of opinion that neither the decree in Original Suit No. 540 of 1903 nor the sale in execution of it, is binding on the second plaintiff.

We have now to consider the case of the first plaintiff who was a party both to Exhibit II, the mortgage bond of 1902, and to the decree in Original Suit No. 540. It is contended by the learned vakil for the respondent that the first plaintiff is bound by the decree and the sale. We have come to the conclusion that he is not. Exhibit II was executed on his behalf by his father. He had then no interest in the property but merely a *spes successionis* or chance of succeeding to the estate if he survived his mother the sixth defendant. That it cannot have the effect of binding his reversionary interest must now be regarded as well established. See *Ramasami Naik v. Ramasami Chetti*(4), and was really not denied for the respondent. It cannot have the effect of estopping him from contending that the debt is not binding on the estate, for a guardian has no right to make such an admission on behalf of his ward; see *Aliyamma v. Kunhammed*(5). The power of a guardian must be taken to be restricted to the management of the minor's property and it would be dangerous to hold that he has a right to bind the minor by admissions made by him, which have no connection with the present management of the property in his charge. He, moreover, received no consideration in this case on behalf of the minor for doing so. It may be that he was actuated by a desire to enable the sixth defendant his own wife to get further time for discharging the debt which she had already contracted under Exhibit III. It remains to consider the effect

(1) (1910) 20 M.L.J., 204.

(3) (1907) 6 C.L.J., 490.

(2) (1907) I.L.R., 30 Mad., 3.

(4) (1907) I.L.R., 30 Mad., 255.

(5) (1910) 20 M.L.J., 946.

BENSON AND
SUNDARA
AYYAR, JJ.

BHOGARAJU
VENKATRAMA
JOGIRAJU
v.
ADDEPALLI
SESHAYYA.

BENSON AND
SUNDARA
AYYAR, JJ.

BHOGARAJU
VENKATRAMA
JOGIRAJU
v.

ADDEPALLI
SESHAYYA.

of the compromise decree as against the first plaintiff. The plaint in Original Suit No. 540 has not been filed as evidence in this case. We are not in a position to know whether the first defendant sought in that case to bring the first plaintiff's reversionary interest to sale for the realisation of his debt. The compromise agreement (Exhibit B) throws no light on the question. We cannot assume that the Court in sanctioning the compromise and passing a decree in pursuance of it intended to do what was unlawful, by directing the sale of a *spes successionis*. As observed in *Ramasami Naik v. Ramasami Chetti*(1), it is a sound rule that decrees should be considered so far as possible, as being in accordance with law." For aught we know, the first defendant may have been under the impression that the first plaintiff had some sort of present interest in the property in the possession of his mother, and this may have been the reason also why he took Exhibit II from the first plaintiff as well as from his mother. It would be incorrect in our opinion to assume that it was brought to the notice of the Court in the previous case that a part of the terms of the compromise was unlawful and such as could not be recorded by it, especially when nothing of the sort appears in Exhibit B, the razi petition. We must, therefore, hold that the razi decree directed the sale of any such interest in the suit lands as first plaintiff then had and that interest was 'nil' in the eye of the law. The decree and the sale, therefore, do not carry the case of defendants Nos. 1 to 5 as against the first plaintiff any further than Exhibit II itself does.

The result is that the decree of the lower Court must be reversed and the plaintiffs must be given a declaration that the mortgage bond Exhibit II, the decree in Original Suit No. 540 of 1903 on the file of the District Munsif of Ellore and the sale of the suit lands in execution thereof cannot affect the rights of the plaintiffs as reversioners of the sixth defendant on her death. Defendants Nos. 1 to 5 must pay the plaintiff's costs both in this Court and in the subordinate Court.

(1) (1907) I.L.R., 30 Mad., 255.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.

S. VISWESWARA SARMA (PLAINTIFF), APPELLANT,

v.

T. M. NAIR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, Act V of 1908, order 7, rule 10—Plaint returned for presentation to proper Court—Court to which such plaint is represented, bound to give credit for the fee levied by the Court to which the plaint was first presented.

Where a Court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper Court under order 7, rule 10, of the Civil Procedure Code of 1908 the latter Court to which the plaint is represented is bound to give credit to the fee already levied by the former Court.

This is the existing practice in this Presidency and there is nothing in the new Code of Civil Procedure in the Presidency Small Cause Courts Act or in the City Civil Courts Act to indicate that the legislature intended to interfere with such practice.

Prabhakarbhut v. Vishwambhar Pandit, [(1884) I.L.R., 8 Bom., 313], followed.

CASE stated under section 69 of the Presidency Small Cause Courts Act, XV of 1882, and rule 428 of the Rules of Procedure of the Presidency Small Cause Court of Madras by the Chief Judge of that Court in Suit No. 3067 of 1910 on the file of that Court.

This case came on for hearing before KRISHNASWAMI AYYAR and AYLING, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH (KRISHNASWAMI AYYAR, J.).—This is a reference by the learned Chief Judge of the Presidency Small Cause Court. The question stated is one of far-reaching importance. The Judge of the City Civil Court returned a plaint for presentation to the proper Court under order 7, rule 10, of the Code of Civil Procedure. The plaint has been represented to the Presidency Small Cause Court under the authority of that rule. The question is whether the plaintiff is entitled to

* Referred Case No. 8 of 1910.

1911.
January 19.
March 12.

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

credit for the court-fee levied in the City Civil Court. Section 9 of the Madras City Civil Court Act, 1892, directs the value to be ascertained for the purposes of court-fee in the manner provided by the Court-fees Act, section 7, clause (v), if the suit is for land or a house or a garden. Section 6 of the Court-fees Act renders the first schedule applicable to a plaint filed in the City Civil Court. Section 25 of the Court-fees Act provides that all fees referred to in section 3 or chargeable under the Act, shall be collected by stamps. Section 26 directs that the stamps used to denote any fees chargeable under the Act, shall be impressed or adhesive or partly impressed and partly adhesive, as the Governor-General in Council may direct. By section 27 the Local Government is empowered to make rules for regulating among other things the renewal of damaged or spoiled stamps. Section 30 provides that no document requiring a stamp *under this Act* shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled. The rest of the section deals with the mode of cancellation.

In this case the stamp used for the plaint in the City Civil Court was cancelled in accordance with the provision of section 30 and the instructions issued by the Government of India (see Appendix VI to Jagannada Iyer's Court-fees Act). Now the plaint comes again into Court with the cancelled stamp and an additional stamp to make up the deficiency in the court-fee required for the plaint in the Small Cause Court in pursuance of the Government Notification under section 75 of the Presidency Small Cause Courts Act (see page 276 of Bakewell's Presidency Small Cause Courts Act). There is no doubt that the identical plaint returned by the City Civil Court is properly presented to the Presidency Small Cause Court under order 7, rule 10, of the Code of Civil Procedure. A plaint presented in the Small Cause Court is chargeable with a fee under section 71 of the Presidency Small Cause Courts Act, not exceeding that which is specified in that section. Under section 75 of the same Act the Local Government may from time to time by notification in the Official Gazette vary the amount of the fee under section 71. The Government of Madras has fixed the fee under this section by a notification dated the 23rd January 1883. These two sections of the Act together with the notification only determine the fee, but make no provision as regards the mode in which that fee is to be

paid. By section 77 it is enacted that sections 3, 5 and 25 of the Court-fees Act shall remain unaffected by anything contained in Chapter X, *i.e.*, for our present purpose, by sections 71 and 75 of the Presidency Small Cause Courts Act. The result of the saving is that by virtue of section 3 the fees chargeable in the Presidency Small Cause Court shall be collected in manner thereafter appearing in the Court-fees Act, and that by section 25 the court-fee chargeable in the Presidency Small Cause Court, which is referred to in section 3, though it is not leviable under the Court-fees Act, shall be collected by stamps. Section 26 appears to have no application to the nature of the stamps which may be used for court-fees in the Presidency Small Cause Court, as they are not chargeable under the Court-fees Act. Section 28, which is applicable to the Presidency Small Cause Court because the court-fees referred to in section 3, are payable in stamps under section 25, declares that no document which ought to bear a stamp under this Act, shall be of any validity unless and until it is properly stamped. Can it be said that a plaint which bears a cancelled stamp is properly stamped within the meaning of section 28, of the Court-fees Act? There is no definition of the words "properly stamped" in the Act. If a stamp which has been properly cancelled in accordance with the requirements of section 30 may be used again in payment of a court-fee chargeable, there is no provision limiting such user to the mere case of a plaint returned. In *Prabhakarbhat v. Vishwambhar Pandit*(1) the question referred to the Full Bench was whether a plaint could be returned, where in Second Appeal a suit was held to have been filed in the wrong Court. In the course of the judgment of the Full Bench it was incidentally observed "where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one." There is no reference in the judgment to the provisions of section 30 of the Court-fees Act as regards cancellation of the stamp or of section 28 as to the requirement of a proper stamp. Stress was laid on the provision contained in section 30, of the Court-fees Act in the decision in

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

(1) (1884) I.L.R., 8 Bom., 313.

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

Jaggivan Javherdas Seth v. Magdum Ali(1) as precluding the presentation of a plaint returned with a cancelled stamp without new stamps being affixed to it. In the case of *In re Bai Amrit*(2) the same learned Judges who decided the case of *Jaggivan Javherdas Seth v. Magdum Ali*(1) declined to accept the decision of the Full Bench in *Prabhakarbhat v. Vishwambhar Pandit*(3) as binding upon them. One of the Judges, Mr. Justice PINHEY, points out at page 390, that the decision of the Full Bench was silent on one of the grounds on which the decision in *Jaggivan Javherdas Seth v. Magdum Ali*(1) was based, viz., the futility of returning a plaint after the court-fee stamps have been cancelled, because cancelled court-fee stamps can no more be used a second time than cancelled postage stamps can be so used.

The argument in favour of the opposite view can only be that the cancelled stamps must be treated as uncanceled because the Court which returned the plaint for want of jurisdiction had no jurisdiction to cancel the stamp. But that is evidently not the effect of section 30 of the Court-fees Act which requires cancellation of the stamp before the plaint is filed or acted upon. The Court must consider the allegations in the plaint and the relief asked for before determining the question of jurisdiction. On the foregoing considerations the result must be that the plaint returned to be presented to the proper Court, will have to be stamped anew without reference to the cancelled stamps. Section 29 of the Court-fees Act, which makes a special provision in the case of amendment of a document that it shall not necessitate the affixing of a fresh stamp, appears to strengthen the above view. A cancelled stamp does not also appear to fall under the head of damaged or spoiled stamps with reference to the renewal of which the Local Government has power to make rules. The rules made by the Local Government under section 27, clause (c) which refer to plaints written on stamps and not filed in any Court, do not extend to the case of a cancelled stamp returned.

But the matter does not appear to rest here. The learned Chief Judge points out that section 21 of the Civil Procedure Code of 1882, section 14 of the Madras City Civil Court Act, 1892, and sections 19A and 40 of the Presidency Small Cause

(1) (1883) I.L.R., 7 Bom., 487.

(2) (1884) I.L.R., 8 Bom., 380.

(3) (1884) I.L.R., 8 Bom., 313.

Courts Act, 1882, make special provision for the deduction of the court-fee paid in one Court from the fee payable in another to which a plaint returned by the first is represented or a suit is transferred from the first in the circumstances referred to in those sections. Where the transfer of the suit or the representation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid, as the system of charging court-fees is essentially different under the Rules of Practice applicable to the Original Side. But it is not easy to explain why a special provision for deduction was made in section 21 of the old Code of Civil Procedure where a suit is stayed in one Court under section 20 and the plaint is returned and presented to another under section 21. It must, however, be noted that sections 20 and 21 have not been reproduced in the Civil Procedure Code of 1908. On a full consideration of the various provisions of the several enactments to which our attention has been drawn, I feel constrained to agree with the learned Chief Judge of the Small Cause Court. But the practice not only in the Small Cause Court but throughout the Presidency, has been, in such cases as the present, to accept the original stamp affixed to the plaint in one Court as good so far as it goes in the second Court to which the plaint is represented. As the question is one of great importance and the view we are at present inclined to take is against the established practice, we refer the question stated to the Full Bench.

AYLING, J.—I am not prepared to dissent from the view of the law expounded by my learned brother; but it cannot be denied that its adoption will not only alter the general practice both in the Presidency and mofussil Courts, but (what is of more importance) will inflict considerable hardship on many litigants who have in perfect good faith taken their case to the wrong Court. I doubt very much whether this was the intention of the legislature. I therefore agree in the proposed reference to a Full Bench.

This case again came on for hearing in due course before the Full Bench constituted as above.

C. K. Mahadeva Ayyar for plaintiff.

C. Venkatasubramiah, V. V. Srinivasa Ayyangar and M. Kunjuni Nair for defendants.

The CHIEF JUSTICE.—I do not think we ought to interfere with an established practice in this Presidency unless we are

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

fully satisfied that the practice is contrary to law. In this case, on the facts stated in the Order of Reference, I am not so satisfied.

The plaint presented to the Small Cause Court is the same plaint as that which was presented to the City Civil Court and returned by that Court under order 7, rule 10 of the first schedule to the Code of Civil Procedure. The amount actually paid on the plaint is an amount which satisfies the requirements of sections 71 and 75 of the Presidency Small Cause Courts Act, 1882, and the notifications under the latter section. No doubt the stamp on the plaint when it was presented to the City Civil Court was cancelled by the City Civil Court in pursuance of section 30 of the Court-fees Act, because the Court purported to "act upon" it by returning it. But I do not find anything in the Court-fees Act which compels me to hold that the plaint when presented to the Small Cause Court was unstamped *quoad* the cancelled stamp. The analogy of the cancelled postage stamp suggested by *In re Bai Amrit*(1) does not seem to me to be in point. If it were, it might be pointed out that the postal regulations do not require a new stamp when a letter is re-addressed and re-delivered. The provision in section 28 of the Court-fees Act that no document which ought to bear a stamp under that Act shall be of any validity unless it is properly stamped affords us no assistance on the question whether, on the facts stated, the plaint was properly stamped when presented to the Small Cause Court. The provision in the same section that when a document is amended in order to correct a mistake, a fresh stamp is not necessary, no doubt on the "*expressio unius est in alterius*" principle, lends some support to the conclusion that the document in question in the present case, was not properly stamped. The same observation may apply to the last paragraph of section 19-A and section 40 (3) of the Presidency Small Cause Courts Act. But as pointed out in the Order of Reference "Where the transfer of the suit or the representation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid, as the system of charging court-fees is essentially different under the Rules of Practice applicable to the Original Side." Sections 20 and

(1) (1884) I.L.R., 8 Bom. 380, at p. 390.

21 of the old Code of Civil Procedure, as the Order of Reference points out, have not been reproduced in the present Code.

The observation of the Full Bench of the Bombay High Court in *Prabhakarbhut v. Vishwambhar Pandit*(1) "Where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one" is no doubt *obiter*, but, in the absence of express statutory provision the other way, I am prepared to apply it to the facts of the present case. In so doing I am upholding what is admittedly the settled practice in this Presidency and what would seem to be, though I have no information as to this, the settled practice in Bombay.

I would answer the question in the affirmative.

MUNRO, J.—I agree that the question whether the Small Cause Court is bound to give credit for the fee levied by the City Civil Court should be answered in the affirmative. I think this result can be deduced from order 7, rule 10 of the Civil Procedure Code of 1908, which lays down that the plaint shall at any stage of the suit, be returned to be presented to the Court in which the suit should have been instituted. If the plaint as returned is not a document which the Court to which it is to be presented, is bound to receive as it stands—assuming the same scale of court-fees is in vogue in both Courts—I am unable to find any sufficient reason for the enactment of the rule. The return of the plaint does not by itself save limitation. So far as limitation is concerned the plaintiff would be in the same position if he tore up the plaint which had been returned to him, and drew up and presented a fresh one; for whether the original plaint is presented or a fresh one, the plaintiff, if he wishes to call in aid section 14 of the Limitation Act, must show that he comes within its terms. I do not think that a Court when returning a plaint under this rule can be said to be acting upon it within the meaning of section 30 of the Court fees Act. It is conceivable that the fact that the Court had no jurisdiction to entertain the plaint might be noticed before anything was done to the stamps. In such a case the plaint could, and should, be returned

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

(1) (1884) I.L.R., 8 Bom., 313.

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.

VISWESWARA
SARMA
v.
NAIR.

without cancelling the stamps. A plaintiff who had acted *bona fide* should not be in a worse position because the Court did not find out its want of jurisdiction before the stamps were cancelled, and, as the rule for the return of plaints makes no distinction between cases where the plaintiff has acted *bona fide* and cases where he has acted otherwise, the same principle is clearly meant to apply in all cases.

SANKARAN NAIR, J.—A plaint was presented to the City Civil Court on the 21st January 1910 written upon a stamp paper of the value of Rs. 75. The stamp was cancelled by an officer of the Court on 22nd January 1910.

The Judge of the City Civil Court was of opinion that the suit should have been instituted in the Small Cause Court and returned it on the 22nd February for presentation to that Court. The same plaint was presented to the Small Cause Court with the stamp of Rs. 75 which had been already cancelled and further adhesive stamps for Rs. 9-12-0 which were required to make up the fee of Rs. 84-12-0 chargeable on the plaint in the Small Cause Court under section 71 of the Presidency Small Cause Courts Act. The learned Chief Judge of the Small Cause Court, Mr. Justice AYLING with some hesitation and Mr. Justice KRISHNASWAMI AYYAR are of opinion that the 75-rupee stamp having been rightly cancelled when the plaint was first presented to the City Civil Court has lost its force and the plaint when presented to the Small Cause Court must be taken to bear only a stamp of Rs. 9-12-0.

Section 71 of the Presidency Small Cause Courts Act provides that an *ad valorem* fee shall be paid on the plaint in every suit and that no plaint shall be received until such fee has been paid. Section 28 of the Court-fees Act also states that no document requiring a stamp under that Act shall be of any validity unless and until it is properly stamped. If therefore the plaint when presented to the Small Cause Court bears, in law, only a stamp of Rs. 9-12-0, the plaint cannot be received or acted upon.

The question referred to the Full Bench for decision is whether the stamp cancelled has lost its force in the circumstances above stated and whether the plaint must again be stamped with a stamp of equal value. I am clearly of opinion that the plaintiff need not affix the stamp again to his plaint.

There is no difference between this case and similar cases in the mofussil Courts where plaints are returned by one Court for

presentation to the proper Court. There was a doubt entertained for some time under the old Code of Civil Procedure whether a plaint should not be returned before it was filed; or whether it might be returned at any stage of the suit. The Bombay and the Madras High Courts took the latter view, which has been embodied in order 7, rule 10 of the present Code of Civil Procedure, that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been first instituted. The return of a plaint for presentation to a proper Court is to enable the plaintiff to present that document without paying the stamp over again. It was on the ground that "where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one," that it was held by the Full Bench of the Bombay High Court that a plaint might be returned at any stage of a suit to enable the plaintiff to present the same plaint without paying over again that fee to the proper Court.—*Prabhakarbhat v. Vishwambhar Pandit*(1). Order 7, rule 10 of the Code of Civil Procedure, 1908, now embodies that rule and it would be thus defeating the very object of the legislature in directing the return of a plaint to levy the fee over again when it is again presented.

The decision of the Bombay High Court was passed in 1884 and the practice in the Bombay Presidency may be presumed to be in accordance with that decision. In this Presidency it has been the practice to accept the original stamp in the second Court to which the plaint is presented. The legislature has not interfered with that decision or the practice. It has obviously accepted this view.

Section 14 of the Madras City Civil Courts Act and sections 19A and 40 of the Presidency Small Cause Courts Act provide that credit shall be given to the plaintiff in cases of return of plaints to be presented to the High Court for the court-fee paid in such Court. This was apparently due to the doubt raised by the system of the court-fees levied on the Original Side of the High Court

WHITE, O.J.,
MUNRO AND
SANKARAN
NAIR, JJ.
VISWESWARA
SARMA
v.
NAIR.

(1) (1884) I.L.R., 8 Bom., 313.

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.
—
VISWESWARA
SARMA
v.
NAIR.

being different in principle from the Court-fees Act. Sections 20 and 21 of the Civil Procedure Code of 1882, not reproduced in the present Code, enact a similar provision. But they deal with the re-institution of the suit and this may have created some doubt. These provisions certainly indicate the tendency of legislation and, taken with the omission to deal with the cases under consideration, with the prevailing practice and the Full Bench decision of the Bombay High Court before the legislature, can lead only to one conclusion.

It is then said that a stamp which has been defaced and cancelled by proper authority has lost its force and cannot be used again. There is, it appears to me, a fallacy in this argument. It loses sight of the fact that a document does not cease any the less to be a properly stamped document by the cancellation of the stamp. It continues to be properly stamped. By cancellation the stamp cannot be used again, but when the same document, which was the plaintiff in one Court, is rightly presented in another Court as a plaintiff in another Court, the stamp is not being used again. It is only the same document that is being used in another Court; otherwise, it might with equal force be argued that a plaintiff with its stamp cancelled, when filed as an exhibit in another case, must be stamped again.

I am further of opinion that the cancellation in such cases must be taken to be set aside by reason of the subsequent order returning the plaintiff. Section 30 of the Court-fees Act runs thus:—

“No document requiring a stamp under this act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

“Such officer, as the Court or the head of the office may from time to time appoint, shall, on receiving such document, forthwith effect such cancellation by punching out the figure head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.”

In the course of the argument I was inclined to think that under the second clause of this section, the court-fee stamp on a plaintiff has to be cancelled on its presentation. This does not appear to be so. Under section 48 of the Code of Civil Procedure of 1882, the plaintiff has to be presented to the Court or to such officer as may be appointed to receive it. Section 57 provided that, if on the presentation of a plaintiff it appears that the Court has no jurisdiction

to try the cause, the plaintiff shall be returned to be presented to the proper Court. The first clause of section 30 of the Court-fees Act only requires that the stamp shall be cancelled before the document is filed or acted upon. It does not require the cancellation on presentation. The second clause only requires the officer appointed on that behalf, who will be a different person from the Judge himself or who may be a different person from the one appointed to receive plaintiffs, to cancel the stamps when—as I read the clause—he receives it for that purpose, preliminary to its being filed or acted upon. The obvious intention and what these sections lay down is that, when a plaintiff is received, and before it is acted upon or filed, the Judge has to decide whether it has been presented to the proper Court and according to his opinion return it for that purpose or otherwise give it to the proper officer for cancellation before it is acted upon or filed. He may act upon it without filing it by rejecting it for certain reasons, for instance if the plaintiff fails to supply within a given time the requisite stamp paper to meet the deficiency if any. In these cases he may file a new suit but not present the same plaintiff. When the Court at a later stage or the Appellate Court directs the return of a plaintiff, it is only doing what the Court of first instance should have done before the cancellation of the stamp. The important alteration in the present Civil Procedure Code allowing the return of the plaintiff at any stage only strengthens the argument, as already pointed out. It was enacted to enable the Courts to do at any stage of the suit what should properly be done on presentation of the plaintiff before it is acted on or filed. It does not affect the interpretation of section 30 of the Court-fees Act. The final order returning the plaintiff, even if passed only in second appeal, therefore relates back to a stage of the suit before it is acted upon or filed, as a preliminary to which alone the stamp has to be cancelled under section 30 of the Court-fees Act. The final decision directing the return is an order that the Court should not have acted on or filed the plaintiff. It follows therefrom that the cancellation of the stamp was unnecessary under section 30 of the Court-fees Act. The plaintiff is in such cases relegated by the order to the position he would occupy if the plaintiff had been returned before having been acted upon. A Court which has no jurisdiction to entertain a plaintiff ought to return it immediately. It cannot act upon it, though it may be necessary to make an enquiry to decide the

WHITE, C.J.,
MUNRO AND
SANKARAN
NAIR, JJ.
—
VISWESWARA
SARMA
v.
NAIR.

WHITE, C.J., question of jurisdiction. This is not acting upon it but only deciding whether it should act upon it. A party is not to be prejudiced if possible by an act of Court afterwards found improper; and cancellation is therefore of no greater effect than the other proceedings including decrees which may have been passed before the final order was passed to return the plaint.

I therefore answer the question whether the Small Cause Court is "bound to give credit for the fee levied by the City Civil Court" in the affirmative.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

MAHAMED KASIM SAHIB (PLAINTIFF), APPELLANT,

v.

PANCHAPAKESA CHETTI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 503—Receiver appointed under section, powers of—cannot recover from third parties whose rights date prior to his appointment.

A receiver appointed under section 503 of the Code of Civil Procedure, in respect of any moveable or immoveable property is entitled to take possession of it from the parties to the suit, to manage it, etc. He is not entitled to recover possession from a third party, stranger to the suit whose rights date prior to his appointment. Such a receiver has no right to recover property sold before his appointment by the judgment-debtor on the ground that the sale is voidable as against the creditors on the principle embodied in section 53 of the Transfer of Property Act.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 21 of 1909 presented against the decree of V. K. Desika Chariar, Subordinate Judge of Negapatam, in Original Suit No. 31 of 1907.

The facts for the purpose of this case are fully set out in the judgment.

The Hon. the Advocate-General for appellant.
S. Guruswami Chetti for respondent.

JUDGMENT.—The suit in this case was instituted by a receiver appointed by the Subordinate Court of Negapatam in execution of

the decree in Small Cause Suit No. 1210 of 1904 of that Court. The object of the suit was to recover certain goods, which were attached in execution of this small cause decree and of which the plaintiff was appointed receiver, or the value of the goods. The application for the appointment of a receiver was made on the 19th August, 1907 (Exhibit D) and the order of appointment (Exhibit H) was passed on the 18th September, 1907. The defendant was the purchaser of the goods from the judgment-debtor under a sale deed, dated the 12th September 1904. He contended *inter alia* that the plaintiff had no authority to institute the suit as the order sanctioning the appointment of the receiver was passed only on the 13th of September 1907 after the institution of the suit by the District Court of Tanjore, that the suit was barred by section 244 of the Civil Procedure Code, and that the plaintiff had no right to recover the goods from the defendant to whom they had been sold long before they were attached in execution of the small cause decree. The plaintiff's case was that the alleged sale of the goods was not a *bona fide* transaction, but that they were removed by Gopichettiar, the judgment-debtor to the defendant's house on the 30th September 1904 fraudulently with the intention of defeating his creditors. The Subordinate Judge overruled all the pleas referred to above, and held that the transfer to the defendant was made by the judgment-debtor with the fraudulent intention of defeating his creditors, but that there was a debt truly due to the defendant to the extent of Rs. 200. He found that the goods were worth Rs. 500 and passed a decree in the plaintiff's favour for that amount as the goods themselves were not in existence. The plaintiff appealed to the District Court contending that the goods were worth more than Rs. 2,500 and the defendant preferred a memorandum of objections objecting to the Subordinate Judge's decree *in toto*. The District Judge allowed the memorandum of objections and dismissed the suit.

The only question we have to decide is whether the plaintiff as the receiver was entitled to sue the defendant for the goods or their value. We have come to the conclusion that he was not entitled to do so, and the judgment appealed from, is right. The order appointing the plaintiff (who we may say, by the way, was himself the decree-holder) as receiver was passed under section 503 of the Civil Procedure Code and it is to the following effect. "Whereas the property specified in the annexed schedule has been

BENSON
AND
SUNDARA
AYYAR, JJ.
MAHAMED
KASIM SAHIB
v.
PANCHAPAKESA
CHETTI.

* Second Appeal No. 1663 of 1909.

BENSON
AND
SUNDARA
AYYAR, JJ.

MAHAMED
KASIM SAHIB
v.
PANCHAPA-
KESA CHETTI.

attached in execution of a decree passed in the above suit on the 12th November, 1904, in favour of the plaintiff you are hereby appointed Receiver of the said property under section 503 of the Code of Civil Procedure with full powers under the provisions of that section. You are required to render a due and proper account of your receipts and disbursements in respect of the said property" etc. Then follows the schedule of the property consisting of 22 items of moveables estimated to be worth Rs. 4,000 and odd. It will be remembered that long before the date of the order the judgment-debtor had ceased to be in possession of the goods having sold them to the defendant in 1904. The application for the appointment of receiver brought that fact to the notice of the Court, and the prayer was that a receiver should be appointed for collecting either the property or the price thereof. The order, however, did not appoint the plaintiff as receiver for recovering the value of the goods from the defendant but only as receiver of the moveable property itself. Under section 503 of the old Civil Procedure Code when a person is appointed receiver of any moveable or immoveable property, he is entitled to take possession of it from the parties to the suit, to manage it, to realise its incomes and to continue in custody of it until discharged by the Court. The title to the property does not rest in him see *Ram Lochun Sircar v. Hogg*(1). His rights arise only on the date of his appointment and not before, see *Defries v. Creed*(2) and *Edwards v. Edwards*(3). He is not entitled to recover possession from a third party, stranger to the suit, whose rights date prior to his appointment. Nor does his appointment affect any rights previously acquired by third persons—see *Alderson on Receivers*—section 169. In *High on Receivers*, the author states (section 359). "As regards the title acquired by a receiver of a National Bank thus appointed, the rule is that he holds such estate and title as the bank itself had in its assets, his title being similar in this respect to that of an assignee in bankruptcy. He is not a third person in the sense of commercial transactions, and cannot avoid a pledge of estates of the bank which could not be avoided by the corporation itself. When, therefore, the bank has deposited notes constituting a part of its assets with a creditor as security for advances, the bank itself being

(1) (1868) 10 W.R., 430.

(2) (1865) 34 L.J., Ch., 607.

(3) (1876) 2 Ch. D., 291.

BENSON
AND
SUNDARA
AYYAR, JJ.

MAHAMED
KASIM SAHIB
v.
PANCHAPA-
KESA CHETTI.

concluded by the deposit or pledge, the receiver is not entitled to such notes, and can not maintain an action therefor until the creditor or pledgee is made whole for his advances." No authority has been cited to us, nor are we aware of any in support of the position that a receiver appointed in the circumstances of this case has any right to recover property which has been already sold away by the judgment-debtor on the ground that the sale is voidable as against the creditors on the principle embodied in section 53 of the Transfer of Property Act. Mr. Varadachari relied on a passage in paragraph 454 of *High on Receivers* where it is laid down that a receiver in proceedings supplementary to execution in some of the States of America may institute actions in his own name to set aside fraudulent assignments or transfers made by a debtor with the view of defeating his creditors, and may recover the property so transferred for the purpose of applying it in satisfaction of the judgments, but the passage has reference to receivers not of particular property attached by the Court but over all the property and effects of a judgment-debtor and as laid down in *Alderson on Receivers*, section 508. The object of the appointment in such cases is to discover all property which belongs to the judgment-debtor for the benefit of his creditors, and the receiver's right extends not only to all property and rights of property of the debtor, but to property which he has disposed of in fraud, of his creditors. In England also, receivers of the debtor's estate could, formerly at least, be appointed for the benefit of his creditors. "Lord Eldon declared that it was in his day the ancient rule where a judgment-creditor found upon the issue of his execution that the debtor's estate was protected in such a way by circumstances respecting a prior title that the judgment could not be enforced, he might apply for a receiver and that the fact that the creditor could not at law obtain satisfaction of his judgment was sufficient to entitle him to a Receiver of his debtor's estate." But there is apparently no provision in the Indian law for the appointment of such a Receiver. We are of opinion therefore that the Receiver in this case had no power to maintain the suit against the defendant for the value of the goods sold to him on the ground that his sale was not binding on the creditors of the judgment-debtor.

We may also note that the plaint does not state, nor does it otherwise appear that the Receiver obtained the permission of the Court to institute this suit. The ordinary rule is that the permission

BENSON
AND
SUNDARA
AYYAR, JJ.

MAHAMED
KASIM SAH B
v.
PANCHAPA-
KESA CHETTI.

of the Court is necessary to entitle the receiver to institute suits—see Woodroffe on Receivers, pages 241, 242, Kerr on Receivers, page 202 and High on Receivers, section 208. As however no objection was raised by the defendant to the maintainability of the suit on this ground, we do not think it necessary to consider the question further or to rest our decision on it.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

NALAIN PADMANABHAM (PLAINTIFF), APPELLANT,

v.

SAIT BADRINADH SARDA AND OTHERS (DEFENDANTS NOS. 1 TO 3,
7 AND 9 TO 13), RESPONDENTS. *

Opium Act I of 1878, ss. 4, 5 and 9—Contract by which person without license is enabled to sell opium void.

A and B were farmers of opium revenue under Government. They obtained a license from the Collector for the sale of opium, subject to the condition, among others, that they should not sell, transfer or sub-rent their privileges without the permission of the Collector. A and B, without the sanction of the Collector, entered into an agreement with C, by which they admitted him as a partner in the opium business. C brought a suit for dissolution and winding up of the business.

Held that the agreement was void and the suit was not maintainable.

The effect of the agreement between A and B on the one hand and C on the other, was to enable C to sell opium without a license, an act directly forbidden by section 4 of the Opium Act and made penal by section 9. The contract being intended to enable C to do what was forbidden by law was unlawful and void.

The provisions of the Abkari and Opium Acts are not intended merely to protect public revenue but the prohibitions contained in them are based on public policy.

The agreement was also illegal as it amounted to a transfer by A and B of their privilege to C, in violation of the condition against transfer subject to which the license was granted. The combined effect of sections 4, 5 and 9 of the Opium Act is to make the transfer in violation of the conditions in the license, illegal.

* Appeal No. 54 of 1908.

APPEAL against the decree of M. O. Parthasarathy Aiyangar, District Judge of Godavari at Rajahmundry, in Original Suit No. 13 of 1904, dated 30th September, 1907.

The facts for the purpose of this report are set out in the judgment.

T. R. Ramachandra Ayyar and T. Ramachendra Rau for appellant.

C. Madhavan Nair for the third and fourth respondents and T. Prakasam for the first respondent.

JUDGMENT.—The suit in this case is for the dissolution and winding up of a partnership relating to an opium business. Defendants Nos. 1 and 2 were farmers of opium revenue under Government. They through their agents, entered into an agreement with the plaintiff agreeing to take him as a partner in their business, both with respect to their right to vend opium in the Godavari district, which they had already obtained, and with respect to any further right they might thereafter obtain in adjoining districts. The partnership existed for some years. The District Judge has dismissed the suit on the ground that the agreement of partnership on which the suit is based, was opposed to public policy and unenforceable in law. The plaintiff who preferred this appeal, contends that the lower Court's view as to the nature of the contract is incorrect.

The first and second defendants above obtained a license from the Collector for the sale of opium. Clause 26 of the conditions, subject to which the license was given, provides that "except with the permission of the Collector, you shall not sell, transfer or subrent your privilege. Nor shall you, if the Collector so orders, appoint any person as your agent for the management of your privilege without previously obtaining the Collector's approval of the agent." It is admitted that the Collector's sanction was not obtained for the partnership agreement. The object and intention of the agreement undeniably were that the defendants and their partner, the plaintiff should be enabled to carry on the opium business without any license being taken out by the plaintiff for the purpose. The question we have to decide is, whether the partnership is not illegal and cannot therefore afford a cause of action to the plaintiff for any relief based on it.

We are of opinion that the conclusion arrived at by the lower Court is right. Section 4, of the Opium Act (Act I of 1878)

BENSON
AND
SUNDARA
AYYAR, JJ.

NALAIN
PADMA-
NABHAM
v.
SAIT BADRI-
NADH SARDA.

BENSON
AND
SUNDARA
AYYAR, JJ.

NALAIN
PADMA-
NABHAM
v.
SAIT BADRI-
NADH SARDAR.

runs as follows: "Except as permitted by this Act, or by any other enactment relating to opium for the time being in force, or by rules framed under this Act or under any such enactment, no one shall—

"(a) Cultivate the poppy; (b) manufacture opium; (c) possess opium; (d) transport opium; (e) import or export opium; or (f) sell opium."

Section 5 gives the local Government power to make rules absolutely or subject to any conditions deemed desirable for all or any of the matters including "(f) the sale of opium and the form of duties leviable on the sale of opium by retail." Section 9 makes it an offence on the part of any person to sell opium in contravention of the Act or of rules made and notified under section 5. Now a contract entered into with the object of doing any act which is unlawful because forbidden by law, is unlawful and void. The contract in this case was intended to enable the plaintiff to sell opium without a license an act which is forbidden by section 4, and made penal by section 9. Mr. Ramachandra Ayyar for the appellant contends that according to the terms of exhibit A, the agreement between the parties, the actual sale was not to be made by the plaintiff as the management of the business was left in the hands of the defendants, and that therefore it could not be said that any breach of section 4 was intended. This argument cannot be accepted, because all the partners must be taken to be selling the opium which belongs to the partnership as the sale is made by the managing partner as the agent and on behalf of all the partners. In *Judoonath Shaha v. Nobin Chunder Shaha*(1), CONEB, C.J. and GLOVER, J., held that an agreement whereby the holder of a license for keeping a wine-shop let the shop and the use of the license for a fixed term receiving rent, was contrary to public policy, although there was in the statute or in the rules no express prohibition of letting out the shop. The agreement was held to be contrary to the prohibition of sale without a license. A license, it need hardly be said, is a personal privilege, see the judgment of SALE, J., in *Behari Lal Shaha v. Jagodish Chunder Shaha*(2) where that learned Judge pronounced against the validity of an agreement under which a license-holder for the sale of liquor, entered into an

(1) (1874) 21 W.R., 289.

(2) (1904) I.L.R., 31 Cal., 798.

BENSON
AND
SUNDARA
AYYAR, JJ.

NALAIN
PADMA-
NABHAM
v.
SAIT BADRI-
NADH SARDAR.

arrangement with another person whereby the business was to be carried on by the latter on his own responsibility, but using the name of the plaintiff, and he was to pay the plaintiff a certain sum per month. He observes "section 11 says no person shall sell any excisable article without the Collector's license. The plaintiff's object was to permit the defendant, Basanto Kumarshaba, to sell articles without a license. I am of opinion therefore that the object of the agreement is to enable the defendant to carry on the business of vendor in liquor, in contravention of the excise law" see also *Raghunath Lalman v. Nathu Hirji Bhate*(1). Every partner is the agent of his co-partners and it would be unreasonable to hold that the defendants continued to be the sole vendors of the opium when they made themselves the agents of plaintiff by admitting him as a partner. The learned vakil for the appellant cites *Nutla Bapiraju v. Puranachuta Rajujee*(2) as supporting his contention. In that case MILLER and KRISHNASWAMI AYYAR, JJ., held that section 13 of the Abkari Act (Madras Act I of 1886) "does not prohibit a person who has no license from holding an interest in the manufacture or vending of the liquor jointly with licensed manufacturer or vendor;" but the provision of law referred to by the learned Judges, does not include the sale of liquor amongst the Acts prohibited by it. We may also point out that the language of section 15, of the Abkari Act relating to the sale of liquors "no liquor . . . shall be sold without a license from the Collector" while, as already pointed out, section 4 of the Opium Act enacts "no one . . . shall sell opium." Having regard to the difference in the provisions contained in the two Acts it is unnecessary to consider that decision any further. We may point out however that the learned Judges observed that they did not feel compelled to decide otherwise by *Marudamuthu Pillai v. Rungasami Mooppan*(3), according to which "the provisions of the Abkari Act, as a whole, show clearly that every person carrying on abkari business as a principal, must be licensed" and according to which "to hold that a person who has not got a license could still be a partner with one who has a license and as such partner carry on the business with or without the other

(1) (1895) I.L.R., 19 Bom., 626. (2) (1910) M.W.N., 549.

(3) (1901) I.L.R., 24 Mad., 401.

BENSON
AND
SUNDARA
AYYAR, JJ.

NALAIN
PADMA-
NABHAM
v.
SAIT BADRI-
NADH SARDA.

would enable the unlicensed partner to evade the liabilities intended by the law to be cast on persons carrying on abkari business." It is well established that the provisions of the Abkari and Opium Acts are not intended merely to protect the public revenue and that the prohibitions contained therein are based on public policy. See *Marudamuthu Pillai v. Rangasami Mooppan*(1), *Thithi Pakurudasu v. Bheemudu*(2), *Behari Lal Shaha v. Jagodish Chunder Shaha*(3), *Raghunath Lalman v. Nathu Hiji Bhat*(4) and *Hormasji Motabhai v. Pestanji Dhanjibhai*(5). Two other cases cited on behalf of the appellant *Bhikanbhai v. Hiralal*(6) and *Abdulla v. Mammod*(7) are not in point as they relate to contracts of ferry and the provisions against the transfer and sub-letting in those cases, were not statutory prohibitions. We ought perhaps to mention that the appellant's vakil wishes to make out that his client did not really become a partner with the defendants but merely became entitled to a share of the profits of the business in consideration of financing it, but this contention is obviously contrary to the case set out in the plaint and we must decline to consider it.

We are also of opinion that the partnership in this case was illegal for another reason as it contravened the provisions of clause 26, of the license which prohibits the transfer of the right of sale granted to the defendants. It is contended for the appellant that the admission of the plaintiff to partnership with the defendants is not a transfer. We are of opinion that it is. It is no doubt true that every contract of partnership is not necessarily a transfer but it is equally clear that such a contract may in many cases involve a transfer. Thus if two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction. But if one person carrying on a trade and possessing stock and capital, admits another into partnership with himself, making the stock and capitals, the joint property of both, it is impossible to contend that there is not a transfer in such a case. The word 'transfer' says JAMES, L.J., in *Gathercole v. Smith*(8) is "one of the widest terms that can be used" and according to LUSH, L.J., in the same case the word

'transferable' "is a word of the widest import and includes every means by which the property may be passed from one person to another", we are not concerned in constructing a statute like the Opium Act with the mere form of the transaction but with the substance of it. The form may be more material in interpreting instruments under other statutes such as the Stamp Act or the Registration Act. Our view is in accordance with that laid down in *Marudamuthu Pillai v. Rangasami Mooppan*(1). Reliance was placed for the appellant on *Gauri Shankar v. Mumtaz Ali Khan*(2) where OLDFIELD and SPANKEE, JJ., were apparently of opinion that the co-partnership in that case did not involve a transfer. The decision itself however did not proceed on that ground. The case was one relating to a ferry and according to OLDFIELD, J., the statute relied on in the case, did not prohibit a partnership. If the learned Judges intended to lay down the broad proposition that no partnership can amount to a transfer, we are, with all deference, unable to agree with them. The continued effect of sections 4, 5 and 9 of the Opium Act, is to make a transfer in violation of the provisions of clause 26 in the license (Exhibit 1) illegal and the plaintiff could acquire no rights enforceable in law under exhibit A.

It is contended that the form of the license used for exhibit A, was not sanctioned by the Revenue Board and that the transfer is therefore not illegal. This objection was not raised in the District Court and the absence of sanction is not proved.

In the result we dismiss the appeal with costs of the first, third and fourth respondents.

BENSON
AND
SUNDARA
AYYAR, JJ.
NALAIN
PADMA-
NABHAM
v.
SAIT BADRI-
NADH SARDA.

(1) (1901) I.L.R., 24 Mad., 401.

(3) (1904) I.L.R., 31 Calc., 798.

(5) (1888) I.L.R., 12 Bom., 422.

(7) (1903) I.L.R., 26 Mad., 156.

(2) (1903) I.L.R., 26 Mad., 430.

(4) (1895) I.L.R., 19 Bom., 626.

(6) (1900) I.L.R., 24 Bom., 622.

(8) (1881) 17 Ch. D., 1.

(1) (1901) I.L.R., 24 Mad., 401.

(2) (1879) I.L.R., 2 All., 411.

APPELLATE CIVIL.

*Before Mr. Justice Abdur Rahim.*1910.
December 8.1911,
March 24.

ARIMUTHU CHETTY (PETITIONER),

v.

VYAPURIPANDARAM (RESPONDENT).*

Civil Procedure Code, Act XIV of 1882, s. 295, and order 21, Rules 63, 73 of the Code of 1908—Realisation of assets—Transfer of decree not necessary for rateable distribution of sale proceeds of attached property—Application for rateable distribution may be made though copy of decree not received.

Where the same property is attached in execution of decrees by two Courts of different grades, the decree-holder in the inferior Court who had attached prior to realisation, may apply to the superior Court for rateable distribution of the sale-proceeds of the attached property and the transfer of his decree for execution to the superior Court is not necessary to enable him to do so.

Assets are realised not when the deposit is made by the purchaser, but only when the balance of the purchase money is paid into Court.

An application for execution to the superior Court is an essential pre-requisite of a general claim to rateable distribution. Where the lower Court has ordered the transfer of the decree for execution to the superior Court, an application after such order to the superior Court before it has received a copy of the decree would be sufficient to satisfy the requirements of order 21, Rule 73, and to entitle the applicant to rateable distribution.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of W. B. Ayling, District Judge of Salem, in Regular Execution Petition No. 62 of 1909 (in Original Suit No. 87 of 1908) on the file of the Court of the Principal District Munsif of Salem, dated 20th December 1909.

The facts for the purpose of this report are set out in the judgment.

T. M. Krishnaswami Ayyar for petitioner.

This petition coming on for hearing on Thursday, the 8th day of December 1910, before the Hon'. Mr. Justice KRISHNASWAMI AYYAR, the Court delivered the following

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VYAPURI-
PANDARAM.

JUDGMENT.—The petitioner is the decree-holder in Original Suit No. 87 of 1908 on the file of the Principal District Munsif of Salem. Property of the judgment-debtors was attached in execution of another decree against them in Original Suit No. 35 of 1906 on the file of the District Court of Salem. It was sold by the District Court in execution of that decree. The purchaser made the deposit on the 17th September 1909 and the balance of the purchase money was paid into Court on the 29th September 1909. It must be taken having regard to the decision in *Ramanathan Chettiar v. Subramania Sastri*(1), that the assets were realised only on the 29th of September 1909 within the meaning of section 295 of the old Code. There is no doubt a change in the corresponding provision of order 21, Rule 73 of the present Code. But so far as the question before me is concerned the change in the language is immaterial. The purchase money becomes the asset of the judgment-debtor only when the balance is received and not when the deposit is made. I am bound to hold on the authority of *Muttalagiri v. Muttayyar*(2), that an application to the District Court before the receipt of assets for execution is an essential pre-requisite of a general claim to rateable distribution. The District Judge seems to have assumed that, although an application was made apparently before the time when the assets were received, the petitioner had no right to make the application before the Munsif's decree was received by the District Court under the latter's order of transfer. It is true that the decree was only received by the District Court on the 30th of September. It appears to me that this does not preclude the petitioner's claim to rateable distribution, if he had attached the same property in execution of the Munsif's decree. If the property had been attached in execution of that decree as well as in execution of the decree of the District Court, the Court which should realise the property was the District Court under order 21, Rule 63. That rule provides "the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade." Supposing such a realisation is made by the higher Court, there can be no need for a transfer of the decree of the lower Court to

(1) (1903) I.L.R., 26 Mad., 179.

(2) (1883) I.L.R., 6 Mad., 357.

* Civil Revision Petition No. 78 of 1910.

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VIAPURI-
PANDARAM.

the higher, to entitle the decree-holder of the lower Court, who has also attached the property realised, to share in the proceeds of such realisation. It seems to me that the right to share in the proceeds realised by sale of attached property is independent of a transfer of the decree for execution to the higher Court. Section 38 no doubt provides that a decree may be executed by the Court which passed it or by the Court to which it is sent for execution. I am inclined to think that there is no other Court which can execute a decree and that section 38 is exhaustive. What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a general execution of his decree by the District Court or rateable distribution in all the assets of the judgment-debtor received by the District Court, but only to share by virtue of his attachment in the proceeds of the attached property realised. To a relief so limited, it appears to me to be not essential that the decree of the Munsif's Court should have been previously transferred to the District Court, though this view runs counter to the observation in *Muttalagiri v. Muttayyar*(1) as to the need of transfer. I do not feel bound by that case on this point, though it is followed in *Nimbaji Tulsiram v. Vadia Venkati*(2) as the absence of an application to the higher Court was sufficient to sustain the decision. I prefer the reasoning of SALE, J., in *Clark v. Alexander*(3) to the extent at least of holding that a transfer of the decree was unnecessary to entitle the petitioner to rateable distribution in the sale-proceeds of the attached property.

It was also argued that the transfer was complete when the order was made by the Munsif, and that the receipt of the decree by the District Court on the next day had nothing to do with the petitioner's right to apply to the District Court for rateable distribution on the 29th itself. The petitioner has put in an affidavit in which he says that the transfer was made by the Munsif first on the forenoon of the 29th, that he then applied to the District Court for execution, and that the assets were received thereafter. I am not at all sure, having regard to the provisions of Rules 6, 7 and 8 of Order 21, that the Court to which a decree is sent for execution is authorized to execute it before a copy of

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VIAPURI-
PANDARAM.

the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution. In this view the application to the District Court after the Munsif's order sending the decree to the District Court would be perfectly competent and sufficient to satisfy the requirements of Order 21, Rule 73. Although the Munsif's order, the application to the District Court and the payment of the balance of the sale-proceeds into Court were all on the same day, the last two were the acts of parties and the Court is bound to ascertain the order in which they were done [*Clarke v. Bradlaugh*(1)]. I must ask the District Judge to return findings on the following points—

Was the property sold by the District Court in Original Suit No. 35 of 1906 attached under the Munsif's decree in Original Suit No. 87 of 1908 before realisation?

Were the Munsif's order of the transfer of the decree in Original Suit No. 87 of 1908 and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase money into Court on the 29th September 1909?

Eight weeks will be allowed for findings and one week for objections.

In compliance with the above order, the District Judge submitted the following

FINDING.—I am asked for findings—

Was the property sold by the District Court in Original Suit No. 35 of 1906 attached under the Munsif's decree in Original Suit No. 87 of 1908 before realisation?

Were the Munsif's order of transfer of the decree in Original Suit No. 87 of 1908 and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase money into Court on 29th September 1909?

The attachment under the Munsif's decree in Original Suit No. 87 of 1908 was on 28th September 1909.

The realisation of the money under the District Court sale was on 29th September 1909. The property was therefore attached before realisation.

The Munsif's order transferring the decree to this Court, the petitioner's application in this Court for rateable distribution and

(1) (1883) I.L.R., 6 Mad., 357.

(2) (1892) I.L.R., 16 Bom., 688.

(3) (1894) I.L.R., 21 Cal., 200 at p. 208.

(1) (1881) 8 Q.B.D., 63.

ABDUR
RAHIM, J.

ARIMUTHU
CHETTI
v.
VYAPURI-
PANDARAM.

the payment of the money all took place on 29th September 1909.

As regards the time of these three events, the petitioner who alone appears examines himself and swears that the Munsif passed orders at 11 A.M. He filed his application at 12 and the money was paid at 4 P.M., or so. That is, the receipt was produced in this Court after that. This evidence stands alone and is probable and I accept it.

I therefore find that the Munsif's order of transfer and the application to this Court were prior in point of time to the payment of the money into Court.

This petition coming on for final hearing after the return of the finding of the lower Court, the Court delivered the following

JUDGMENT.—Accepting the finding I allow this petition and revise the order of the District Judge. The petitioner will be entitled to share in the rateable distribution of the money in deposit in the District Court. The petitioner will have costs in this and the lower Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911.
April 20.

SREEPADA VENKATARAMANNA alias VENKATA SURYA
NARAYANA MOORTHY, MINOR BY NEXT FRIEND, PULLELA
SRI RAMA SASTRI (PLAINTIFF), APPELLANT,

v.

SREEPADA RAMALAKSHMAMMA (DEFENDANT),
RESPONDENT.*

Specific Relief Act, s. 42—Fabrication of authority to adopt by widow does not justify suit by reversioner for declaring the authority not genuine.

The mere fabrication of an authority to adopt by the widow will not entitle the reversioner to claim a declaration under section 42 of the Specific Relief Act that the authority is not genuine.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 46 of

* Second Appeal No. 10 of 1910.

1909, presented against the decree of T. Varadarajulu Naidu, the Principal District Munsif of Tanuku, in O.S. No. 479 of 1907.

The facts are set out in the judgment of the lower Appellate Court as follows.

The suit out of which this appeal arose, was instituted for a declaration that the deed of authority alleged to have been executed by the defendant's deceased husband in her favour, is a forged one.

The minor plaintiff and the deceased husband of the defendant, were step-brothers. According to the former, the latter obtained the deed now sought to be set aside from her husband while he was unconscious and in a delirious state.

On the defendant's behalf these allegations of the plaintiff were denied and according to her it is a true and *bona fide* document passed by her husband while in full senses.

The District Munsif non-suited the plaintiff on the ground that there was no cause of action for the suit. Exhibit I is the document in question. It purports to have been executed in favour of the defendant conferring on her a power to adopt a son to him.

The point arising for consideration is whether the fact that the defendant set up such a document and got it registered, furnished cause of action for the suit or not. It is purely a discretionary power, vested in the Court, to grant declaration as to the non-genuineness of a document. The document in question, merely conferred a power on the defendant, which may or may not be exercised by her. She may change her mind and refuse to act according to the document. The cause of action for the plaintiff to have the document declared a forged one, can arise only when the defendant exercised the power conferred by it on her. The plaintiff cannot, as a matter of right, claim the declaration sought for. No doubt a suit will lie for merely setting aside a deed on the sole ground that it is a forgery but unless there is an infringement of right and unless there was present danger to the reversionary right of the plaintiff, he cannot claim a declaration that the document is a forged one. In the circumstances I agree with District Munsif in holding that there can be no cause of action for the suit and accordingly dismiss this appeal with costs.

P. Nagabhushanam for appellant.

P. Narayanamurti for respondent.

BENSON
AND
SUNDARA
AYYAR, JJ.

SREEPADA
VENKATA-
RAMANNA
v.
SREEPADA
RAMA-
LAKSHMAMMA.

BENSON
AND
SUNDARA
ATTYAR, JJ.
SREEPADA
VENTATA-
RAMANNA
v.
SREEPADA
RAMA-
LAKSHMANNA.

JUDGMENT.—We agree with the lower Courts that the mere fabrication of an authority to adopt will not entitle the reversioner to claim a declaration that the authority is not genuine. The deed of authority by itself cannot affect the plaintiff's right to any property, though the further act of adoption in pursuance of the authority would. The authority is not the proximate cause of any injury to the plaintiff's rights. Section 42 of the Specific Relief Act does not authorise such a suit and we think it would be going too far to hold that a document which is merely a preparation for a distinct and separate act which may give the plaintiff a right to declaratory relief would by itself entitle him to ask for a declaration. The observations cited from *Brindaban Chandra Shaha v. Sureswar Shaha Paramanick*(1) must be understood in connection with the facts of that case. We dismiss the second appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Phillips.

1911.
August
10, 15.

MARIGOWDA AND ANOTHER (ACCUSED), PETITIONERS,

v.

SRINIVASA RANGACHAR (COMPLAINANT).*

Indian Penal Code, s. 429—Cutting off the ears of a horse is 'maiming' within section.

The cutting off of the ears of a horse is 'maiming' within the meaning of section 429 of the Indian Penal Code.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of N. Gopalaswami, the First-Class Sub-Divisional Magistrate of Kollegal, in Criminal Appeal No. 27 of 1910 confirming the conviction and the sentence passed on the petitioners (1) Marigowda and (2) Puttan by I. Purushothama Nayudu, Taluk

(1) (1909) 10 O.L.J., 263 at p. 271.
* Criminal Revision Case No. 196 of 1911.

Second-Class Magistrate of Kollegal, in Calendar Case No. 135 of 1890.

Dr. S. Swaminathan for petitioners.

Public Prosecutor on behalf of the Government.

ORDER.—The question is whether cutting off the ears of a horse amounts to "maiming" within the meaning of section 429, Indian Penal Code. In Criminal Revision Case No. 583 of 1910 MUNRO, J., was of opinion that cutting off the ear and tail of a buffalo did not amount to maiming, but he gives no reasons. With all due deference I am unable to accede to this view, if it can be said that the facts here are the same as in that case. Maiming is not defined in the Indian Penal Code, but the definition given in Webster's Dictionary is "(1) The privation of the use of a limb "or member of the body, by which one is rendered less able to defend "himself or to annoy his adversary. (2) The privation of any "necessary part; a crippling; mutilation; injury; deprivation of "something essential." In Gour's 'Penal Law of India,' page "1769, we find "'maiming' is a term of well-known import in "English Law, and is the same as, 'mayhem' which meant the "deprivation of a member proper for defence in fight. . . . "It has, however, since acquired a wider significance, and now "means the privation of the use of a limb or member, and implies "a permanent injury. It does not then mean merely 'wounding', "but wounding or otherwise injuring so as to entail a permanent "injury." In *Regina v. Jeans*(1), removing the end of a horse's tongue was held not to be maiming on the ground that no permanent injury was inflicted—the horse being able to eat and drink but unable to eat quite so fast as before. The blinding of a mare's eye by pouring nitrous acid into it was held to be maiming [*Rex v. Owens*(2)]. Cutting off the ears does not mean the removal of the whole organ of hearing, but it is, I think, a permanent injury to one of the members of the body in that it must permanently affect the sense of hearing, and it is certainly a mutilation, which is also one of the definitions in Webster's Dictionary. Stress is laid on the permanency of the injury in the two English cases cited—*vide* also "Russell on Crimes," volume II, page 976. I therefore hold that cutting off the ears of a horse does amount to maiming. The petition is accordingly dismissed.

(1) (1844) 1. Carrington and Kirman, 539. (2) (1828), 1. M.C.C., 205.

PHILLIPS, J.
MARIGOWDA
v.
SRINIVASA
RANGACHAR.

APPELLATE CRIMINAL.

*Before Mr. Justice Spencer.*1911.
September
15.*Re. MAHOMED ISMAIL ROWTHER (ACCUSED), PETITIONER.***Arms Act, s. 19 (c)—Intention not necessary to constitute offence.*

An offence under section 19 (c) of the Arms Act is committed when a person enters British India with a weapon he is not lawfully entitled to possess in this country. It is not necessary that there should be any particular intention in the mind of the offender to complete the offence.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the First-class Sub-Divisional Magistrate G. T. Boag of Negapatam, in Calendar Case No. 37 of 1911, dated the 8th day of April 1911.

The facts are stated in the judgment of the Sub-Divisional Magistrate as follows.—

“The Negapatam police charge Mahomed Ismail Khan with importation of a revolver under section 19 (c) of the Arms Act.

“Evidence for the prosecution is given by Mr. A. A. Connor, Customs Collector, and Sergeant Boston of the Negapatam police. Mr. Connor says that the accused landed from Penang on February 26th. Mr. Connor was walking from the passenger shed to the landing stage and saw the accused hand a parcel rolled in a cloth to a local merchant. The act looked suspicious; so the parcel was seized and found to contain a revolver and 36 cartridges. The accused was fined Rs. 10 under the Sea Customs Act and handed over to the police.

“Sergeant Boston was in the customs house and sent the accused in custody to the police station with a letter from the Customs Collector.

“The accused says he acted *bona fide*. He had a license in Penang and handed the revolver and cartridges over on landing here in order to ascertain the duty payable on them. He pleads not guilty to a charge under section 19 (c). He examines three witnesses who say they met him when he landed. Two of them say they heard him ask the third what duty was payable and saw him hand the parcel containing the revolver over to the

Customs Collector. The third says that the accused handed the parcel to him to give to the Customs Collector. The imputation is not disputed. The only question is whether the accused acted *bona fide* or not. He is not entitled to possess arms in India. He should, on landing, have declared the revolver at once and handed it over to the Customs Collector. Instead of this, he handed it in a manner that aroused the suspicion of the Customs Collector, to a third person. The Customs Collector was standing close at hand; there was no need to pay the parcel to a third person and this fact alone is enough to prove his intention to evade the custom and in fact the revolver, though not entitled to do so.

“I therefore find him guilty under section 19 (c) and sentence him to pay a fine of Rs. 50.

“Fine paid.”

K. R. Subramania Sastri for *V. Ryrn Nambiar* for petitioner.
The Public Prosecutor on behalf of the Government.

ORDER.—Technically the petitioner committed an offence under section 19 (c) of the Arms Act as soon as he landed in British India with a revolver which he was not lawfully entitled to possess in this country. It is not necessary that there should be any particular intention in the mind of an offender to complete the offence punishable under this section. In this case the facts, as found and admitted, are that between the landing stage and the customs shed, the petitioner was detected by the Customs Officer in the act of handing to a third person a parcel rolled in cloth which, when opened, was found to contain a revolver and 36 cartridges. The conduct of a traveller who honestly intended to comply with the rules would have been to leave the weapon in the bag where it was, till the luggage, had been conveyed to the Customs Officer and then before the examination of luggage to make a declaration about the fire arm and at once to deposit it with the Customs officials. When the petitioner acted as he did, it cannot be said for certain that he would not have smuggled the revolver, though unnoticed, if the Customs Officer had not chanced to come up at the critical moment.

He has been fairly treated and I decline to interfere with the conviction or sentence.

* Criminal Revision Case No. 267 of 1911.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

NANJAPPA CHETTIAR (APPELLANT),

v.

GANAPATHI GOUNDEN (RESPONDENT).*

1911.
September
19 and 28.

Damages—Wrongful attachment, suit for damages for—Want of reasonable and probable cause and malice must be proved—Malice, what amounts to—Special damage, proof of—Amount of.

In a suit for damages for attachment before judgment, the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact.

The provisions of section 95 of the new Code of Civil Procedure and section 491 of the old Code which empowered Courts to award compensation when the attachment was applied for on insufficient grounds, were not intended to affect the applicability of the aforesaid rule of law in regular suits brought for compensation.

Malice means any improper or indirect motive, i.e., some motive other than the one which should actuate the party. No hatred or enmity is required.

Where the motive for the attachment is not to defeat any intended fraud on the part of the debtor, but to enforce speedy payment, it will amount to malice.

The plaintiff in such a suit must prove special damage. It is not necessary however to show pecuniary loss, or that the plaintiff was affected in a specific manner. It will be sufficient if it is shown, that the allegations made against him, must damage his reputation and credit. It will be sufficient if the plaintiff must have sustained some damage such as the law takes notice of.

Quartz Hill Gold Mining Company v. Eyre, [(1883) 11 Q.B.D., 674], referred to. *Kumarasami Pillai v. Udayar Nadan*, [(1909) I.L.R., 32 Mad., 170], followed.

The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount awardable as damages to the plaintiff.

SECOND APPEAL against the decree of S. Authinarayana Aiyar, the Temporary Subordinate Judge of Coimbatore, in Appeal Suit No. 117 of 1908, presented against the decree of T. Sreenivasa Aiyangar, the District Munsif of Tiruppur, in Original Suit No. 37 of 1908.

The facts for the purpose of this case are fully set out in the judgment.

T. Subrahmania Ayyar for appellant.

* Second Appeal No. 272 of 1910.

The Hon. Mr. L. A. Govindaraghava Ayyar for respondent.

JUDGMENT.—The suit in this case was for damages sustained by the plaintiff by reason of the defendant causing his properties to be attached before judgment in a suit instituted by the defendant against the plaintiff (Original Suit No. 6 of 1906 in the District Court of Coimbatore). The defendant along with his plaint in Original Suit No. 6 of 1906 put in an application for attachment of all the properties of the plaintiff. The suit was for a sum of Rs. 6,000 on a promissory note executed by the present plaintiff in favour of the defendant's brother. The properties attached were according to the District Munsif's finding in this case worth at least Rs. 60,000 and on the defendant's own admission their value was not less than Rs. 30,000. The defendant stated in support of his application for attachment that the plaintiff had alienated some of his properties and was about to alienate his other properties in order to defeat the execution of any decree the defendant might obtain against him. He obtained an interim order of attachment, but it was set aside on the plaintiff's application, the Court holding that there was no ground for the application for attachment. The defendant in his written statement alleged "that the plaintiff had plenty of debts and warrants against him, and getting afraid at the action of the plaintiff, who, without paying the defendant's debt, mortgaged properties for Rs. 15,000 to his elder brother and executed some other documents in favour of others, the defendant issued a notice for the discharge of his debt; but it has not been discharged." He then proceeded to state that his debt was not discharged by the plaintiff for two months after he obtained the decree. All the defendant's allegations about the plaintiff's indebtedness and alienations have been found to be untrue, except that the plaintiff had executed a mortgage for Rs. 15,000 in favour of his brother. The District Munsif found that the defendant had absolutely no grounds to believe that the plaintiff intended to defeat him or any other creditor. He also found that the defendant had no reasonable grounds for believing his allegations. He then observes that "unless the defendant had some object (which from his conduct appears to have been sinister and indirect) in view, he could not have applied for attachment of all the plaintiff's properties worth about Rs. 75,000 at the least for his debt of Rs. 5,000 and odd." He also says that the defendant had no information before putting in his application for attachment

SUNDARA
AYYAR AND
PHILLIPS, JJ.
—
NANJAPPA
CHETTIAR
v.
GANAPATHI
GOUNDEN.

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR
v.
GANAPATHI
GOUNDEN.

of any intention on the plaintiff's part to make alienations or of his being indebted to any one except his brother. He found also that the plaintiff must have been put to great mental suffering and apparently credited the plaintiff's statement that he suffered in reputation. He allowed Rs. 500 as damages. On appeal the Subordinate Judge concurred in the Munsif's finding that there was no reasonable and probable cause for the defendant's application, though the language used by him is not quite happy. With regard to the defendant's motive again, his finding is not as precise as might be desired. He refers to the defendant's allegations in his written statement already referred to and then states. "From these pleadings it appears to me that the object of the present defendant in applying for an attachment before judgment in Original Suit No. 6 of 1906 was simply to have his money paid without delay and without enabling this plaintiff to take the objections he took in the previous suit, and thus to delay payment." The objection in the previous suit spoken of by the Subordinate Judge was that the defendant's brother, to whom the promissory-note sued on had been executed, assigned it to the defendant deliberately with a view to deprive the plaintiff of the opportunity of pleading a set off of certain debts, which the defendant's brother owed to him. The Subordinate Judge then says "plaintiff does not say in his evidence and has adduced the other proof of enmity between him and the defendant or of any evil motive of the defendant." The finding therefore must be taken to amount to this that the defendant wished to use the process of attachment before judgment to obtain prompt payment of his debt and not with the view of preventing the plaintiff from alienating his properties so as to defeat any decree, but at the same time not on account of any enmity. With regard to the question whether the plaintiff sustained any damage, the Subordinate Judge merely observes: "For the injury sustained by the plaintiff by reason of all his properties being attached improperly he is no doubt entitled to damages." He reduces the amount of damages to Rs. 250 in consideration of the defendant not being a wealthy man. The defendant has appealed to this court against this judgment, and the plaintiff has preferred a memorandum of objections objecting to the reduction of the amount awarded as damages.

The first argument in second appeal is that in a suit for damages for attachment before judgment the plaintiff is bound

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR
v.
GANAPATHI
GOUNDEN.

to prove both that the defendant had no reasonable and probable cause for applying for attachment and malice in fact. For the respondent it is contended that the law in India is different in this respect from the English Law, as section 95 of the Code of Civil Procedure, 1908 (section 491 of the old Code) provides that the court trying the suit may award compensation against the plaintiff, where it finds that attachment before judgment was applied for on insufficient grounds. Neither absence of reasonable and probable cause nor malice is required under this section. The question for decision is whether the rule laid down in that section is applicable to a case where the defendant who complains of improper attachment before judgment files a distinct and regular suit for compensation. This question, so far as we are aware, has never been expressly decided by this court. We have come to the conclusion that the appellant's argument is well-founded. The section in our opinion creates a special jurisdiction in the court trying a suit to award compensation as an incidental relief and limits the amount it may award to Rs. 1,000. It gives in our opinion an alternative remedy in cases of wrongful attachment and provides that, in case a party complaining resorts to it, he shall not afterwards resort to a fresh suit by enacting that "an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction." There is no reason for holding that the section in any way interferes with the principles regulating suits for damages for the abuse of the process of courts. The general rule governing such cases has always been in England that actual malice must be proved. The section allows a limited remedy, without proof of malice, which it is open to a party to avail himself of, if he chooses. It must be noted that the code makes provision only for some kinds of abuse of the process of courts and does not deal with all kinds of abuse. Section 95 of the Code of Civil Procedure is analogous to section 250 of the Civil Procedure Code which allows a criminal court to award compensation not exceeding Rupees 50 to a complainant when it is satisfied that the accusation against him is frivolous or vexatious. That section does not alter the law regulating regular suits for damages for false prosecution where the plaintiff would be bound to prove absence of reasonable and probable cause and malice while under the section, it is enough for the criminal court to find that the complaint was frivolous or vexatious.

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR
v.
GANAPATHI
GOUNDEN.

That section unlike section 95 of the Code of Civil Procedure does not bar a suit for false prosecution, but merely provides that the amount awarded as compensation under it shall be taken into account in decreeing compensation in a subsequent civil suit. The Allahabad High Court in *Goutiere v. Robert*(1) held that the corresponding provision in the Civil Procedure Code of 1859 did not alter the law applicable to suits for damages for arrest or attachment. The Calcutta High Court was apparently of the same opinion in *Raj Chunder Roy v. Shama Soondari Debi*(2), though the case was one for improper attachment after decree. There is also a dictum of the judicial committee of the Privy Council in *Kissorymohun Roy v. Hursook Dass*(3). The case was one in which a third party sought to recover damages for wrongful attachment of his property as the property of the defendant in the suit. It was contended that it was necessary to prove malice and absence of reasonable and probable cause in making the attachment. Their Lordships say "that is the rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence." The same view was taken by the Bombay High Court in *Surajmal v. Manekchand*(4). The absence of reasonable and probable cause was taken to be necessary in *Thakdi Hajji v. Budrudin Saib*(5) but no reference was made to malice. We must hold that there is no reason for departing, when a suit is filed for damages from the well-established rule that when the plaintiff's grievance arises directly from the order of a Judicial Tribunal though it is moved thereto by a private party the defendant would not be responsible in damages unless he had acted with malice as well as without reasonable and probable cause. Has the Subordinate Judge then found in this case that the defendant acted with malice? On the one hand he says in effect that he was not satisfied that there was previous enmity between the plaintiff and the defendant, or that the latter was influenced by any evil motive arising from such enmity to apply for the attachment. But on the other hand he has not only found that there was no reasonable cause for the application but also says that the defendant's object was not to prevent an alienation of

(1) (1870) 2 N.W.P., 353.

(3) (1889) 17 I.A., 17 at p. 27.

(2) (1879) I.L.R., 4 Cal., 583.

(4) (1904) 8 Bom. L.R., 704.

(5) (1906) I.L.R., 29 Mad., 208.

the defendant's property so as to defeat the execution of his decree but to have his money paid without delay—a motive which unfortunately often induces suitors in this country to apply for attachment before judgment. It need hardly be said that a plaintiff acts improperly in making use, for putting undue pressure on his debtor, of a process intended to prevent fraudulent conduct on the debtor's part. We are of opinion that such conduct amounts to malice in the sense in which that expression is understood with reference to suits of this kind. Malice has been explained to mean any improper or indirect motive, i.e., some motive other than the one which should properly actuate the party. No hatred or enmity is required. See *Hicks v. Faulkner*(1) also *Quartz Hill Gold Mining Company v. Eyre*(2). He who believes that there is no ground for an attachment before judgment, on account of any intended fraud on the part of his debtor, must be actuated by some other motive than a desire to further the ends of justice. In *Brown v. Hawkes*(3) CANE, J., speaking of suits for malicious prosecution explained malice as "some other motive than a desire to bring to justice a person whom he honestly believes to be guilty." If the object be the levying of blackmail, the coercion of the accused in respect of some unconnected matter the obtaining of compensation or restitution from the accused that would amount to malice as pointed out in the same case. The object of the defendant in this case must clearly be held to be malicious in the light of the explanation above given. Recklessness regarding the truth or otherwise of the allegations would also amount to malice. The defendant must certainly be taken to have outstripped his due limits when he took upon himself to state that the plaintiff was about to alienate his properties with a view to defeat his own debt.

The next contention on behalf of the appellant is that as the plaintiff sustained no actual pecuniary loss, he is not entitled to recover any damages, as in all suits of this kind special damage must be alleged and proved in order to entitle the plaintiff to recover. It is no doubt often stated that special damage is one of the essentials necessary to maintain such an action. But as pointed out by Bowen, L.J., in *Ratcliffe v. Evans*(4) the expression

(1) (1878) 8 Q.B.D., 167 at p. 175.

(3) (1891) 2 Q.B.D., 718.

(2) (1883) 11 Q.B.D., 674 at p. 681.

(4) (1892) 2 Q.B.D., 524.

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR
v.
GANAPATHI
GOUNDEN.

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR

v.
GANAPATHI
GOUNDEN.

"special damage" is apt to mislead and care is required to find out in what particular sense it is used in each context. That very learned Judge points out that the expression has at least three different meanings. In the first place it means actual damage arising out of special circumstances of the case which if properly pleaded, may be super-added to the general damage which the law implies in every breach of contract and other infringement of an absolute right, i.e., the particular damage which results from the particular circumstances of the case. In the second place where no actual and positive right has been disturbed and where it is the damage done that is the wrong, the expression denotes the actual and temporal loss which has in fact occurred and is also called particular damage. In the third place in actions brought for a public nuisance such as the obstruction of a river or a highway. The expression means that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public if his action is to be supported such particular loss being the cause of action. Dealing with the case before him, which related to a statement maliciously published by the defendant about the business of the plaintiff, the learned Judge observes that the allegation of special damage necessary to support the action would vary according to the circumstances of the case, while damage is the gist of such an action it is not always necessary, he observes, to prove the actual loss specially and with certainty and "cases may occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss." "In all actions accordingly in the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved." In the *Quartz Hill Gold Mining Company v. Eyre*(1) where the action was for maliciously and without reasonable and probable cause, presenting a petition under the Companies Acts to wind up a Trading Company, it was held by the Court of Appeal to be unnecessary to prove actual pecuniary loss to the Company. Brett, M. R., said that all that was necessary was that

(1) (1883) 11 Q.B.D., 674.

the plaintiff company must have sustained some damage "such as the law takes notice of." By the very presentation of the petition the credit and reputation of the company were sure to be affected, Bowen, L.J., observing that "a trading credit was as valuable as his property." When a blow is struck at the credit of a person it would be a pity if the law did not place in the hands of the injured and aggrieved person a means of righting himself and recouping himself as far as can be for the mischief done to him. This principle was adopted by the Madras High Court in *Kumarasamia Pillai v. Udayar Nadan*(1) in an action for malicious prosecution see also *Wyatt v. Palmer*(2) where the Court of Appeal doubted whether after the decision in *Quartz Hill Gold Mining Company v. Eyre*(3) an allegation of special damage could be considered necessary in an action for damages for getting the plaintiff adjudicated a bankrupt. In Halsbury's 'Laws of England', volume X, the law is thus stated where actual damage is necessary to sustain an action. "In these cases the character of the acts themselves which produce the damage, and the circumstances in which these acts are done, regulate the degree of certainty and particularity with which the damage done ought to be stated and proved." See section 639, p. 347. In Clark and Lindsell on Torts, IV Edition, p. 659 the learned authors observe that an action for the abuse of an ordinary civil process differs from an action for malicious prosecution in that the gist of it seems to be 'special damage.' It is not clear whether they mean that pecuniary damage or specific damage to reputation should be proved. If they do, we are with all respect, not prepared to agree with them: and the learned authors cite no English cases in support of such a position. We cannot doubt that the attachment of a respectable man's property before judgment on the ground that he is attempting to alienate his properties with a view to defeat his judgment-creditors must in this country damage his reputation and credit. It is immaterial that it is not proved that they were affected in some specific manner and we are prepared to follow the learned Judges who decided *Kumarasamia Pillai v. Udayar Nadan*(1) in applying the rule in *Quartz Hill Gold Mining Company v. Eyre*(3) to such a suit. We hold therefore that the

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR

v.
GANAPATHI
GOUNDEN.

(1) (1909) I.L.R., 32 Mad., 170.

(2) (1899) 2 Q.B., 106.

(3) (1883) 11 Q.B.D., 674.

SUNDARA
AYYAR AND
PHILLIPS, JJ.

NANJAPPA
CHETTIAR
v.
GANAPATHI
GOUNDEN.

plaintiff is entitled to a decree for damages in this suit. The Subordinate Judge in assessing the amount reduced the sum awarded by the District Munsif on the ground that the defendant was not a man of large means and that the costs payable to the plaintiff would amount to Rs. 260. He was not right in taking the former of these circumstances into consideration. The District Munsif observes that the defendant did not object to the amount of compensation claimed by the plaintiff in his plaint, viz., Rs. 2,000 nor do we find any objection taken to the amount decreed by the Munsif in the grounds of appeal to the Lower Appellate Court. In all the circumstances of the case we think that the Subordinate Judge was wrong in making a reduction in the sum awarded by the Munsif. We shall therefore modify the decree of the Subordinate Judge by awarding to the plaintiff the sum of Rs. 500 allowed by the District Munsif. The Second Appeal is dismissed with costs and the memorandum of objections is allowed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer.

Re. VELU NATTAN (PETITIONER), COMPLAINANT.*

1911.
September
29.

Criminal Procedure Code, s. 203—Dismissal of complaint under s. 203 without taking sworn statement of complainant.

A Presidency Magistrate may dismiss a complaint under section 203 of the Criminal Procedure Code on a police report without examining the complainant. The verification on oath of a complaint before a Magistrate is a sufficient compliance with the provisions of section 203.

The omission to examine will, at the most, amount to an irregularity of the description covered by section 537, Criminal Procedure Code.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of Mr. W. S. Marshall, Third Presidency Magistrate, Georgetown, Madras, in Application No. 2991, dated 10th May 1911.

P. Sambandam for petitioner.

The Crown Prosecutor on behalf of the Government.

ORDER.—It is argued that the Presidency Magistrate had no power to dismiss a complaint under section 203, Criminal

* Criminal Revision Case No. 833 of 1911.

Procedure Code, without examining the complainant. It was held in *Queen-Empress v. Murphy*(1) that a verification on oath of a complaint before a Magistrate, was a sufficient compliance with the provisions of section 203, and this has been followed in Criminal Revision Case No. 398 of 1908 on the file of this Court with special reference to the procedure provided for Presidency Magistrates under section 200 (b). In the present case the petitioner's vakil was present when the Magistrate passed orders under section 203, Criminal Procedure Code, dismissing the complaint and in the absence of any affidavit saying that he was precluded from showing cause against accepting the result of the police enquiry, I am not prepared to find that the complainant was in any way prejudiced by the Magistrate's procedure, assuming that the law required him to make a more detailed examination. At the most the omission to examine in this case amounts to no more than an irregularity of the description covered by section 537, Criminal Procedure Code. The petition is dismissed.

SPENCER, J.
Re. VELU
NATTAN.

PRIVY COUNCIL.

SHAMU PATTTER (PLAINTIFF),

v.

ABDUL KADIR RAVUTHAN AND OTHERS (DEFENDANTS) AND
ANOTHER APPEAL CONSOLIDATED.

P.C.*
1912.
June 19, 20.
July 30.

[On appeal from the High Court of Judicature
at Madras.]

Transfer of Property Act (IV of 1882), s. 59—Attestation of deed—Presence of witnesses at actual execution—Acknowledgment of his signature by executant. Civil Procedure Code (Act XIV of 1882), s. 149—Issue raised by Court at late stage of case—Power of Court as to issues.

Held (affirming the decision of the Madras High Court) that attestation of a mortgage deed within the meaning of section 59 of the Transfer of Property Act (IV of 1882) must be made by the witnesses signing their names after seeing the actual execution of the deed. Mere acknowledgment of his signature by the executant is not sufficient.

(1) (1887) I.L.R., 9 All. 666.

* Present:—Lord SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

SHAW, EDGE
AND AMEER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAVUTHAN.

Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee(1), *Abdul Karim v. Salimun*(2), *Ranu v. Laxmanrao*(3), and *Shamu Patter v. Abdul Kadir Ravuthan*(4), approved of.

Ramji v. Bai Parvati(5), and *Ganga Dei v. Shiam Sundar*(6), dissented from. Cases in England on the meaning of "attest" reviewed and discussed. The first portion of section 149 of the Civil Procedure Code (Act XIV of 1882) leaves it in the discretion of the Court to frame such additional issues as it thinks fit; whilst the latter part makes it imperative on the judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was therefore fully empowered to frame the issue on which he decided the case.

TWO APPEALS consolidated against two decrees (28th January 1908) of the High Court at Madras, made in Appeals Nos. 27 and 62 of 1904, affirming decrees (19th November 1903) of the Subordinate Judge of South Malabar in Original Suits Nos. 25 of 1902, and 24 of 1903 respectively.

The former of the suits was brought by the present appellant for sale of the land comprised in a mortgage deed, dated 30th May, 1899, and executed in favour of his predecessor in title by the defendants Nos. 1 and 2. The latter suit was brought against the present appellant by attaching creditors of the above defendants Nos. 1 and 2 for a declaration that the mortgage deed was void as against them on the ground that it had been executed fraudulently and without consideration.

The suits were heard together. The mortgage deed was admitted and evidence was given on the only issue then raised which was, "Is the plaint bond supported by consideration to its full, or what extent? Was the plaint bond executed *bonâ fide*, and is it supported by consideration to its full or any extent?"

After the evidence was completed a fresh issue was framed as to whether the deed was valid under section 59 of the Transfer of Property Act (IV of 1882) relating to the attestation of mortgage deeds.

According to the effect of the evidence as stated by the High Court, the persons whose names appear in the deed as witnesses affixed their signatures just before the deed was presented for registration, the executants having first acknowledged their signatures before them. In the registration office the executants

(1) (1899) I.L.R., 26 Cal., 246.

(3) (1909) I.L.R., 33 Bom., 44.

(5) (1903) I.L.R., 27 Bom., 91.

(2) (1900) I.L.R., 27 Cal., 190.

(4) (1908) I.L.R., 31 Mad., 215.

(6) (1903) I.L.R., 26 All., 69.

admitted their execution and the receipt of the consideration, and the admission was attested by one Narayana Patter who had been present when the deed was signed. The Sub-Registrar also appended his signature on the registration endorsement.

The Subordinate Judge decided the suits on the second issue only, and against the present appellant, on the ground that the deed had not been properly attested and was therefore void.

Appeals from the decision were preferred by the present appellant in both suits, to the High Court (WALLIS and SANKARAN NAIR, JJ.) and that Court affirmed the decision of the Subordinate Judge, holding that the executants of the deed had only acknowledged, and not actually affixed their signatures in the presence of the attesting witnesses and that on this ground the attestation was insufficient, and the deed was consequently void.

The judgments of the High Court in appeal 27 (which governed both the appeals on the construction of section 59 of the Transfer of Property Act) will be found in the report of the cases before the High Court in *Shamu Patter v. Abdul Kadir Ravuthan*(1).

On these appeals (which were heard *ex parte*):

DeGruyther, K.C., and *Kenworthy Brown* for the appellant contended that the Subordinate Judge ought not to have arbitrarily framed a fresh issue impugning the validity of the mortgage deed at so late a stage of the case when the evidence and arguments on the only issue raised had been closed and the case was ready for judgment. The deed in suit had been admitted by the executants and contesting defendants in the pleadings, and no other issue should have been framed. Reference was made to sections 146, 147, 148 and 149 of the Civil Procedure Code, 1882, the procedure there provided being used, it was submitted, only to rectify unintentional omissions. There was no cross-examination of the attesting witnesses on the point raised by the new issue: before the issue was decided the appellants ought to have had the opportunity of producing evidence on it.

It was also contended that the deed was duly attested within the meaning of section 59 of the Transfer of Property Act (IV of 1882), notwithstanding that the attesting witnesses did not see the actual execution of the deed, but it was acknowledged afterwards by the executant, and they then attested his signature.

(1) (1908) I.L.R., 31 Mad., 215.

SHAW, EDGE
AND AMEER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAVUTHAN.

SHAW, EDGE
AND AMEER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAVUTHAN.

That interpretation of section 59 was supported by the Bombay case of *Ramji v. Bai Parvati*(1), and the Allahabad case of *Ganga Dei v. Shiam Sundar*(2) but was opposed to two Calcutta decisions in *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee*(3) and *Abdul Karim v. Salimun*(4). For the view that acknowledgment of a signature before witnesses was sufficient, reference was made to the English cases decided on section 5 of the Statute of Frauds (29 Car., II., c. 3) as to the attestation of wills, *Grayson v. Atkinson*(5); *Ellis v. Smith*(6) and *White v. Trustees of the British Museum*(7); and Jarman on 'Wills' (edition 1910), page 104, was referred to. On the other hand cases on the same Statute took the contrary view in *Roberts v. Phillips*(8) though the point in the present case was not there directly before their Lordships: *Bryan v. White*(9), and *Burdett v. Spilsbury*(10), and a view contrary to the present contention was taken in the cases under the Bills of Sale Act, 1878 (41 and 42 Vict., c. 31), sections 8 and 11; see *Seal v. Claridge*(11), *Sharpe v. Birch*(12), and *Ford v. Kettle*(13). The view that a signature attested after acknowledgment is sufficient was supported by section 50, paragraph 3 of the Succession Act (X of 1865); and by section 11 of the Companies Act (VI of 1882), which was passed in the same year as the Transfer of Property Act, section 59 of which was now under consideration and presumably the meaning given to the word "attest" in the two Acts was the same. The case of *Casement v. Fulton*(14) was one under the Indian Wills Act (XXV of 1838), section 2 of which partially repealed the Statute of Frauds in India, and section 7 of which also allowed acknowledgment as sufficient. But the point in the present case was not taken or decided in that case. [Lord SHAW referred to *Ranu v. Laxmanarao*(15) a case which had not been before cited.] The Evidence Act (I of 1872), sections 68 and 70 were also referred to. The mortgage deed therefore, it was submitted, had been duly attested. But even if it had not been

(1) (1902) I.L.R., 27 Bom., 91.

(3) (1899) I.L.R., 26 Cal., 246.

(5) (1752) 2 Ves. Sen., 454 at p. 456.

(2) (1908) I.L.R., 28 All., 69.

(4) (1900) I.L.R., 27 Cal., 190.

(6) (1754) 1 Ves. Jun., 11 at p. 15.

(7) (1829) 6 Bing., 310 at p. 318.

(8) (1855) 4 E. & B., 450 at p. 453; 24 L.J.N.S., Q.B., 171 at pp. 174 & 175.

(9) (1850) 2 Rob., 315 at p. 317.

(10) (1843) 10 Cl. & Fin., 340 at p. 417.

(11) (1881) L.R., 7 Q.B.D., 516 at p. 519.

(12) (1881) L.R., 8 Q.B.D., 111 at p. 114.

(13) (1882) L.R., 9 Q.B.D., 139.

(14) (1845) 3 M.I.A., 395.

(15) (1909) I.L.R., 33 Bom., 44 at p. 48.

so attested as a mortgage, a charge on the lands was thereby effectively created.

1912, July 30.—The judgment of their Lordships was delivered by Mr. AMEER ALI.

These are two consolidated appeals from certain judgments and decrees of the High Court of Madras, dated the 28th of January, 1908, affirming the decisions of the Subordinate Judge of South Malabar at Palghat; and the sole question for determination in both cases turns upon the meaning to be attached to the word "attested" in section 59 of the Indian Transfer of Property Act (IV of 1882), the first clause of which provides that where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The appellant Shamu Patter, as the representative of one Appu, deceased, brought a suit on the 18th of July 1902 in the Court of the Subordinate Judge of South Malabar to enforce a mortgage alleged to have been executed in favour of Appu by the Ravuthan defendants. The other defendants to Patter's action were certain attaching creditors of the Ravuthans, who are respondents in the present appeals, and who challenged the mortgage on the ground *inter alia*, that it was in fraud of creditors and without consideration. Their attachment on the mortgaged properties appears to have been partially removed at the instance of Patter, and they accordingly brought a suit sometime in 1900 in the Court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration, and ineffective so far as their rights were concerned. This suit was afterwards transferred to the Court of the Subordinate Judge and was tried with Patters' action, the evidence in one being taken as evidence in the other.

The trial began, as appears from the Order Sheet, on the 7th of September 1903; arguments were heard on the 16th and 17th of November, and judgment was reserved. On the same date, it appearing from the evidence of the witnesses to the mortgage deed that they were not present at its execution but had put their names on the document on the acknowledgment of the Ravuthans, the Subordinate Judge framed a supplemental issue in these terms: "Is it (meaning the mortgage deed) valid under section 59 of the Transfer of Property Act?" And on the 19th of November,

SHAW, EDGE
AND AMEER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAVUTHAN.

SHAW, EDGE
AND AMER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAVUTHAN.

holding that the document was invalid under that section, he dismissed Patter's suit (save as regards a personal decree against the Ravuthans) and by a separate judgment decreed the action of the creditors.

From these two decrees Patter appealed to the High Court of Madras, which has upheld the lower Court's decisions.

In the present appeals the judgments of the Courts in India have been challenged on two grounds, first that the Subordinate Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it; and secondly that the Courts are in error in holding that the word "attested" in section 59 of the Transfer of Property Act implies the witnessing of the actual execution of a document.

With regard to the first point their Lordships are of opinion that section 149 of the Civil Procedure Code (Act XIV of 1882) which is applicable to the proceedings, is conclusive. That section declares that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

The first part of the section leaves it in the discretion of the Court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was, therefore, fully empowered to frame the issue on which he decided the case.

Even had there been no such express provision in the Code, their Lordships consider every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties.

The substantial ground, however, on which the decrees of the High Court are impugned, has reference to the interpretation put upon section 59 of the Transfer of Property Act. It is contended on the authority of *Grayson v. Atkinson* [decided in 1752](1) and *Ellis v. Smith* [decided in 1754](2) which was followed in 1829 in *White v. Trustees of the British Museum*(3), that the learned

Judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it.

The construction put in those cases on the word "attested" occurring in section 5, c. 3, 29 Car., II. (the Statute of Frauds) no doubt supports the contention of the appellant that attestation upon the acknowledgment of the executant is equivalent to being present at and witnessing the execution. They related, however, to the due execution of wills, and though the language of Lord Hardwicks in *Grayson v. Atkinson*(1) was sufficiently wide to cover other deeds, his interpretation has not passed without question in later cases. The eminent Judges who decided *Grayson v. Atkinson*(1) and *Ellis v. Smith*(2) themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them. Chief Baron PARKER began his judgment with the following important observation:—

* * * *

"I confess, if this had been *res integra*, I should doubt whether the testator's declaration is a proper execution within the 5th clause; because, I think, an admission that it is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries."

WILLES, C.J., observed that he was not satisfied in his own mind that the testator's acknowledgment was sufficient, but he added "authorities bear me down and I must yield." And the Master of the Rolls pronounced the extended construction to be "a dangerous determination and destructive of those barriers the statute erected against perjury and frauds." The learned Judges, however, felt bound by the previous decisions, and proceeding on the principle of *stare decisis* decided in favour of the view now pressed before their Lordships regarding the construction of a section of the Indian Statute relating to a totally different subject.

As the question involved in these appeals is of considerable importance and there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not desire to pass altogether unnoticed the other authorities discussed at the Bar

SHAW, EDGE
AND AMER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAVUTHAN.

(1) (1752) 2 Ves. Sen., 454.

(2) (1754) 1 Ves. Jun., 11.

(3) (1829) 6 Bing., 310.

(1) (1752) 2 Ves. Sen., 454.

(2) (1754) 1 Ves. Jun., 11.

SHAW, EDGE
AND AMEER
ALI, P.Cs.

as well as in the well-reasoned judgments of the learned Judges in the Madras High Court.

SHAMU
PATTER
v.

ABDUL
KADIR
RAYUTHAN.

In *Casement v. Fulton*(1), which was decided in 1845, the question for decision was whether the signatures of two witnesses who had subscribed a will at different times but the first had acknowledged to the second that he had signed the same, amounted to sufficient compliance with the provisions of section 7 of the Indian Wills Act of 1838. Lord BROUGHAM, in delivering the judgment of the Judicial Committee, observed that—

"The Statute of Frauds (29 Car. II., c. 3, s. 5), requires the Will to be signed by the testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been, that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle, we need not now stop to enquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things,—as different as the witnessing a fact or act, and the witnessing a confession of that fact or act."

And after referring to the hesitation with which the decision had been arrived at in *Ellis v. Smith*(2), refused "to carry one step further, a construction which so great a weight of authority lamented, and showed to have been ill-advised in its inception."

The later cases are still more direct in the interpretation of the words "attestation" and "attested." In *Bryan v. White*(3), Dr. Lushington in 1850 laid down that "'attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." In 1855 Lord CAMPBELL, Chief Justice, in *Roberts v. Phillip*(4), enunciated the same rule as regards the word "attested," that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett v. Spilsbury*(5). The Lord Chancellor summed up the conclusion in these words:—"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then attesting witness."

The meaning of the words "attest" and "attestation" has also been before the Courts under the Bills of Sale Act of 1878

(1) (1845) 3 M.I.A., 395.

(3) (1850) 2 Rob., 315 at p. 317.

(2) (1754) 1 Ves. Jun., 11.

(4) (1855) 4 E. & B., 450.

(5) (1843) 10 Cl. & Fin., 340.

SHAW, EDGE
AND AMEER
ALI, P.Cs.

SHAMU
PATTER

v.
ABDUL
KADIR
RAYUTHAN.

(41 & 42 Vict. c. 31, ss. 8 & 14) and the interpretation put on them in *Roberts v. Phillips*(1) and *Bryan v. White*(2) has invariably been followed.

Section 50 of the Indian Succession Act (X of 1865) was referred to in support of the appellant's contention regarding the meaning of the word "attested" in section 59 of the Transfer of Property Act. The phraseology of the two sections are quite different as different in fact as the objects of the two statutes.

Section 2 of Act XXV of 1838 (The Indian Wills Act) declared that after the passing of that Act, 29 Car. II "shall cease to have effect" except to a limited extent within the territories of the East India Company. In section 7 the word "attested" is left out, but it is provided that the testator's signature "shall be made or acknowledged by him in the presence of two or more witnesses present at the same time." The latter words gave rise to the question in *Casement v. Fulton*(3). Act X of 1865 (The Indian Succession Act) has substantially taken the place of the Indian Wills Act of 1838, and embodies the rules which constitute the law applicable in India to cases of intestate or testamentary succession, excepting as regards Muhammadans, for the major portion of this Act was made applicable to Hindus by the Hindu Wills Act. Section 50 provides for the due execution of what are called unprivileged wills, and paragraph 3 declares—

"The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature, of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

It will be noticed that the word "attested," which was omitted in section 7 of the Act of 1838, is re-introduced in section 50, and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word "attested" by itself conveyed the meaning that attestation upon

(1) (1855) 4 E. & B., 450.

(2) (1850) 2 Rob., 315 at p. 317.

(3) (1845) 3 M.I.A., 395.

SHAW, EDGE
AND AMER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAYUTHAN.

the acknowledgment of the executant was sufficient, there would have been no reason for making an express provision in the section. The inference to be drawn from it is obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words, of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and as the word "attest" was not sufficient to validate such attestation, introduced an express provision to that effect. Section 68 of the Indian Evidence Act (I of 1872) which declares that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution," appears to their Lordships to indicate that the Indian Legislature used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. Section 59 of the Transfer of Property Act in requiring that in a certain class of cases a mortgage "can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses," could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds.

The Calcutta High Court has, in three cases arising under section 59, taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon acknowledgment, in *Ranu v. Laxmanrao*(1) the learned Judges, on the authority of *Burdett v. Spilsbury*(2) arrived at the same conclusion as the two other Presidency High Courts. The Allahabad High Court, however, in the case of *Ganga Dei v. Shiam Sundar*(3) has taken a different view. The learned Judges seem to consider the introduction of the words "personal acknowledgment" in section 50 of the Indian Succession Act as an interpretation of the word "attest." They say as follows:—

* * *
"It seems to us reasonable to suppose that the interpretation put upon the word 'attest' in that section, in the absence of good technical

(1) (1909) I.L.R., 33 Bom., 44.

(2) (1843) 10 Cl. & Fin., 340.

(3) (1903) I.L.R., 28 All., 69.

or substantial reason to the contrary, should be taken to be the meaning in which the word is used in section 59 of the Transfer of Property Act."

With respect, their Lordships are wholly unable to follow the reasoning. As already observed, the provision as to attestation upon the testator's personal "acknowledgment" was quite a separate condition and in no sense an interpretation of the word "attest." In fact, it was provided that the witnesses might attest the document on witnessing the actual execution or on the personal acknowledgment of the testator of the execution. But that, in their Lordships' judgment, affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned Judges regarding the policy of placing a larger construction on the word in consequence of the "social institutions of the country." Those very institutions, their Lordships consider, make it necessary that "the barriers against perjury and fraud," to use the language of the Master of the Rolls in *Ellis v. Smith*(1) should not be removed upon speculative considerations.

On the whole their Lordships are of opinion that the judgment of the High Court of Madras is right, and that these appeals ought to be dismissed, and they will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for the appellant: *Douglas Grant*,

J.V.W.

(1) (1754) 1 Ves. Jnn., 11.

SHAW, EDGE
AND AMER
ALI, P.Cs.

SHAMU
PATTER
v.
ABDUL
KADIR
RAYUTHAN.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

MUTHURAKKOO THEVAN AND NINE OTHERS
(DEFENDANTS), APPELLANTS,

v.

R. G. ORR AND FIVE OTHERS (PLAINTIFFS NOS 1 AND 2 AND
DEFENDANTS NOS. 5, 8 AND 11 AND SIXTH RESPONDENT IN THE
LOWER APPELLATE COURT), RESPONDENTS.*

Landlord and Tenant—Encroachment by tenant on adjoining land of landlord—Such encroachments enure for the benefit of the tenant during his tenancy and afterwards for the benefit of the landlord—Adverse possession.

Possession by a person will be presumed to be held in his own right and adversely to the true owner. This presumption will not apply when a special relationship exists between the parties, as tenants in common or members of an undivided family. The presumption in such cases will be that possession is held on behalf of all the co-owners or members of the family and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose right he seeks to affect by such possession.

Where a tenant taking advantage of his position as such, takes possession of lands belonging to his landlord not included in his holding the presumption is that such lands are added to the tenure and form part thereof for the benefit of the tenant so long as the holding continues and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit.

Gooroo Dass Roy v. Issur Chunder Bose [(1874) 22 W.R., 246], approved.

It is not necessary that the tenant trespasser should prove that his trespass was known to his landlord to justify such presumption.

SECOND APPEAL against the decree of J. G. Burn, Additional Sudordinate Judge of Madura, in Appeal Suit No. 446 of 1908, presented against the decree of K. S. Gopalaratnam Ayyar, District Munsif, Sivaganga, in Original Suit No. 223 of 1907.

K. Srinivasa Ayyangar for appellants.

T. Rangachariar for sixth respondent.

Suit for declaration that the defendants have no right to encroach upon 7-0-14 cheis of the Ayan land over and in excess of 7-2-0 cheis of land granted originally on cowle to one Sinnanna Raju, the defendants' vendee and for possession of the 7-0-14 cheis of land encroached upon by the defendants and for damages Rs. 275 for faslis 1313, 1315 and 1316.

* Second Appeal No. 861 of 1909.

Rani Katama Nachiar, once zamindari of Sivaganga, leased certain lands on cowle to one Sinnanna Raju through whom the defendants claim title. The plaintiffs, who are the lessees of the whole Sivaganga zamindari, allege that the defendants, instead of confining themselves to the 7-2-0 cheis granted originally on cowle, have encroached upon 7-0-14 cheis of the Ayan land and on this ground ask for possession of the encroached cheis of land and for Rs. 275 as damages in respect thereof for three faslis 1313, 1315 and 1316. The plaintiffs do not claim damages for fasli 1314 of their own accord.

The defendants No. 5, 8 and 11 remained *ex parte*. The defendants Nos. 1, 2, 3, 4, 6 and 7 state amongst other things that the defendants have acquired a prescriptive right in respect of the excess lands claimed by the plaintiffs, that, as such, the plaintiffs are entitled to claim only rent for the excess lands and not to cancel the cowle, that the plaintiffs are not entitled to claim any damages, that the suit is bad for non-joinder of parties and that the suit should therefore be dismissed with costs. Defendants Nos. 9, 10, 12 and 13 were added as supplemental defendants as per order on M.P. 1699 of 1907, dated 18th November 1907, and they adopt the statements of the other contending defendants.

The District Munsif gave a decree for possession of the lands encroached upon. This decree was confirmed on appeal. The appellate judgment is as follows:—

“There are two points only which have been argued in this appeal. Firstly it is urged that the appellants should have been given an opportunity to produce evidence in support of their case as to adverse possession. The appellants were let into possession of a certain extent of land within specified boundaries in virtue of exhibit B. They have in fact extended their occupation over an area within those boundaries larger than that leased to them. There can be no doubt that they made those encroachments under cover of their position as tenants and they cannot be allowed to advance the plea which they now set up. The mere fact that the cowle recognised that there might be a greater extent within the boundaries will not help the appellants.

“The second and only other point argued is that the plaintiffs are in any case not entitled to recover possession of the excess land under occupation of the appellants but only to demand rent therefor. Considering the terms of the cowle and the conduct of

BENSON AND
SUNDARA
Ayyar, JJ.

MUTHU-
RAKKOO
THEVAN
v.
ORR.

1910.
October 24.
1911.
April 12.

BENSON AND
SUNDARA
AYYAR, JJ.

MUTHU-
RAKKOO
THEVAN
v.
ORR.

the appellants I am unable to see how this contention can be supported.

"For these reasons I think the decision of the District Munsif on these matters was right. This appeal is dismissed with costs."

Defendants appealed.

This case came on for hearing before BENSON and KRISHNASWAMI AYYAR, JJ., who remitted the case for a finding holding as follows:—

"The Courts below were wrong in holding that the defendants were not entitled to adduce evidence on the second issue. If the defendants held the excess lands for more than the statutory period, they would be entitled to claim the same rights in them as in the lands admittedly held under the cowle. We must ask the present District Judge to return a finding on the second issue after taking the evidence that the parties may adduce.

"The finding should be submitted within six weeks from this date, and seven days will be allowed for filing objections."

In compliance with the order contained in the above judgment, the District Judge of Madura after taking evidence found that the defendants had acquired a prescriptive right in respect of the excess lands claimed by them.

This second appeal coming on for final hearing and having stood over for consideration, the Court delivered the following

JUDGMENT.—The District Judge has found that the defendants have acquired a prescriptive right of tenancy to the excess lands claimed by the plaintiffs. We accept the finding. Mr. Rangachariar contends that as the Judge has not found that the plaintiffs or their predecessors in interest were aware more than twelve years before this suit of the encroachment made by their tenants, the defendants, the defendants cannot be taken to have acquired a prescriptive right. His argument is that a tenant who encroaches upon his lessor's land adjoining the land leased to him must prove that he set up to the knowledge of his lessor more than twelve years prior to the suit in ejectment a right to hold the land encroached on as a tenant. We are unable to uphold this argument. Unquestionably the ordinary rule of law is that possession held by a person in his own right is adverse to the true owner, whether the owner is aware of such possession being taken or not, and if the adverse possession be continued for the statutory period, it will

confer a prescriptive title on the trespasser. This rule is qualified by the principle that if the trespasser while in possession claims a right less than the absolute ownership in the land he will acquire by prescription only the inferior title set up by him. The title acquired will be determined by the *animus possidendi* of the trespasser. It is also well established that when possession is proved by a person it will be presumed to be held in his own right. This presumption no doubt is not applicable in cases where a special relationship exists between the parties such as tenants in common or members of an undivided family. The Court will in such cases presume that possession is held on behalf of all the co-owners or the members of the family and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose rights he seeks to affect by his possession. What then is the proper presumption where a tenant takes possession of lands not included in his holding, taking advantage of his character as tenant? We are clearly of opinion that the view enunciated by MARKBY, J., in *Gooroo Doss Roy v. Issur Chunder Bose*(1) is correct. That learned Judge observes "We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit." This is also the view enunciated in the later case in *Ishan Chandra Mitter v. Raja Ramranjan Chakrabutty*(2). See also *Maidin Saiba v. Nagapa*(3). Our attention has been drawn to some cases in which it has been stated that the tenant is bound to prove that he set up a right of tenancy over the encroached lands to the knowledge of his landlord; *Wali Ahmed Chowdhry v. Tota Meah Chowdhry*(4), *Krishna Govinda Jawadar v. Banka Behari Shaha*(5). See also *Prohlad Teor v. Kedar Nath Bose*(6), where MACLEAN, C.J., was of opinion that the rule laid down by MARKBY, J., was stated in too broad terms. In *Wali Ahmed Chowdhry v. Tota Meah Chowdhry*(4), the encroachment was on waste land and the acts of enjoyment might be held not to amount

BENSON AND
SUNDARA
AYYAR, JJ.

MUTHU-
RAKKOO
THEVAN
v.
ORR.

(1) (1874) 22 W.R., 246.

(3) (1883) I.L.R., 7 Bom., 96.

(5) (1908) 13 Cal. W.N., 698.

(2) (1906) 2 C.L.J., 125.

(4) (1904) I.L.R., 31 Cal., 397.

(6) (1898) I.L.R., 25 Cal., 302.

BENSON AND
SUNDARA
ATTAR, JJ.

MUTHU-
RAKKOO
THEVAN
v.
ORR.

to effective possession. These decisions might be perfectly right on the particular facts on which they were passed, but if they intend to lay down that a tenant-trespasser is as a matter of law bound to prove that his trespass was known to his landlord, we must say that we prefer the rule laid down by MARKBY, J. We can see no basis for a presumption that a tenant when he encroaches on his landlord's lands intends to hold possession purely for the benefit of the landlord. We are therefore of opinion that on the finding arrived at by the District Judge the plaintiffs must fail. We may add that it is almost impossible to believe that during the period of about thirty years that the defendants were cultivating the lands prior to 1904 their landlords were ignorant of the fact. The result of the finding is that the decrees of the lower courts must be reversed and the suit dismissed with costs throughout.

APPELLATE CIVIL.

1911.
January 26.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

T. UNNI KOYA (PLAINTIFF), APPELLANT,

v.

A. P. UMMA (DEFENDANT), RESPONDENT. *

Civil Procedure Code (Act XIV of 1882), s. 273—Where decree attached, the decree-holder cannot take any steps to execute the decree.

Section 273 of the Code of Civil Procedure prohibits the holder of a decree which has been attached in execution from applying for execution of the decree attached and any such application by him will be infructuous as it could not be granted and will not have the effect of saving limitation.

The only person competent to execute will be the attaching creditor, who will be liable in damages if he allows the decree to become barred by limitation. *Adhar Chandra Dass v. Lal Mohun Das* [(1897) I.L.R., 24 Cal., 778], not followed.

APPEAL under section 15 of the Letters Patent against the order and judgment of the Honourable Mr. Justice SANKARAN NAIR in Civil Revision Petition No. 687 of 1908 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of T. V. Ananthan Nair, Subordinate Judge of South Malabar at Calicut, in Small Cause Suit No. 262 of 1908.

K. P. M. Menon for appellant.

* Letters Patent Appeal No. 1 of 1910.

C. Madhavan Nair for respondent.

The facts for the purpose of this case are sufficiently set out in the judgment.

JUDGMENT. —The suit was instituted for recovery of damages on the ground that the defendant who attached in execution of his decree against the plaintiff, a decree for money, which the plaintiff held against a third person, allowed the decree by his negligence or by collusion with the judgment-debtor of the plaintiff to lapse by efflux of time. The defendant has realised the amount of his decree from the properties of the plaintiff. The Subordinate Judge gave a decree to the plaintiff finding the facts in his favour.

SANKARAN NAIR, J., in revision has set aside the judgment of the Subordinate Judge on the ground that the plaintiff, the holder of the attached decree, could have executed the decree in spite of the attachment, and in support of this proposition the learned Judge relies on three cases *Patumma v. Idivi Beari*(1), *Sami Pillai v. Krishnasami Chetti*(2) and *Adhar Chandra Dass v. Lal Mohun Das*(3). It is contended on behalf of the plaintiff who appeals against his judgment that section 273 of the Civil Procedure Code (Act XIV of 1882) expressly lays down that, when a decree is attached, execution of it shall be stayed by the Court which passed the decree, unless and until the Court which issued the notice of attachment cancels the notice, or the judgment-creditor at whose instance the attachment was made applies for execution of the decree so attached.

We think this contention is well founded. It is urged on behalf of the respondent that the words "stay the execution" in section 273 must be understood to mean only the taking of the proceeds of the execution, and that the section does not preclude the holder of the attached decree from taking all the necessary steps for its execution short of actually receiving the amount.

We think that such a construction would be entirely artificial. As regards the authorities, it would appear that, so far as the case of *Patumma v. Idivi Beari*(1) is concerned, the learned Judges who decided the case did not wish that their decision should be used as a precedent for the general proposition which is now relied upon on behalf of the respondent. In *Adhar Chandra Dass v. Lal*

(1) (1903) 13 M.L.J., 265.

(2) (1898) I.L.R., 21 Mad., 417.

(3) (1897) I.L.R., 24 Cal., 778.

ABDUR
RAHIM AND
AYLING, JJ.
UNNI KOYA
v.
UMMA.

ABDUR
RAHIM AND
AYLING, JJ.

UNNI KOYA
v.
UMMA.

Mohun Das(1), there is no doubt a general dictum of MACLEAN, C.J., that attachment of a decree does not prevent the holder of that decree from executing it; but BANERJI, J., does not go so far, and he limits his judgment to another ground. MACLEAN, C.J., if we say so with respect, does not attempt to show how the words of section 273 are compatible with his construction but proceeds on what appears to us to be general grounds of expediency. The case of *Sami Pillai v. Krishnasami Chetti*(2) has no relevancy to the present question.

If the holder of the attached decree could not execute it, then any application made by him for that purpose would have been infructuous in the sense that it would not be competent for the Court to grant it and it would further follow that such an application if made would have been useless to save limitation (see *Manawar Hussain v. Jani Bijai Shankar*(3), *Purna Chandra Mandal v. Radha Nath Dass*(4), and *Gurupadāpā Basāpā v. Virbhadrāpā Irsangāpā*(5)).

We are therefore of opinion that the defendant, the attaching judgment-creditor, was the only person who could have executed the attached decree.

The judgment of SANKARAN NAIR, J., must be reversed and that of the Subordinate Judge restored. Each party will bear the costs of this appeal and before SANKARAN NAIR, J.

(1) (1897) I.L.R., 24 Cal., 778.

(3) (1905) I.L.R., 27 All., 619.

(2) (1898) I.L.R., 21 Mad., 417.

(4) (1906) I.L.R., 33 Cal., 867.

(5) (1883) I.L.R., 7 Bom., 459, at p. 484.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara
Ayyar.

MUTHIA CHETTY (FIRST DEFENDANT), APPELLANT

v.

SINNA VELLIAM CHETTY *alias* SINNA KARUPPAN
CHETTY (PLAINTIFF), RESPONDENT.*

1911.
February 2.

Transfer of Property Act (Act IV of 1882), sec. 55, cl. (4)—Vendor has no absolute title to interest in all cases irrespective of equities—Right of vendor in possession to interest.

Section 55, clause (4) of the Transfer of Property Act, does not give the vendor an absolute title to interest in all cases irrespective of equities. It only provides that the vendor shall have a lien for interest when it is payable.

Interest on the purchase money cannot be claimed so long as the vendor remains in possession of the property sold.

APPEAL against the decree of S. Ramasamy Aiyangar, Subordinate Judge of Madura (East), in Original Suit No. 62 of 1906.

S. Srinivasa Aiyangar for appellant.

K. Srinivasa Aiyangar for respondent.

The facts for the purpose of this case are fully set out in the judgment.

JUDGMENT.—In this appeal the first defendant is the appellant. The plaintiff sued to recover possession of a tope half of which was sold to him by the first defendant with the profits thereof from the 4th July 1903, the date of the conveyance (Exhibit C). The plaintiff's case is that as the defendant failed to execute a conveyance according to the agreement (Exhibit A), dated the 28th April, 1903, within the time fixed, the plaintiff demanded performance of the agreement and after some negotiations between the parties it was agreed that the plaintiff should pay the purchase money Rs. 2,600 before the Registrar of Assurances at the time of the registration of the conveyance after the defendant made an endorsement of discharge on a hundi for the amount which the plaintiff had previously executed in the defendant's favour and deposited with one Muthia Chetti. The plaintiff alleges that as the defendant refused to register the deed he applied for compulsory

* Appeal No. 72 of 1908.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
MUTHIA
CHETTY
v.
SINNA
VELLIAM
CHETTY.

registration of Exhibit C which had been previously executed by the defendant and handed over to the plaintiff. Before the Registrar the execution of Exhibit C was admitted by the defendant, but he stated that the sale could not be completed as the plaintiff had failed to pay the purchase money. The defendant contended in this suit that the understanding between the parties was that the property should not pass to the plaintiff and Exhibit C should not have any legal operation until the plaintiff paid the purchase money which he was bound to do at the Registration office before the registration of Exhibit C. He repudiated all obligation under Exhibit C and if he was held bound by it, he claimed payment of not only the sum of Rs. 2,600, the amount of the purchase money, but also interest on it at 12 per cent.; at the same time he disclaimed any liability for the payment to the plaintiff of the profits of the land until the payment of the purchase money.

The lower Court found that the defendant was not to blame in the matter of the non-payment of the purchase money and that the plaintiff if he was entitled to have payment endorsed on the hundi ought to have had it produced at the Registrar's office. It therefore refused to award to the plaintiff the profits claimed. With regard to the defendant's claim for interest the Subordinate Judge held that he was not entitled to it, as he remained in possession of the land and got the income accruing therefrom.

It is contended before us by the appellant that he is entitled to interest from the date of Exhibit C when according to him the ownership of the property vested in him. The respondent contended before us that according to the agreement between the parties the ownership had not passed to the plaintiff as he failed to pay the purchase money. We do not consider it necessary to go into this question as we agree with the learned vakil for the respondent that the appellant is not entitled to interest in this case. For the same reason we do not deal with the contention that the plaintiff is entitled to an unconditional decree for possession and that the lower Court was not justified in making its decree in the plaintiff's favour conditional on his paying the purchase money to the defendant; but we may point out that the case of *Velayutha Chetty v. Govindasawmi Naicken*(1) relied on in

(1) (1910) M.W.N., 637.

support of this position appears to be in conflict with *Subrahmaniya Ayyar v. Poovan*(1) which does not seem to have been brought to the notice of the learned Judges who decided *Velayutha Chetty v. Govindasawmi Naicken*(2). The claim for interest is based by the learned pleader for the appellant on section 55, clause 4 (b) of the Transfer of Property Act. That clause in our opinion does not give the vendor an absolute right to interest on the purchase money irrespective of the equities and circumstances of each case. The object of the clause is to give the vendor a lien on the property for unpaid purchase money and it declares that the lien will inure for the interest as well as for the principal of the purchase money, assuming that interest is payable. It does not enact that the vendor is entitled to interest in every case. The only case relied on by the appellant, *Leggott v. Metropolitan Railway Company*(3), does not support his contention. In that case, the agreement between the parties expressly provided for payment of interest by the vendee and of an occupation rent by the vendor till delivery of possession which was to take place on a certain day. The vendor was obliged to remain in possession against his will after the time fixed for delivery and he had to sue for specific performance. The question raised was whether the vendee was entitled to occupation rent till delivery of possession and no question was raised as to the vendor's right to interest on the purchase money, which was conceded, the parties having expressly provided for it. Sir W. M. JAMES, L.J., held that the vendee was not entitled to occupation rent, as the vendor continued in occupation of the premises "under a pressure arising from the purchaser's default." As observed in *Fry on Specific Performance*, page 591, fourth edition, it is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase money. The estate and purchase money are things mutually exclusive. "You cannot", said Knight Bruce, v.c., in a case arising out of the sale of some *sloh* lands in Chichester harbour, "have both money and mud." It is not alleged that there was any such express stipulation in this case. On the other hand, we

BENSON
AND
SUNDARA
AYYAR, JJ.
—
MUTHIA
CHETTY
v.
SINNA
VELLIAM
CHETTY.

(1) (1904) I.L.R., 27 Mad., 28. (2) (1910) M.W.N., 637.
(3) (1870) L.R., 5 Ch., App. Cases, 716.

BENSON
AND
SUNDARA
AYYAR, JJ.

MUTHIA
CHETTY
v.
SINNA
VELLIAM
CHETTY.

think that the parties must have intended that the payment of purchase money and the delivery of possession of the property should be carried out contemporaneously and that interest on the money would not be payable so long as the defendant was in possession of the land.

We confirm the lower Court's decision and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran Nair.

A. SUNDARARAMAYYA (PLAINTIFF), APPELLANT

v.

C. SITAMMA AND SEVEN OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Gift—Gift of immoveable property to daughter by father—Gift valid whether made at or after marriage.

There is a moral obligation on a Hindu father to make a gift to his daughter on the occasion of her marriage.

A gift by a father to his daughter of a small portion of ancestral immoveable property is binding on the undivided family, whether such gift is made at or after the daughter's marriage.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 18 of 1908, presented against the decree of T. Varadarajulu Nayudu, District Munsif of Tanuku, in Original Suit No. 56 of 1906.

The facts for the purpose of this case are fully set out in the judgment.

The Hon. the Advocate-General for appellant.

V. Ramesam for sixth to eighth respondents and P. Narayanamurti for first respondent.

JUDGMENT.—The plaintiff and his father were members of an undivided family. The father made a gift of about 8 acres of land, which formed ancestral property, to the first defendant, his daughter, in 1899. The father died in 1904 and the plaintiff sues to recover possession of the land given to the first defendant by his father, on the ground that the father was not competent to make

* Second Appeal No. 572 of 1909.

a gift of joint family property. The family owned not less than two hundred acres at the time of the gift.

The lower Appellate Court was of opinion that the plaintiff's father had intended at the time of her marriage to give some properties to the first defendant and as he was only carrying out that intention by making this gift, it is valid.

The marriage took place about forty years before the gift. There is no evidence that the father then had any intention to give any property to the first defendant. We are therefore unable to accept that finding. Is the gift then valid?

The Hindu Law texts fully support the proposition that it is competent to a father to make gifts of jewels or other ancestral moveable property to his daughter on her marriage. In a learned judgment it has been held by the High Court of Calcutta that a widow may make a valid gift of a reasonable portion of even the immoveable property of her husband to her daughter on the occasion of the performance of certain ceremonies which are usual when the wife on the attainment of puberty leaves her parental home for that of her husband—*Churaman Sahu v. Gopi Sahu*(1). That a gift of land to the son-in-law on the occasion of his marriage is an act warranted by the authorities and customary in this Presidency was held by the Madras High Court in *Ramasami Ayyar v. Vengidusami Ayyar*(2).

We see no reason to differ from these two decisions. The father or the widow is not bound to give any property. There may be no legal but only a moral obligation. It is also true that in the case before us the father did not make any gift and discharge that moral obligation at the time of marriage. But it is difficult to see why the moral obligation does not sustain a gift because it was not made to the daughter at the time of marriage but only some time later. The moral obligation of the plaintiff's father continued in force till it was discharged by the gift in 1899. This question was raised in the case of *Kudatamma v. Narasimha Charyulu*(3). There, after the death of the father, the brother made a gift of certain joint family property to his sister who was married during the life-time of the father, who gave her or her husband no property at the time

MUNRO AND
SANKARAN
NAIR, JJ.

SUNDARA-
RAMAYYA
v.
SITAMMA.

(1) (1910) I.L.R., 37 Cal., 1. (2) (1899) I.L.R., 22 Mad., 113.
(3) (1907) 17 M.L.J., 528.

MUNRO AND
SANKARAN
NAIR, JJ.
—
SUNDARA-
RAMAYYA
v.
SITAMMA.

of marriage. It was found there that the father had expressed no intention at any time of making any gift. He had made no promise either. It was held, however, that there was a strong moral obligation on the father to make a gift out of the joint family property on the occasion of the marriage either to the daughter or son-in-law as a provision for them and the gift which in the circumstances of the case was an eminently reasonable one was not in excess of the powers of the brother though he was not even the managing member at the time of the marriage. This case was followed in *Churaman Sahu v. Gopi Sahu*(1). It is directly in point and is consistent with principle. It was argued that the case of *Ramasami Ayyar v. Vengidusami Ayyar*(2) refers only to a gift to a son-in-law and there is no authority to support gifts to daughters. But the texts relating to gifts on marriage show that they are made to the bride, and regard being had to the fact that these gifts are intended as a provision for the married couple and are made by the father probably in lieu of her share of the family property, when by marriage she is leaving it for another family, it seems more appropriate that such gifts should be made in her name than that of her husband. In both the cases, *Kudatamma v. Narasimha Charyulu*(3) and *Churaman Sahu v. Gopi Sahu*(1), the gifts were made to the woman.

It was also contended that a father is entitled to give only jewels and other moveable property, and that the Hindu Law texts do not justify any gift of land on marriage occasions. In all the three cases we have referred to, the gifts were of immoveable property, and, so far as this Presidency is concerned, it is enough to say that a gift of land has been common for more than a century, and that the payment of money when paid is in lieu of land. See *Ramasami Ayyar v. Vengidusami Ayyar*(2). When the necessity of the gift is recognised, it seems unreasonable in these days to make its validity depend upon the nature of the property—upon the question whether it is moveable or immoveable. It is not suggested that the alienation in question is unreasonable as in *Kamakshi Ammal v. Chakrapany Chelttiar*(4). In the case of *Churaman Sahu v. Gopi Sahu*(1), the value of the property given away was more than a fourth and less than a third

(1) (1910) I.L.R., 37 Calo., 1.
(3) (1907) 17 M.L.J., 528.

(2) (1899) I.L.R., 22 Mad., 113.
(4) (1907) I.L.R., 30 Mad., 452.

of the father's property. Here, if the father had enforced a partition, he would have admittedly got not less than one hundred acres and it is impossible to say that a gift of eight acres is unreasonable.

The second appeal is dismissed with costs.

MUNRO AND
SANKARAN
NAIR, JJ.
—
SUNDARA-
RAMAYYA
v.
SITAMMA.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

K. SESHADRI AIYANGAR AND TWO OTHERS (DEFENDANTS),
APPELLANTS

1911.
April 7.

v.

RANGA BHATTAR (PLAINTIFF), RESPONDENT.*

Trustees of temple, powers of, to suspend hereditary Archakas—Suspension otherwise justifiable not bad for want of previous notice—Archaka, a servant, subject to the disciplinary power of trustees—Power of interim suspension incidental to trustee's power to inquire and dismiss for misconduct.

The position of the hereditary Archaka of a temple is that of a servant subject to the disciplinary power of the trustee.

The trustee of a temple has power to inquire into the conduct of such servants and dismiss them for misconduct. The right of interim suspension pending such inquiry is incidental to such power and no notice is required for an interim suspension pending inquiry.

Even if such notice is deemed necessary, the order of suspension will not be set aside, if misconduct is proved at the inquiry.

A hereditary Archaka can be dismissed by the trustee but only for good reasons which are liable to examination by a Court of Justice.

SECOND APPEAL against the decree of E. L. Thornton, the District Judge of Trichinopoly, in Appeal Suit No. 154 of 1908, presented against the decree of K. S. Kothandarama Ayyar, the District Munsif of Srirangam, in Original Suit No. 35 of 1907.

T. Rangachariar for appellants.

T. R. Ramachandra Ayyar and R. Rangaswami Aiyangar for respondent.

* Second Appeal No. 722 of 1909.

BENSON
AND
SUNDARA
Ayyar, JJ.

SESHADRI
AIYANGAR
v.
RANGA
BHATTAR.

The facts for the purpose of this report are sufficiently set out in the judgment.

JUDGMENT.—The plaintiff in this suit was an archaka in the great Vishnu temple of Srirangam. He instituted the suit against the managers of the temple for the cancellation of an order of suspension passed against him by the managers and to recover damages alleged to have been sustained by him and the value of perquisites which he would have earned if the suspension had not taken place. The only question for decision in this second appeal is whether the suspension which is found to have been otherwise justifiable in the circumstances was illegal on the ground that no notice was given to the plaintiff to show cause against it before the order was passed. The District Judge held it to be illegal on the authority of certain observations contained in *Seshadri Ayyengar v. Nataraja Ayyar*(1). It may be stated that at the enquiry held after the suspension the plaintiff was found by the managers to be guilty of the offences complained of against him and he was suspended from office for a term by way of punishment. These offences were that he committed theft and concealed property belonging to the idol, while engaged in the performance of his duties as archaka. We are of opinion that the decision of the District Judge is not correct and that the order of suspension cannot be held to be invalid on the mere ground of absence of notice. According to the view taken by this Court a hereditary archaka like the plaintiff could be dismissed by the trustee but only for good reasons which are liable to examination by a Court of Justice. See *Kristnasamy Tatacharry v. Gomatum Rungacharry*(2) and with regard to the dismissal of a trustee *Seshadri Ayyengar v. Nataraja Ayyar*(1), where the earlier cases are cited and examined. A different rule has no doubt been recently laid down in the Bombay High Court in *Bhavani Shankar v. Timmanna*(3) by JENKINS, C.J., and BATTY, J., where those learned Judges held that the *bonâ fide* dismissal of a maktesar by a devasthanam committee could not be reviewed by a civil Court. As the correctness of the decision in *Kristnasamy Tatacharry v. Gomatum Rungacharry*(2) has not been impugned before us, we accept it as sound for the purposes of this case. The plaintiff is entitled to hold the office

(1) (1898) I.L.R., 21 Mad., 179.

(2) (1868) 4 Mad. H.C.B., 68.

(3) (1906) I.L.R., 30 Bom., 508.

during his lifetime and on his death his heirs are entitled to succeed him. The order of suspension we have to deal with, is one not passed as a punishment on the plaintiff for an offence of which he was found guilty but an *ad interim* order preventing him from performing his office pending the investigation of the charges of misconduct made against him. The suspension complained of in *Seshadri Ayyengar v. Nataraja Ayyar*(1) was also a similar order. That case was, however, in other respects very different from the present one. The temple committee who passed the order in that case was a statutory body whose powers had to be determined by the interpretation of the provisions of Act XX of 1863. The question was whether the right of superintendence vested in them by that act included the right to suspend a trustee. There is certainly authority for the position that a statutory power of dismissal which, according to the decisions, a temple committee possesses does not necessarily include the right to suspend as a primitive measure. [See American Cyclopædia of Law and Procedure, article "Officers," vol. 29, page 1405 and *Barton v. Taylor*(2).] The decision of the majority of the Judges in that case proceeded largely on the ground that the result of a suspension might be to create a temporary vacancy in the office of trustee without provision for any one in whom the management of the temple could vest for the time being. The trustee was not a servant of the committee which possessed only the power of supervision over him, conferred on it by statute. The position of an archaka on the other hand, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the archaka must be subject to his disciplinary authority. It cannot be said that his position in relation to the trustee is similar to the position of the trustee in relation to the committee. We may observe that COLLINS, C.J., in holding that the power of suspension is the same as the power of dismissal did not apparently have regard to the difference, which in our opinion is important, between punitive suspension and suspension pending enquiry which is incidental to the exercise by the trustee of his right to enquire into a charge of misconduct against the archaka and to dismiss him in cases where serious misconduct is proved. *Seshadri Ayyengar*

BENSON
AND
SUNDARA
Ayyar, JJ.

SESHADRI
AIYANGAR
v.
RANGA
BHATTAR.

(1) (1898) I.L.R., 21 Mad., 179.

(2) (1886) L.R., 11 A.C., 197.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
SESHADRI
AIYANGAR
v.
RANGA
BHATTAR.

v. *Nataraja Ayyar*(1) cannot, therefore, be taken to govern this case. What then is the rule applicable to the case of a hereditary servant in a case like the present? In our opinion the sounder view is that no notice is required for an *ad interim* suspension pending enquiry into a complaint against a servant entitled to hold office during good behaviour or for life. The nature of the office may be such that instant suspension from the functions of the office would be necessary in the interests of the institution and to hold that the officer could not be suspended without notice and without explanation received from him might be seriously detrimental to the interests of the temple. In the present case, for instance, the charge against the plaintiff was that he was actually found removing coins strewed over the deity and concealing other property which was within the precincts of the shrine. Would it be reasonable to hold that a person regarding whom there were good grounds of suspicion of such conduct should be permitted to continue to officiate within the shrine and give him chances of repeating his offence until a formal enquiry into his conduct could be completed? We are of opinion that such a view would seriously jeopardise the interests of the institution. The suspension must be regarded as incidental to the right possessed by the trustee of enquiring into and punishing the archaka for any offence committed by him and may be fairly taken to come within the purview of his disciplinary jurisdiction over the servants of the temple. We have little doubt that temple trustees have generally exercised this right without question. In the American Cyclopædia of Law and Procedure, vol. 29, page 1405, it is observed: "But where the power of removal is limited to cause, the power to suspend, made use of as a disciplinary power pending charges, is regarded as included within the power of removal. Power to suspend may be exercised without notice to the person suspended, and the suspension, when made in the exercise of a legal power to suspend, is irreviewable by the Courts, and takes effect from the time that the order of suspension is issued and served."—See also Dillon on "Municipal Corporations," vol. I, page 332, section 247. We do not mean to lay down that in every case where the right to dismiss exists, the right of suspension must necessarily be incidental to it. Such might possibly not be the case where the right depends

(1) (1898) I.L.R., 21 Mad., 179.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
SESHADRI
AIYANGAR
v.
RANGA
BHATTAR.

upon the construction of a statute as for example where the right of Government to deal with a Municipal Councillor for misconduct was in question—*Vijiya Raghava v. Secretary of State for India*(1). The right may not exist also where the question depends upon the construction of the rules of a Corporation or a quasi-Corporation like a club. But in the case of servants subject to the discipline of a trustee we think these analogies should not be applied.

We are also of opinion that even if the right view should be that notice before suspension is essential in such a case, the Court should not set aside the order where after enquiry it has been found that it was proper and justifiable in the circumstances. This view is supported by the decision in *The King v. The Mayor, etc., of London* (2) where the Court of King's Bench in England refused to grant a mandamus against the Common Council of London to restore a clerk entitled to a life tenure in his office on the ground of want of notice before suspension. See also Halsbury's "Laws of England," vol. 8, page 330 (paragraph 743). Where an order against an officer by his superiors or by a corporate body is not liable to be reviewed by the Courts, it will no doubt be set aside on the ground of want of notice on a principle similar to that applicable to the decision of an arbitrator. But where the person affected by such an order has the right to appeal to the Courts against it and to have the propriety of the order examined by it and the Court has found the order justified it will be useless to set aside the order as it could be passed again immediately after giving notice. The Courts will not order a restoration where they can see there is good ground for removal and that the order to restore would be without practical and useful effect—Dillon on Municipal Corporations, section 254. Such a case would be similar to an order passed irregularly by an inferior Court which the superior Court finds to be a proper order notwithstanding the irregularity. In *Vijiya Raghava v. Secretary of State for India*(1) it was held that the dismissal of a municipal councillor for misconduct would not be set aside by the Court merely on the ground of want of notice, if the misconduct itself is proved before it. See *Vijiya Raghava v. Secretary of State for India*(1). Mr. Ramachandra Ayyar

(1) (1884) I.L.R., 7 Mad., 466 and at p. 473.
(2) (1787) 8 T.R., 209 (100 E.R., 96).

BENSON
AND
SUNDARA
AYYAR, JJ.
—
SESHADRI
AIYANGAR
v.
RANGA
BHATTAR.

contends that his client is entitled to the profits of his office during the time that he was under suspension without notice. This proposition is, in our opinion, quite untenable as the suspension was found to be proper at the subsequent enquiry. The correct rule in such cases is, we think, that laid down at page 1406 of vol. 29, American Cyclopædia, and in Dillon on Municipal Corporations, section 247, although if the order is set aside as improper he might be entitled to recover the profits. In the result we reverse the decision of the lower Appellate Court and restore that of the District Munsif with costs both here and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911.
April 20.

GOPALASAMI AYYAR (PLAINTIFF), APPELLANT

v.

SUBRAMANIA SASTRI (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), sched. I, art. 49—Limitation begins to run upon refusal to return property detained.

Where a person to whom moveable property is entrusted to be returned on the fulfilment of certain conditions, retains such property after such conditions are fulfilled, he will be deemed to be in possession on behalf of the person entitled, until he refuses delivery: mere silence on demand being made will not constitute such refusal. The period of limitation for a suit to recover the property thus detained will, under article 49 of schedule II of the Limitation Act, run from the date when the defendant refuses to deliver such property.

SECOND APPEAL against the decree of T. Swami Ayyar, the Subordinate Judge of Kumbakonam, in Appeal Suit No. 471 of 1909, presented against the decree of C. S. Venkataramana Row, District Munsif of Mannargudi, in Original Suit No. 40 of 1908.

S. Krishnamurti Ayyar for appellant.

S. Srinivasa Ayyar for respondent.

The facts are thus stated in the judgment of the Court of First Instance.

* Second Appeal No. 190 of 1910.

"Suit to recover from the defendant Rs. 425 with Rs. 135 for interest thereon as detailed below. The plaintiff was dealing in jewels till 1905. In January 1904 he, being in need of money, applied to the defendant for a loan. The defendant stated that if some jewels were given him, he would raise money on their pledge, whereupon plaintiff handed to him a diamond nose-screw worth Rs. 175 and a cut ruby thodu worth Rs. 250, and defendant then paid him Rs. 110 alleging that he raised the money on their pledge. In July 1904, one Gopala Sastri informed plaintiff that there was demand for the nose-screw, whereupon plaintiff paid Gopala Sastri Rs. 117, being the principal and interest due on the loan asking him to hand over the same to the defendant and to receive from him the nose-screw alone. Thus the debt was repaid. Defendant then informed plaintiff that Gopala Sastri took away both the jewels representing to him that plaintiff wanted him to deliver both of them, and he (defendant) promised to get back the jewels. At the end of July 1904, defendant gave a notice to Gopala Sastri and in reply, the latter denied having received any jewel. After this, defendant on being pressed by plaintiff, promised to make good their value to him if a slight remission be made, but eventually defendant sent him a notice in April 1906 alleging that nothing was due. Plaintiff has reason to believe that the jewels have been misappropriated by the defendant. He is therefore bound to make good their value with interest. The cause of action is stated to have arisen in April 1906 when defendant refused to return the jewels."

The defendant raised the plea of limitation which was overruled and decree given for plaintiff. On appeal the Subordinate Judge held the suit barred. The material portion of his judgment is as follows:—

"On hearing the arguments advanced before me on the question of limitation, I am convinced that the objection must prevail. The suit is not governed by article 145, as held by the District Munsif, for the reasons explained at pages 55 and 56 of *Ramakrishna Reddy v. Panaya Goundan* (1). It is governed by article 49. The authority which is followed in that case is the decision in *Subbakka v. Maruppakkala* (2) which applies

BENSON
AND
SUNDARA
AYYAR, JJ.
—
GOPALASAMI
AYYAR
v.
SUBRAMANIA
SASTRI.

(1) (1899) 9 M.L.J., 51.

(2) (1892) I.L.R., 15 Mad., 157.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
GOPALASAMI
AYYAR
v.
SUBRAMANIA
SASTRI.

on all fours to the present case. There the deposit of the title-deeds rendered its detention lawful in its origin, but after the debt to secure which they had been deposited was discharged, and the depositor made a demand and the title-deeds were not returned, their further detention was considered unlawful. It is not necessary that there should be an express refusal in such a case to determine the date when the cause of action begins. The ruling under reference distinctly lays down that the date of demand is the period from which it should be calculated. Article 49 states that in a suit to recover specific moveable property under wrongful detention the cause of action arises from the date when the detention becomes wrongful [see *Ramaswamy Ayyar v. Muthusamy Ayyar*(1)]. When the detention becomes wrongful in a case like this has been explained in the *Subbakka v. Maruppakkala*(2) case above cited in the terms already referred to. In this case the first demand was made in August 1904 as per Exhibit B, and the defendant did not return the jewels. His detention became wrongful from that time and plaintiff's cause of action also arose then. Calculated from that period the suit is clearly barred by limitation."

Plaintiff appealed.

JUDGMENT.—The plaintiff handed over the jewel to the defendant to procure a loan for the plaintiff. The defendant obtained the loan after the plaintiff had paid it off. The defendant who had got back the jewel retained possession of it. The plaintiff made a demand on defendant for the return of it by Exhibit B on 18th August, 1904. The defendant's refusal to return was on 29th April 1906 (Exhibit III) and the suit was instituted on 18th February, 1908, i.e., within three years after the defendant's refusal. The plaint does not allege that there was an agreement that the jewel should remain in deposit with the defendant after the repayment of the loan. Article 145 of the Indian Limitation Act, 1908, would therefore apparently be inapplicable. But the defendant must be taken to have held possession of the jewel on behalf of the plaintiff until the date of Exhibit III. We are therefore of opinion that under article 49 of the Indian Limitation Act, 1908, the suit is not barred by limitation. We are unable to agree with Mr. Srinivasa Ayyar's

(1) (1907) I.L.R., 30 Mad., 12. (2) (1892) I.L.R., 15 Mad., 157.

contention that mere silence on defendant's part when he received exhibit B would on this account amount to refusal (see *Gopal Chandra Bose v. Surendra Nath Dutt*(1)). We reverse the decree of the lower Appellate Court and restore that of the Munsif with costs both here and in the lower Appellate Court.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
GOPALASAMI
AYYAR
v.
SUBRAMANIA
SASTRI.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

S. M. S. SUBRAMANIAN CHETTY (PLAINTIFF),
APPELLANT,

v.

V. K. A. MUTHIA CHETTY (DEFENDANT),
RESPONDENT.*

1911.
April 21.

Contract to assign document, breach of—Damages awardable though no loss is proved—Measure of damages.

A, as the agent of B, took from D, a debtor of B, for the debt due, a promissory-note in favour of C. A undertook to get the note endorsed in favour of B by C. A having failed to do so for more than a year, B sued A claiming as damages the amount of the note with interest. At the settlement of issues A produced the promissory-note endorsed in favour of B.

Held, that B's suit was maintainable and that the endorsement after the suit was filed could not defeat B's claim. The contract to obtain the assignment not having been performed within a reasonable time the contract was broken and the right to sue accrued before the suit was brought. It could not be said that B had sustained no damage which he was entitled to recover as the note standing in the name of a third party prevented him from suing on the original obligation.

A promissory-note in consideration of a pre-existing debt is only a conditional payment; and if the note remains in the hands of the original payee when it is dishonoured, the original debt revives. If however the note had been endorsed to a third party a suit on the original debt would not be maintainable.

A debtor, *In re*, [(1908) L.R., 1 K.B., 344], referred to.

It is not necessary that B should prove that D had become insolvent or that the money could not be recovered if a suit had been brought against D.

The amount recoverable will be the amount for which the promissory-note was executed.

(1) (1908) 12 C.W.N., 1010 at p. 1014.

* Second Appeal No. 1187 of 1909.

BENSON
AND
SUNDARA
AIYAR, JJ.
—
SUBRAMANIAN
CHETTY
v.
MUTHIA
CHETTY.

SECOND APPEAL against the decree of F. W. Hamnett, the District Judge of Madura, in Appeal Suit No. 458 of 1908 presented against the decree of S. Ramaswami Iyengar, the Subordinate Judge of Madura (East), in Original Suit No. 115 of 1906.

The facts for the purpose of this case are sufficiently set out in the judgment.

C. V. Anantakrishna Aiyar for appellant.

K. Srinivasa Aiyangar for respondent.

JUDGMENT.—The defendant was plaintiff's agent at Jaffna carrying on business on plaintiff's behalf from March, 1900 to August, 1903. The plaintiff sues to recover three sums of money from the defendant. The first sum is claimed on account of a debt due to the plaintiff from a Jaffna debtor, from whom the defendant had taken a negotiable promissory-note for the amount due, in the name of a third party, one Subramanian Chetty, in August, 1903 before he left Ceylon on the termination of his agency. Subsequently when there was a mediation between the plaintiff and the defendant in connection with the settlement of the latter's accounts, it was agreed that the defendant should obtain possession of the promissory-note, get it duly endorsed in plaintiff's favour by the payee and deliver it over to the plaintiff. The defendant failed to carry out this covenant and the plaintiff therefore claimed to recover from him the amount of the note. At the time of the settlement of issues in the suit the defendant offered to hand over the note to the plaintiff. He subsequently got the necessary endorsement in plaintiff's favour made and produced the note in Court. The plaintiff refused to receive it and the Subordinate Judge held his refusal justified and passed a decree in his favour. On appeal the District Judge held that the plaintiff's claim for damages was premature and dismissed it. The ground of his judgment is that the plaintiff did not prove that he sustained any damage in consequence of the defendant's breach of his obligation under the covenant as he did not prove that the executant of the note had become insolvent or that he would be unable to realize his debt if he sued him. Now the defendant's contract which is evidenced by exhibit A, was made on 2nd May, 1905, and the suit was not instituted till 4th December, 1906. There can therefore be no doubt that the defendant had more than reasonable time within which to perform his obligation.

We are unable to uphold the view that the plaintiff has not sustained any damage which he is entitled to recover. The defendant's offer of performance of his obligation after the institution of the suit cannot affect the plaintiff's right of action if he had such right at the date of the suit. We are of opinion that he was entitled to claim from the defendant the amount for which the Jaffna debtor had executed the note exhibit III. He could not have maintained a suit against the debtor in the Ceylon Courts for the original debt for which exhibit III had been executed so long as it was outstanding in the hands of a third party. The principle on which such a suit cannot be allowed to be maintained has been clearly explained in "*A debtor, In re*" (1) by F. MOULTON, L.J. The learned Judge says "A parallel case where a bill is taken in payment of a debt, say for instance in payment for goods sold, exactly illustrates what is the effect of taking a bill. It is perfectly true that it is only a conditional payment. It is a payment if the bill is paid, and if it is in your hands when it becomes due and is dishonoured the debt revives. But if you have availed yourself of the character of the bill as a negotiable instrument, and have passed it out of your possession so that the right to proceed on that bill is vested in some one else and not in you at the date of the dishonour, the suspension of the debt continues just as much as if the bill was not overdue. A moment's consideration will show that the Courts would not be administering justice if they did not hold this to be the case, because otherwise you could sue for the price of the goods, while another man, through possession by your act of the negotiable instrument which had been given for the price, could make the debtor pay the amount over again When you have got it back you can wipe it out, and the debtor can no longer say, 'There is an outstanding bill which suspends your right.' " These observations are exactly applicable to this case. The defendant by taking the note in Subramanian's name and allowing it to remain in his possession and neglecting to hand it over to the plaintiff, put it out of the plaintiff's power to sue the debtor on the original consideration. See also *Ex parte Matthew* (2), *Davis v. Reilly* (3), Leake on 'Contracts,' page 633 (5th edition). We reverse the District Judge's decision with respect to this item.

BENSON
AND
SUNDARA
AIYAR, JJ.
—
SUBRAMANIAN
CHETTY
v.
MUTHIA
CHETTY.

(1) (1908) L.R., 1 K.B., 344 at p. 350. (2) (1884) L.R., 12 Q.B.D., 506.
(3) (1896) L.R., 1 Q.B., 1.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
SUBRAMANIAN
CHETTY
v.
MUTHIA
CHETTY.

The two other items of the plaintiff's claim are based on exhibits B and C executed by the defendant in the plaintiff's favour on settlements of the accounts between the parties on their respective dates. These documents have been held by the lower Courts to be promissory-notes and to be inadmissible in evidence as they are not stamped. The appellant does not dispute this finding but contends that he is entitled to recover the amount in the circumstances of the case on the settlements themselves, but we agree with the lower Courts that the obligation created by the settlements was intended to be evidenced only by exhibits B and C and that there was no completed obligation created by way of settlements except by those documents. The result is that the decree of the lower Appellate Court in so far as it modified the decree of the Subordinate Judge must be set aside and the latter decree restored. The parties will pay and receive proportionate costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

*Before Sir Charles Arnold White, Chief Justice, and
Mr. Justice Munro.*

MAHALAKSHMAMMAL (FOURTH DEFENDANT),
APPELLANT,

v.

SRIMAN MADHWA SIDDHANTA OONNAHINI NIDHI,
LIMITED, AND THREE OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 1—3), RESPONDENTS.*

*Mortgage, discharge of—Whether security kept alive for benefit of person
making payment.*

The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. If it is to the advantage of the person paying that the security should be kept alive, the law will presume that he intended to keep it alive.

Bhawani Koer v. Mathura Prasad, [(1908) 7 Calo. L.J., 1 at p. 31], referred to.

* Original Side Appeal No. 23 of 1910.

APPEAL from the judgment of SANKARAN NAIR, J., in Civil Suit No. 49 of 1909.

K. Srinivasa Aiyangar, E. Venkatarama Sarma and O. P. Ramaswami Aiyar for appellant.

C. Balarama Rao for first respondent.

The facts are fully stated in the judgment of SANKARAN NAIR, J. :—

“Suit to recover the amount due under a mortgage bond, dated 4th August, 1903. The fourth defendant claims that he has a prior charge on items Nos. 1 and 2 under his document of 1899.

“The second and third issues raise the question whether item No. 2 is included in the plaintiff's and fourth defendant's instruments of mortgage respectively. These issues were not argued before me. I find that item No. 2 was mortgaged to the plaintiff and also to the fourth defendant.

“The plaintiff was a mortgagee by deposit of title-deeds in 1895. He obtained a mortgage-decree in Civil Suit No. 261 of 1899 on the 13th February, 1900 (H). On the 11th August he took the plaint mortgage (O) for Rs. 2,700, of which Rs. 1,086-0-8 was the amount found due under the decree and the balance money then paid to the mortgagor. The fourth defendant took a mortgage of the equity of redemption in June 1899 stated in terms to be subject to the plaintiff's mortgage. He obtained a decree for sale (B) in Calendar Case No. 210 of 1900 on the 28th September, 1900. The sale was to be subject to the claim of the plaintiff as mortgaged and in his application for execution the plaintiff's rights were reserved (C). But in the proclamation of sale it was stated that the plaintiff's claim was extinguished by the subsequent mortgage, though the plaintiff contends otherwise. The property was sold and purchased by the fourth defendant himself. On these facts the question raised by the first issue. ‘Is the plaintiff entitled to priority in respect of his mortgage over the fourth defendant’ has to be determined. As to the amount paid to the mortgagor at the time of the execution of (O) in 1903, I fail to see how the plaintiff can claim the rights of a prior mortgagee.

“The next question is whether the new mortgage (O) operated to extinguish the plaintiff's rights under his prior mortgage and decree against the fourth defendant. In many decided cases, it is said that this depends upon the intention of the parties to the contract.

WHITE, C.J.,
AND
MUNRO, J.
—
MAHALAKSH-
MAMMAL
v.
SRIMAN
MADHWA
SIDDHANTA
OONNAHINI
NIDHI.

WHITE, C.J.,
AND
MUNRO, J.
—
MAHALAKSH-
MAMMAL
v.
SRIMAN
MADHWA
SIDDHANTA
OONNAHINI
NIDHI.

"The law imputes to a person an intention to act according to his interest. That presumption is made even when the mortgagee as in this case may not have been aware of the circumstances indicating what course of conduct would be for his interest. If so the statement in (O) made without the knowledge of the fourth defendant's encumbrance that the charge and the decree debt is extinguished is not material and has no greater effect than the provision in section 89 of the Transfer of Property Act that the security becomes extinguished on the passing of an order absolute for sale. In the later case it is quite clear that even after such order the security subsists as against a subsequent encumbrancer. An intention to give up his charge against a puisne encumbrancer cannot be imputed in the absence of any knowledge on his part of that encumbrance.

"The true principle is that stated in section 101 of the Transfer of Property Act though that section does not apply to this case. Where the continuance of a charge is for a person's benefit, then it is not extinguished in such cases; but it subsists. I am therefore of opinion that for the sum of Rs. 1,086-0-8 and interest thereon and proportionate costs the plaintiff has a first charge. The fourth defendant's mortgage comes next in order of priority. The plaintiff's claim for the balance under (O) with interest and proportionate costs comes next. I do not see why the amount of Rs. 400 should be deducted out of the sum of Rs. 1,086-0-8. The plaintiff is therefore entitled to the usual decree for sale as first mortgagee and if the property is sold, the sale-proceeds will be distributed in the above order.

"If the property is not sold, but the fourth defendant pays the first charge to the plaintiff, then the fourth defendant will be declared to have a charge for the amount he has paid in addition to his own mortgage debt and it will be open to the plaintiff as mortgagee for the balance under (O) to redeem him. Against the representatives of the mortgagor as such there will be a decree for the recovery of the amount with interest at 6 per cent. and costs out of the assets of the deceased. As between the plaintiff and the fourth defendant each party will pay and receive proportionate costs."

Fourth defendant appealed under clause (15) of the Letters Patent.

(The CHIEF JUSTICE).—The facts are stated in the judgment of SANKARAN NAIR, J. The learned Judge held that the plaintiff (I refer to the plaintiff Company as the plaintiff) could not claim priority as regards the sum of Rs. 1,600 odd, the amount of the further advance made by the plaintiff at the time of the execution of the mortgage of August 1903 (exhibit O). This finding was not contested by the plaintiff (the respondent). The question for us is was the learned Judge right in holding that as regards the sum of Rs. 1,080 odd, the amount remaining due from the mortgagor to the plaintiff at the time of the mortgage of August, 1903, the plaintiff had priority over the fourth defendant; in other words, did the mortgage of August, 1903 operate so as to extinguish the plaintiff's mortgage rights under the decree obtained by him in February, 1900 (exhibit H) in the suit brought on his equitable mortgage of 1895? In September, 1900, *i.e.*, after the plaintiff had got his decree on his equitable mortgage of 1895, the fourth defendant obtained a decree for sale (exhibit B) on a mortgage of the equity of redemption of the property in question which had been executed in June, 1899. This decree was executed by the fourth defendant who bought the property in execution. The sale was subject to the plaintiff's rights as mortgagee and in the fourth defendant's application for execution the plaintiff's rights were reserved.

There can be no question that before exhibit O was executed the plaintiff had priority over the fourth defendant as regards any balance remaining due to him under his equitable mortgage of 1895. Is exhibit O to be construed as a surrender of his mortgage rights as against the puisne encumbrancer (the fourth defendant) so as to convert the fourth defendant into a first mortgagee by virtue of his mortgage of June, 1899, and relegate the plaintiff to the position of second mortgagee?

A document, dated March 11, 1902 (exhibit I), is in evidence which is a notice given to the plaintiff on behalf of the fourth defendant of the decree obtained by the fourth defendant in September, 1900 (exhibit B). The case for the plaintiff was that no notice which was legally binding on the plaintiff had been received. It does not seem to me to be very material whether the notice was received or not. If the plaintiff had no knowledge of an encumbrance it is difficult to say that he intended to give that encumbrance priority over an earlier subsisting encumbrance in his

WHITE, C.J.,
AND
MUNRO, J.
—
MAHALAKSH-
MAMMAL
v.
SRIMAN
MADHWA
SIDDHANTA
OONNAHINI
NIDHI.

WHITE, C.J., AND MUNRO, J. MAHALAKSH-MAMMAL v. SRIMAN MADHWA SIDDHANTA OONNAHINI NIDHI.

favour. On the other hand, the fact that notice had been received (if it was received) would render it unlikely that the plaintiff should have been content to surrender his mortgage rights as against the fourth defendant without consideration, or for a consideration which seems inadequate. The terms of the mortgage of 1903 may have been, as between the mortgagor and the plaintiff, more advantageous than those of the equitable mortgage of 1895. But this would not have compensated the plaintiff for the loss of his mortgage rights as against the fourth defendant. What the plaintiff purports to give up (by exhibit O) as against his mortgagor is all his rights under his mortgage decree of February, 1900 (exhibit H) and under an agreement. The agreement is recited in the instrument as an agreement, which had been sanctioned by the Court, under which the sale under the plaintiff's decree was postponed on certain terms. The instrument contains a covenant by the mortgagor that he has power to convey free from encumbrances. With regard to this question of intention I think the view taken by SANKARAN NAIR, J., was right. The plaintiff gave up his rights to sue on his mortgage of 1895 but he did not give up his rights as a secured creditor in respect of the unpaid balance which would of course include the right to set up his security as against his puisne encumbrancer. I do not think we ought to hold, as we were asked by the appellant to hold that the rights of the parties were the same as if the mortgagor had paid off the plaintiff. It may be that, as suggested on behalf of the respondent the form in which exhibit O was drawn was intended to meet the decision in *Venkata Subramania Ayyar v. Koran Kannan Ahmod*(1). However this may be, the effect of exhibit O was unquestionably to put an end to the plaintiff's subsisting judgment debt against his mortgagor, but the fact that the debt was extinguished leaves open the question whether the security was put an end to. The law is thus stated in *Bhawani Koer v. Mathura Prasad*(2). "As laid down by their Lordships of the Judicial Committee in *Gokuldoss Gopaldoss v. Rambux Seochand*(3), *Mohesh Lal v. Mohunt Bawan Das*(4), *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*(5) and by the House of Lords in *Thorne v. Cann*(6) and *Liquidation Estates*

(1) (1903) I.L.R., 26 Mad., 19.

(3) (1884) L.R., 11 I.A., 126.

(5) (1902) L.R., 29 I.A., 9.

(2) (1908) 7 Calc. L.J., 1 at p. 31.

(4) (1883) L.R., 10 I.A., 62.

(6) (1895) A.C., 11.

Purchase Company v. Willoughby (1), the question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. The principle upon which this doctrine is founded, is that, although ordinarily when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, where, from the intentions of the party, either express or implied, it is for his benefit that they should be so kept; it depends upon the intention, actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage. Consequently where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption." This principle was recognised in *re Jennings's Estate*(2) where it was held that where an equitable mortgagee by deposit of title-deeds took a bond to secure the same debt and entered up judgment thereon he did not thereby forfeit his security or defeat its priority. I may also refer to the judgment of this Court in *Purnamal Chund v. Venkata Subbarayalu*(3) and the judgment of the Calcutta High Court in *Gopal Chunder Sreemany v. Herembo Chunder Holdar*(4). See too Ghose on 'Mortgages,' vol. I, p. 475, edition 4.

The decision in *Ramakrishna Sadashiv v. Chothmal*(5) is no doubt in point and is an authority in the appellant's favour. But in the case before us I am not prepared to hold that it was the intention of the plaintiff to give up his mortgage rights as against the fourth defendant. The judgment in *Commercial Bank of Tasmania v. Jones*(6) no doubt lays down the general principle that a party may be entitled to the benefit of a contract which operates as a novation though he was no party to the contract. This however does not affect the rule that the law imputes to a person the intention to act according to his interest.

(1) (1898) A.C., 321.

(3) (1897) I.L.R., 20 Mad., 486.

(5) (1899) I.L.R., 13 Bom., 348.

(2) (1885) 15 Irish Reports, 277.

(4) (1889) I.L.R., 16 Calc., 523.

(6) (1893) A.C., 313.

WHITE, C.J., AND MUNRO, J. MAHALAKSH-MAMMAL v. SRIMAN MADHWA SIDDHANTA OONNAHINI NIDHI.

WHITE, C.J.,
AND
MUNRO, J.
—
MAHALAKSH-
MAMMAL
v.
SRIMAN
MADHWA
SIDDHANTA
OONNAHINI
NIDHI.

I think the learned Judge was wrong in holding that the plaintiff was entitled to redeem the fourth defendant in respect of the fresh advance made under exhibit O since this advance was made after the fourth defendant had obtained his decree for sale. Except as regards this the appeal is dismissed. Plaintiff and fourth defendant will pay and receive proportionate costs. Three months from this date will be allowed for redemption.

MUNRO, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911.
September
20.

K. P. KALLIANI AMMA (SECOND DEFENDANT), APPELLANT,

v.

K. P. GOVINDA MENON AND TWENTY-TWO OTHERS
(PLAINTIFF AND DEFENDANTS NOS. 1 AND 3 TO 23), RESPONDENTS.*

K. P. KARUNAKARA MENON (FIRST DEFENDANT), APPELLANT,

v.

K. P. GOVINDA MENON AND TWENTY-TWO OTHERS
(PLAINTIFFS AND DEFENDANTS NOS. 2—23), RESPONDENTS.*

Marumakattayam law—Gift to a woman and her children enures for their benefit with the incidents of tarwad property—Members subsequently born acquire an interest by birth—Karnavan, power of to alienate—Right of one member of Tarwad to erect buildings in tarwad property—Compensation, claim to, for demolition of building—Malabar Tenants' Improvement Act I of (1900), s. 5.

A gift to a woman governed by the Marumakattayam Law and her children enures in favour of the donee and her children with the incidents of tarwad property. As members of a tarwad acquire an interest in the tarwad property by birth, children born subsequent to the gift will acquire an interest in such property.

A karnavan cannot make an alienation for such a long period as sixty years in the absence of special necessity or special benefit. Such an alienation cannot be held good for a portion of the term, i.e., the usual period of twelve years, as it will have the effect of creating a new contract between the parties.

Although in the case of ordinary co-parceneries, the courts will not order the demolition of buildings erected by one co-parcener in joint property, unless some substantial injury is shown, the case will be different in the case of tarwad property. The members of the tarwad have not, like the members of

* Second Appeals Nos. 525 and 526 of 1910.

an ordinary co-parcenary, the right of compulsory partition and it would not be fair or equitable to compel the karnavan to purchase the building erected by a junior member or to deprive the karnavan of possession of part of the property for ever. The junior member cannot therefore on general principles resist recovery or demolition of the building.

A lessee, whose lease is disputed and who is put on inquiry as to the real title of the lessor, before constructing buildings on the land leased cannot after constructing buildings on a wrong view of the lessor's title, claim on eviction compensation for the buildings as a *bonâ fide* tenant under section 5 of the Malabar Tenants' Improvements Act.

SECOND APPEAL against the decree of A. V. Anantharama Ayyar, the Subordinate Judge of South Malabar at Calicut, in Appeal Suits Nos. 313 and 406 of 1909, respectively, presented against the decree of P. S. Sessa Ayyar, the Principal District Munsif of Calicut, in Original Suit No. 213 of 1908.

T. R. Ramachandra Ayyar for appellants.

C. V. Ananthakrishna Ayyar for first respondent.

The facts for the purpose of this case are fully set out in the judgment.

JUDGMENT.—These two second appeals arise out of a suit by the plaintiff to recover a paramba demised by the second defendant in favour of the first defendant. The parties to the suit are all members of a Marumakattayam tarwad. The plaintiff, first defendant, and defendants Nos. 3 to 6 are the children of the second defendant who is the senior lady of the tarwad. The other defendants are the children and grand-children of the second defendant's children. The plaintiff is the senior male member and according to the Marumakattayam law the karnavan of the tarwad. Until about a year before the date of the suit the second defendant was in actual management of the tarwad. But in April 1907 she gave up the management to the plaintiff under exhibit I. Prior to her doing so she executed in April 1906 a kanom-deed, exhibit T, demising the paramba in question in favour of a junior son, the first defendant, for a period of sixty years. The demise purports to be made expressly for the purpose of enabling the first defendant to erect a house on the property and entitles him to receive at the expiry of the kanom the value of the house as well as compensation for other improvements that he might make. The plaintiff impeaches the demise as an improvident transaction which the second defendant as manager has no power to make, and claims to recover the premises and to

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

have the building erected by the first defendant pulled down and removed, and states that he is not bound to pay any compensation for the building. The first and second defendants contend that the property in suit belongs to the second defendant alone, that the other members of the tarwad have no title to it during her life, and that the demise by her in favour of the first defendant is valid. The first defendant claims in case of eviction to be entitled to compensation for the value of the building. The property in dispute together with a large number of other items of property was the subject of a deed of gift executed in 1857 in favour of the second defendant's mother, Ammu Amma, by her husband, one K. Govinda Menon, and it is on the construction of this instrument that the first and second defendants contend that the second defendant is exclusively entitled to the property during her life-time. Both the lower Courts have negatived this contention and held that the properties included in the deed of gift, exhibit A, were taken by Ammu Amma to be held and enjoyed by her with the incidents of tarwad property under the Marumakkattayam law, and that consequently they belonged to Ammu Amma and her children and the issue of her female children, with the result that the plaintiff and the defendants, other than the second defendant, were equally entitled to them along with the second defendant. The lower Courts have further held that the demise in question was beyond the powers of disposition of the second defendant, and that the first defendant was bound to surrender the property. The District Munsif was of opinion however that the first defendant was entitled to receive compensation for the building. But the Subordinate Judge held he was not. It would appear that the plaintiff, after the institution of the suit, applied for an *ad interim* injunction restraining the first defendant from erecting the building. But the application was not granted as the first defendant had already made some advance in the building of the house. The second defendant has preferred Second Appeal No. 525 and the first defendant Second Appeal No. 526 against the judgment of the Subordinate Judge.

The contentions urged by the learned vakil for the appellants are—

(i) That on the correct construction of exhibit A the second defendant alone has a present title to the property in dispute;

(ii) That even if the property belongs to the whole tarwad the demise is not invalid;

(iii) That even if the demise should be held not binding on the tarwad on the ground that it is for the excessive period of sixty years, it should not be altogether set aside, but upheld for the period for which a karnavan could lawfully grant a demise of the character of exhibit T;

(iv) That, if the demise be not upheld at all, the second defendant, being a co-owner of the property with the plaintiff, did not act wrongfully in constructing the building, and the plaintiff is not entitled to have it demolished, and that first defendant is entitled to compensation on eviction.

These contentions will now be dealt with *seriatim*.

With respect to the first contention relating to the construction of exhibit A, the material terms of the instrument which, as already stated, is a deed of gift executed by K. Govinda Menon in favour of Ammu Amma are:—"I have now given properties consisting among others of land, paramba, and house, particulars whereof are given below In all, properties to the value of Rs. 10,000 are as aforesaid given to you as yours, and I have delivered the documents, etc., relating thereto, and now in my possession. Therefore I have resolved that, acting in accordance with the terms and conditions thereof, you and your santhanams should be in enjoyment for ever, along with me at the said Puthiaveetu as long as I live and *in proprium* thereafter." The document recites that the donor had already given some properties to the donee and her santhanams permanently and for ever. The provision entitling the donor to joint enjoyment with the donee during his life-time may for the purposes of this case be neglected. At the time of the gift Ammu Amma had several children besides the second defendant, but the second defendant is the only survivor of them at present. The gift may be briefly stated to be one to Ammu Amma and her children. The appellant's contention is that it should be regarded as a gift, jointly to Ammu Amma and her children alive at the date of the gift, and that on the death of the other donees it survived to the second defendant exclusively. This contention is absolutely untenable in the face of the cases already decided by this Court. It is unnecessary to refer to precedents earlier than the Full Bench ruling in *Kunhacha Umma v. Kutti Mammi*

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
KALLIANI
AMMA
v.
GOVINDA
MENON.

Hajee(1). In that case a gift to a Muhammadan woman (governed by the Marumakattayam law) and her children was held by the full Court, concurring with BEST and SUBRAMANIA AYYAR, JJ., the referring Judges, to enure in favour of the donee and her children with the incidents of tarwad property, and that the property could not be attached for the debts of one of the children as he had no disposable interest in it. The decision was no doubt based on the principle enunciated by the Judicial Committee of the Privy Council in *Sreemulky Soorjeemoney Dossee v. Denobundoo Mullick*(2) and *Mahomed Shumsool v. Shewukram*(3) that in the construction of instruments the law applicable to the parties and the mode in which the property is generally held by them should be taken into account in determining the intention of the donor and the estate which the donee would take under the instrument. According to the Marumakattayam law, property is held by the members of a tarwad jointly without any right to compulsory partition and without any individual right of disposal so long as the tarwad continues to exist. It follows therefore that the property gifted must be taken to belong to Ammu Amma and her children with the above-mentioned incidents of tarwad property. As according to the Marumakattayam system all members born in the family acquire by birth a right in the tarwad property, the issue of Ammu Amma's female children became entitled on their birth to the property equally with Ammu Amma and her children existing at the date of exhibit A. This point was expressly decided in the subsequent case of *Katankandi Koma v. Siva Sankaran*(4). In *Pattatheruvath Pathumma v. Mannamkunnnyil Abdulla Haji*(5), the learned CHIEF JUSTICE and WALLIS, J., and in *Kunhamina v. Kunhambi*(6), MILLER and MUNRO, JJ., held that none of the persons taking under such an instrument has any right of disposal of his or her interest contrary to the Marumakattayam law. In *Abdula v. Chekkootti*(7) and in *Parvathi Kattilammah v. Ramachandra Ejaman*(8) it was held that those who take under such an instrument of gift would be regarded as a tarwad for the purpose of management of the property and that the senior male member would have the right of management as in the case of ordinary tarwad property. Mr. Ramachandra

(1) (1893) I.L.R., 16 Mad., 201.

(3) (1874) L.R., 2 I.A., 7.

(5) (1908) I.L.R., 31 Mad., 228.

(7) (1910) 20 M.L.J., 368.

(2) (1856) 6 M.I.A., 526.

(4) (1910) 20 M.L.J., 184.

(6) (1909) I.L.R., 32 Mad., 315.

(8) (1910) 1 M.W.N., 124.

Ayyar relies on certain observations contained in the judgment of MOORE and SANKARAN NAIR, JJ., in *Koroth Amman Kutti v. Perungottil Appu Nambiar*(1) in support of his contention that so long as the second defendant should live the other members of the tarwad would have no right to the property in question. In that case the gift was made to a woman and her children. A decree was obtained by a creditor against the assets of one of the children who had died prior to the suit. The decree-holder sought to attach his interest in the gifted property, but the learned Judges held that the share of the deceased passed by survivorship to the other children and that the creditor had nothing to proceed against. The case therefore affirms the joint holding by all the donees and the absence of any separate interest in any of them capable of being disposed of by him. The observation relied on by the appellants is this. "The District Judge has held that Unichira and her sons formed a separate tarwad by reason of their having obtained these properties on gift and therefore Koran Nambiar had no interest available for attachment and sale. We are unable to agree with the District Judge in his view that when a female and some of or all her children obtain any property from their father or karnavan as in this case, they are thereby constituted into a tarwad by themselves, the senior member among them having the ordinary rights of the karnavan of a Malabar tarwad so far as the other members in his branch are concerned." According to this dictum, it is contended that, as the female donee and her children are not constituted into a tarwad the children of the donee do not acquire an interest in the property under exhibit A, and that consequently Ammu Amma's issue could not acquire a right in the property in dispute during her life-time. This construction of the dictum cannot be upheld. It must be noted that the decision in *Kunhacha Umma v. Kutti Mammi Hajee*(2) was expressly affirmed and adopted by the learned Judges. The proposition that the property gifted was taken by the donees with the incidents of tarwad property, was not departed from, and one of such incidents, viz., that the holders of the property have no right of disposal and that the property goes by survivorship to the remaining holders, on the death of any, was affirmed and acted on. No question arose in the case whether the members of the tarwad

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

(1) (1906) I.L.R., 29 Mad., 322.

(2) (1893) I.L.R., 16 Mad., 201.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

born after the date of gift would take an interest in it by birth or not. What then is the meaning of the statement "that the donees could not be taken to be constituted into a tarwad by themselves, the senior donee having the ordinary rights of a karnavan of a Malabar tarwad so far as the other members in his branch are concerned"? It can only be taken to mean that they do not become a tarwad so as to give the karnavan all the ordinary rights of a karnavan over the members of his tarwad. It is only in this sense that this statement could have been understood in *Pattathuruvath Pathumma v. Mannamkunnayil Abdulla Haji*(1) and *Kunhamina v. Kunhambi*(2), which quote it with approval. The question—what rights a karnavan of such special property held by a branch of a tarwad would have with respect to the other members of the branch—has not been elucidated by the learned Judges who decided *Koroth Amman Kutti v. Perungottil Appu Nambiar*(3). But there can be no doubt that he cannot have all the rights of a karnavan over the junior members of his tarwad. He is not their guardian and has no right of supervision or control over them. He is not responsible for their protection, education or maintenance. His right is confined to the management of the special property owned by him and the other members of his branch. His title to manage them has been upheld as already mentioned in *Abdulla v. Chekkootti*(4) and *Parvathi Kattilammah v. Ramachandra Ejaman*(5). What his duties are with respect to the disposal of the income of the property and what the rights of the other members of the branch are to receive a portion of the income are points that have not yet been judicially decided, and it is not necessary to make any further remarks on them as they do not arise for decision in this case. In Appeal No. 122 of 1905 it was held that, where a member of a branch of a tarwad holding special property has certain properties standing in his own name, there is no presumption that such property belongs to the branch and not to himself, although it has often been held that there is a presumption that all the properties standing in the name of any member of a tarwad belong to the tarwad and that the onus lies on him to rebut such presumption. Whatever may be the scope

(1) (1908) I.L.R., 31 Mad., 228.

(3) (1906) I.L.R., 29 Mad., 322.

(2) (1909) I.L.R., 32 Mad., 315.

(4) (1910) 20 M.L.J., 368.

(5) (1910) 1 M.W.N., 124.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

of the dictum that the manager of special property belonging to a branch has not got all the powers of a karnavan with respect to the other members of the branch, it certainly does not mean that the members who are born in the branch would not acquire a right in the property by birth. This contention must therefore fail.

The argument that the demise is not valid, even if the property belongs to the whole tarwad, must also fail. We cannot attach weight to the consideration that the demise is in favour of one of the junior members inasmuch as, if it be valid in his favour, it must be equally so in favour of any person to whom he may alienate. That a karnavan ordinarily cannot make an alienation for such a long period as sixty years cannot be doubted, and no special necessity or special benefit such as would justify it has been shewn.

It is also impossible to uphold on the facts in this case the contention that the demise may be maintained for a portion of the term granted by it, namely the usual period of twelve years. To do so would necessitate the making of a new contract for the parties different from what they intended. Then it provides for the payment of the value of improvement at the expiration of sixty years, the term fixed. It would not be reasonable to compel the first defendant to wait for forty-eight years for payment after his surrender or to require the plaintiff to make payment long before the time fixed in the document.

The next contention is that the first defendant being a co-owner, his action in constructing the building was not wrongful, that the tarwad would sustain no injury by it, and that the plaintiff is therefore entitled to the demolition of the building. We may say at once that it is not shewn that the tarwad would sustain no injury at all by the first defendant's action. It is pointed out on the other hand that the tarwad is growing in numbers, and that the demised aramba which is adjacent to the tarwad house may be required for the construction of an additional residence for the members of the family. It is no doubt true that as between co-owners generally one of them who takes possession of a portion of the common holding cannot be said to be necessarily a wrong-doer, and that this would be so even if he raised substantial buildings thereon. The principles applicable in such cases have been laid down in numerous decisions, which have been collated in the elaborate judgment of MOOKERJEE, J., in *Ananda Chandra Sen v. Parbati Nath*

ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

Sen(1). The learned Judge states the principle thus: "Now, as was pointed out in *Mohesh Narain v. Naubut Pathak*(2), although in the case of immoveable property, jointly owned, each co-owner is in theory interested in every infinitesimal portion of the subject-matter, and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with the others, yet it does not follow, that one joint-owner is entitled to maintain an action in ejectment against a co-owner, merely on the ground that the latter has taken exclusive possession of a portion of the joint property. Such exclusive occupation may, under certain circumstances be perfectly legitimate and may not constitute an invasion of the rights of the co-sharer; if there is no assertion of a hostile title, no exclusion or ouster, an action in ejectment cannot lie. I am not prepared to hold, that an exclusive appropriation by one co-owner of a part of the joint land to his own use by the erection of a permanent structure, is necessarily evidence of an ouster; it may well be, that the lands cannot be enjoyed, as each of the joint-owners is entitled to enjoy them, without making extensive and permanent improvements. Why should the co-owner, willing to bear the expense of such improvements, be compelled to desist from making them and be required to leave his lands in a condition in which he cannot use them advantageously to himself, for he is necessarily so compelled and required, if his improvements are to be treated as hostile acts subjecting him to the penalties visited upon a co-owner found guilty of an ouster of his companion in interest; [Freeman on Co-tenancy and Partition, section 240]. The rule is well settled that the plaintiff, who complains of the act of his co-owner cannot obtain a decree for demolition of buildings or for joint possession, unless he can establish that he has sustained some substantial injury by reason of the act of which he complains." This principle however is not applicable to the case of the members of a Marumakkatayam tarwad. The property of such a tarwad is no doubt vested in all the members of the family as owners. But it must be remembered that none of the members has a right to any particular portion of the property. On the other hand, the karnavan of the tarwad is entitled to manage the whole estate and to

(1) (1906) 4 O.L.J., 198.

(2) (1905) 1 C.L.J., 437.

be in possession thereof for that purpose. His possession no doubt is the possession of all in law so far as its effect on the title of the members is concerned, but nevertheless no junior member is entitled to take actual possession of any portion of the property without the consent of the karnavan. In *Kannan v. Tenju*(1) the karnavan's right to actual possession as against an anantharavan has been recognised by this Court. Any other rule would indeed destroy one of the most important rights of the karnavan and make it impossible for him to carry on the management of the estate. It would therefore be impossible to hold that any anantharavan might take possession of any particular portion of the family estate he might choose and erect buildings on it and continue in occupation of it. Mr. Ramachandra Aiyar relies in support of his contention on *Nocury Lall Chuckerbutty v. Brindaban Chunder Chuckerbutty*(2). In that case one of the co-parceners of a Dayabhaga family in Bengal had occupied and constructed a building on a piece of land belonging to the family and the question was whether the plaintiff in the suit, another member (it does not appear that he was the manager) was entitled to have the building demolished. It was found that the plaintiff took no steps to prevent the erection of the building when it was actually going on. McDONELL and FIELD, JJ., held that in the circumstances of the case demolition should not be ordered as he had failed to show that injury had accrued to him by reason of the erection of the building. The decision is not applicable to the present case. In so far as it proceeds on any estoppel of the plaintiff in consequence of his conduct, it is inapplicable, as the plaintiff objected to the demise in this case and the defendant according to the Courts below at one time agreed to give up the demise but subsequently withdrew his consent and proceeded to build on it. The right of a co-parcener of a Dayabhaga family is materially different from that of a junior member of a Marumakkatayam tarwad in the matter of dealing with the joint estate of the family. The former may enforce a partition at any time he pleases. The latter can do so under no circumstances. Where a co-parcener entitled to partition erects a building on family land without the consent of the manager, the Court may hesitate to direct its demolition, seeing that at a partition between the parties the Court could in the exercise of its

ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

(1) (1882) I.L.R., 5 Mad., 1.

(2) (1832) I.L.R., 3 Cal., 708.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

KALLIANI
AMMA
v.
GOVINDA
MENON.

equitable jurisdiction allot the land built on to the co-parcener who made the building and thus avoid the hardship caused by the demolition. But in a Marumakkatayam family no such course is possible, as the Court has no power to decree a partition, and it would not be fair or equitable either to compel the karnavan to purchase the building constructed by a junior member or to deprive the karnavan of possession of part of the family property for ever. The conclusion must therefore be that the defendant cannot resist recovery or demolition of the building on general principles.

It remains to deal with the claim to compensation for improvements which is made on the ground that the first defendant honestly believed that the second defendant was the sole owner of the property during her life-time and was therefore entitled to grant a demise, and that he believed himself *bonâ fide* to be a lessee, thus entitling him to compensation under section 5 of the Malabar Tenants Improvements Act. Mr. Anantakrishna Aiyar for the respondent contends that no claim to compensation was made on the ground put forward in this Court. We find on reference to the written statement that the right to compensation was not rested on any particular ground, and issue No. IV relating to the question was framed in general terms. The District Munsif dealt very briefly with the question observing that "even a trespasser when he makes improvements *bonâ fide* is entitled to the value of the improvements." The Subordinate Judge observes: "He is not a trespasser believing in good faith that he had power to make improvements. He is not a tenant within the meaning of the Improvements Act." We cannot say that the first defendant is disentitled either by the terms of his written statement or by the frame of the issue to contend that he *bonâ fide* believed that the second defendant was the absolute owner of the property entitled to deal with it at her pleasure. We were at first inclined to direct an inquiry with reference to this point, but we find it would be useless to do so, as it is perfectly clear on the facts appearing on the record that the plaintiff objected to the kanom before the defendant constructed the building and the latter at one time actually agreed to give it up but subsequently refused to do so. It is not therefore open to him now to say that he made the building *bonâ fide* under the impression that the land belonged absolutely to his mother. He was certainly put upon enquiry as

'transferable' "is a word of the widest import and includes every means by which the property may be passed from one person to another", we are not concerned in constructing a statute like the Opium Act with the mere form of the transaction but with the substance of it. The form may be more material in interpreting instruments under other statutes such as the Stamp Act or the Registration Act. Our view is in accordance with that laid down in *Marudamuthu Pillai v. Rangaswami Mooppan*(1). Reliance was placed for the appellant on *Gauri Shankar v. Mumtaz Ali Khan*(2) where OLDFIELD AND SPANKEE, JJ., were apparently of opinion that the co-partnership in that case did not involve a transfer. The decision itself however did not proceed on that ground. The case was one relating to a ferry and according to OLDFIELD, J., the statute relied on in the case, did not prohibit a partnership. If the learned Judges intended to lay down the broad proposition that no partnership can amount to a transfer, we are, with all deference, unable to agree with them. The continued effect of sections 4, 5 and 9 of the Opium Act, is to make a transfer in violation of the provisions of clause 26 in the license (Exhibit I) illegal and the plaintiff could acquire no rights enforceable in law under exhibit A.

It is contended that the form of the license used for exhibit A was not sanctioned by the Revenue Board and that the transfer is therefore not illegal. This objection was not raised in the District Court and the absence of sanction is not proved.

In the result we dismiss the appeal with costs of the first, third and fourth respondents.

BENSON
AND
SUNDARA
AYYAR, JJ.

NALAIN
PADMA-
NABHAN
v.
SAIT BADRI-
NADH SARDA.

(1) (1901) I.L.R., 24 Mad., 401.

(2) (1879) I.L.R., 2 All., 411.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim.

ARIMUTHU CHETTY (PETITIONER),

v.

VYAPURIPANDARAM (RESPONDENT).*

1910.
December 8.
1911.
March 24.

Civil Procedure Code, Act XIV of 1882, s. 295, and ss. 63, 73 of the Code (Act V of 1908)—Realisation of assets—Transfer of decree not necessary for rateable distribution of sale-proceeds of attached property—Application for rateable distribution may be made though copy of decree not received.

Where the same property is attached in execution of decrees by two Courts of different grades, the decree-holder in the inferior Court who had attached prior to realisation, may apply to the superior Court for rateable distribution of the sale-proceeds of the attached property and the transfer of his decree for execution to the superior Court is not necessary to enable him to do so.

Assets are realised not when the deposit is made by the purchaser, but only when the balance of the purchase money is paid into Court.

An application for execution to the superior Court is an essential pre-requisite of a general claim to rateable distribution. Where the lower Court has ordered the transfer of the decree for execution to the superior Court, an application after such order to the superior Court before it has received a copy of the decree would be sufficient to satisfy the requirements of section 73, and to entitle the applicant to rateable distribution.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of W. B. Ayling, District Judge of Salem, in Regular Execution Petition No. 62 of 1909 (in Original Suit No. 87 of 1908) on the file of the Court of the Principal District Munsif of Salem, dated 20th December 1909.

The facts for the purpose of this report are set out in the judgment.

T. M. Krishnaswami Ayyar for petitioner.

This petition coming on for hearing on Thursday, the 8th day of December 1910, before the Hon. Mr. Justice KRISHNASWAMI AYYAR, the Court delivered the following

JUDGMENT.—The petitioner is the decree-holder in Original Suit No. 87 of 1908 on the file of the Principal District Munsif of

Salem. Property of the judgment-debtors was attached in execution of another decree against them in Original Suit No. 35 of 1906 on the file of the District Court of Salem. It was sold by the District Court in execution of that decree. The purchaser made the deposit on the 17th September 1909 and the balance of the purchase money was paid into Court on the 29th September 1909. It must be taken having regard to the decision in *Ramanathan Chettiar v. Subramania Sastri*(1), that the assets were realised only on the 29th of September 1909 within the meaning of section 295 of the old Code. There is no doubt a change in the corresponding provision of section 73 of the present Code. But so far as the question before me is concerned the change in the language is immaterial. The purchase money becomes the asset of the judgment-debtor only when the balance is received and not when the deposit is made. I am bound to hold on the authority of *Muttalagiri v. Muttayyar*(2), that an application to the District Court before the receipt of assets for execution is an essential pre-requisite of a general claim to rateable distribution. The District Judge seems to have assumed that, although an application was made apparently before the time when the assets were received, the petitioner had no right to make the application before the Munsif's decree was received by the District Court under the latter's order of transfer. It is true that the decree was only received by the District Court on the 30th of September. It appears to me that this does not preclude the petitioner's claim to rateable distribution, if he had attached the same property in execution of the Munsif's decree. If the property had been attached in execution of that decree as well as in execution of the decree of the District Court, the Court which should realise the property was the District Court under section 63. That section provides "the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade." Supposing such a realisation is made by the higher Court, there can be no need for a transfer of the decree of the lower Court to the higher, to entitle the decree-holder of the lower Court, who has also attached the property realised, to share in the proceeds of such realisation. It seems to me that the right to share in the

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VYAPURI-
PANDARAM.

* Civil Revision Petition No. 76 of 1910.

(1) (1903) I.L.R., 28 Mad., 179.

(2) (1888) I.L.R., 6 Mad., 357.

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VYAPURI-
PANDARAM.

proceeds realised by sale of attached property is independent of a transfer of the decree for execution to the higher Court. Section 38 no doubt provides that a decree may be executed by the Court which passed it or by the Court to which it is sent for execution. I am inclined to think that there is no other Court which can execute a decree and that section 38 is exhaustive. What the decree-holder of the Munsif's Court is entitled to, when there is no transfer of his decree to the District Court, is not a general execution of his decree by the District Court or rateable distribution in all the assets of the judgment-debtor received by the District Court, but only to share by virtue of his attachment in the proceeds of the attached property realised. To a relief so limited, it appears to me to be not essential that the decree of the Munsif's Court should have been previously transferred to the District Court, though this view runs counter to the observation in *Muttalagiri v. Muttayyar*(1) as to the need of transfer. I do not feel bound by that case on this point, though it is followed in *Nimbaji Tulsiram v. Vadia Venkati*(2) as the absence of an application to the higher Court was sufficient to sustain the decision. I prefer the reasoning of SALE, J., in *Clark v. Alexander*(3) to the extent at least of holding that a transfer of the decree was unnecessary to entitle the petitioner to rateable distribution in the sale-proceeds of the attached property.

It was also argued that the transfer was complete when the order was made by the Munsif, and that the receipt of the decree by the District Court on the next day had nothing to do with the petitioner's right to apply to the District Court for rateable distribution on the 29th itself. The petitioner has put in an affidavit in which he says that the transfer was made by the Munsif first on the forenoon of the 29th, that he then applied to the District Court for execution, and that the assets were received thereafter. I am not at all sure, having regard to the provisions of Rules 6, 7 and 8 of Order 21, that the Court to which a decree is sent for execution is authorized to execute it before a copy of the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder

(1) (1883) I.L.R., 6 Mad., 357.

(2) (1892) I.L.R., 16 Bom., 683.

(3) (1894) I.L.R., 21 Cal., 200 at p. 203.

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VYAPURI-
PANDARAM.

to apply to the Court to which the decree is sent for execution. In this view the application to the District Court after the Munsif's order sending the decree to the District Court would be perfectly competent and sufficient to satisfy the requirements of section 73. Although the Munsif's order, the application to the District Court and the payment of the balance of the sale-proceeds into Court were all on the same day, the last two were the acts of parties and the Court is bound to ascertain the order in which they were done [*Clarke v. Bradlaugh*(1)]. I must ask the District Judge to return findings on the following points—

Was the property sold by the District Court in Original Suit No. 35 of 1906 attached under the Munsif's decree in Original Suit No. 87 of 1908 before realisation?

Were the Munsif's order of the transfer of the decree in Original Suit No. 87 of 1908 and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase money into Court on the 29th September, 1909?

Eight weeks will be allowed for findings and one week for objections.

In compliance with the above order, the District Judge submitted the following

FINDING.—I am asked for findings.

Was the property sold by the District Court in Original Suit No. 35 of 1906 attached under the Munsif's decree in Original Suit No. 87 of 1908 before realisation?

Were the Munsif's order of transfer of the decree in Original Suit No. 87 of 1908 and the petitioner's application to the District Court to execute it prior in point of time to the payment of the purchase money into Court on 29th September, 1909?

The attachment under the Munsif's decree in Original Suit No. 87 of 1908 was on 28th September, 1909.

The realisation of the money under the District Court sale was on 29th September 1909. The property was therefore attached before realisation.

The Munsif's order transferring the decree to this Court, the petitioner's application in this Court for rateable distribution and the payment of the money all took place on 29th September, 1909.

(1) (1881) 8 Q.B.D., 63.

ABDUR
RAHIM, J.
—
ARIMUTHU
CHETTY
v.
VIYAPURI-
PANDARAM.

As regards the time of these three events, the petitioner who alone appears examines himself and swears that the Munsif passed orders at 11 A.M. He filed his application at 12 and the money was paid at 4 P.M., or so. That is, the receipt was produced in this Court after that. This evidence stands alone and is probable and I accept it.

I therefore find that the Munsif's order of transfer and the application to this Court were prior in point of time to the payment of the money into Court.

This petition coming on for final hearing after the return of the finding of the lower Court, the Court delivered the following

JUDGMENT.—Accepting the finding I allow this petition and revise the order of the District Judge. The petitioner will be entitled to share in the rateable distribution of the money in deposit in the District Court. The petitioner will have costs in this and the lower Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1911.
April 20.

SREEPADA VENKATARAMANNA alias VENKATA SURYA
NARAYANA MOORTHY, MINOR BY NEXT FRIEND, PULLELA
SRI RAMA SASTRI (PLAINTIFF), APPELLANT,

v.

SREEPADA RAMALAKSHMAMMA (DEFENDANT),
RESPONDENT.*

Specific Relief Act (I of 1877), s. 42—Fabrication of authority to adopt by widow does not justify suit by reversioner for declaring the authority not genuine.

The mere fabrication of an authority to adopt by the widow will not entitle the reversioner to claim a declaration under section 42 of the Specific Relief Act that the authority is not genuine.

SECOND APPEAL against the decree of T. Gopalakrishna Pillai, the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 46 of

* Second Appeal No. 10 of 1910.

to her real title; and if he put a wrong construction on the deed of gift, on which the plea of *bonâ fides* is sought to be maintained, he must take the consequence. We must dismiss both the Second Appeals with costs.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
KALLIANI
AMMA
v.
GOVINDA
MENON.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

PONNUSAMI NADAR AND TEN OTHERS (JUDGMENT-
DEBTORS, APPELLANTS,

v.

LETCHMANAN CHETTIAR AND THREE OTHERS (DECREE-
HOLDERS), RESPONDENTS.*

1911.
September
21.

Civil Procedure Code (Act V of 1908), Order XXI, Rule 2—Assignment of decree for benefit of judgment-debtor—Execution by assignee—Civil Procedure Code (Act XIV of 1882), s. 258.

A held a decree against C. It was arranged between C and B that B should advance the decree amount to C as a loan and that an assignment of the decree should be obtained in the name of B for the benefit of C. The decree was accordingly assigned to B who applied for execution. C set up the above arrangement as a bar to execution. B contended that such arrangement amounted to an adjustment of the decree and not being certified to the Court it could not be given effect to under Order XXI, Rule 2 of the Civil Procedure Code. Held (their Lordships differing):

Per ABDUR RAHIM, J.—That the arrangement amounted to an adjustment of the decree and not being certified, could not be pleaded as a bar to execution. The prohibition contained in Order XXI, Rule 2, is not confined to cases where the parties to the transaction adjusting the decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor.

Per SUNDARA AYYAR, J.—Order XXI, Rule 2, does not make uncertified adjustment invalid but merely forbids effect being given to such an adjustment when it is set up as a defence to the execution of a decree by one entitled to do so. The section will not disentitle the judgment-debtor to prove facts which will show that the applicant is not the real transferee, even if the facts he relies on show that the decree has been adjusted.

The prohibition regarding an uncertified adjustment will not apply where the adjustment is made with a third party.

* Appeal against Order No. 239 of 1909.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

APPEAL against the order of V. K. Desikachari, Subordinate Judge of Negapatam in Execution Petition No. 33 of 1909 in Original Suit No. 18 of 1904.

PONNUSAMI
NADAR
v.

S. Srinivasa Ayyangar and K. V. Krishnaswami Ayyar for appellants.

LETCHMANAN
CHETTIAR.

K. Srinivasa Ayyangar and T. Rangaramanujachariar for respondents.

The facts for the purpose of this case sufficiently appear in the judgments.

ABDUR RAHIM, J.—This appeal raises a question of some nicety with reference to the construction of Order XXI, Rule 2, corresponding to section 258 of the old Civil Procedure Code, 1882.

The first respondent applied for execution of a decree which he alleged had been assigned to his father by the original decree-holders. Objection is made to execution by the second appellant, who is one of the judgment-debtors, on the ground that the assignment which is in the name of the first respondent's father was made under an arrangement by which the first respondent's father was to be a mere benamidar for the judgment-debtors. On the date of the assignment the amount due under the decree was Rs. 60,000, and the allegation of the judgment-debtors is that Rs. 15,000 out of this sum was actually paid to the original decree-holders, and that an assignment of the decree was obtained in the name of the first respondent's father on the understanding that he was to hold it for the appellants' benefit, the appellants agreeing to pay the balance of Rs. 45,000 due under the decree.

The Subordinate Judge has held, by way of demurrer, that accepting the facts as stated by the appellants, he as the Court executing the decree is precluded from giving effect to the arrangement inasmuch as admittedly it was not certified as required by Order XXI, Rule 2. He regards the arrangement as an adjustment or satisfaction of the decree.

It is now contended by the learned vakil who appeared for the appellants that here there are two questions. The first is whether the assignee has a good title. The next question, which would only arise if the first question is answered in the affirmative, is whether there has been any adjustment or satisfaction within the meaning of the law. It seems to me that on the allegations of the appellants themselves it is impossible to accept this contention

as sound. The first respondent is *prima facie* an assignee of the decree, and he applies to the Court to give effect to his assignment by executing the decree. The judgment-debtors' objection is that the assignment was intended for their own benefit and that the first respondent was a mere benamidar.

The question, therefore, which this court has to decide is whether any effect can be given to this objection of the appellants. Suppose the judgment-debtors had obtained the assignment in their own name from the decree-holders, it could hardly be contended that such assignment would not amount to an adjustment or satisfaction of the decree. And I did not understand Mr. S. Srinivasa Ayyangar to contend that it would not. If such assignment was not certified as required by Order XXI, Rule 2, it seems to me clear that the judgment-debtors could not rely upon the assignment as a bar to execution. Should the assignment be any the less an adjustment or satisfaction of the decree because it was obtained in the name of another person as a mere benamidar or *alias* for the judgment-debtors themselves? Speaking for myself, I am unable to see any reason why it should be. The language of Rule 2, paragraph 3, is "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree." If the arrangement alleged amounts to an adjustment,—and there can be no doubt that it does—the language of the section is imperative that the court executing the decree shall not recognize it at all. But it is contended that the adjustment referred to in the Code is what purports to be an adjustment and not what has the effect of adjustment by the operation of law. There is no reason why the meaning of the word "adjustment" should be limited in that way when there is nothing in the section itself to suggest such a limitation. It is not the name by which a party calls a transaction but its legal character with which the court is concerned. The very object of the arrangement relied on by the appellant was that the decree should be assigned to him, only that it should stand in the name of another person as a sort of *alias* for him. It is not the case of the appellants, and their learned pleader does not seek to make out any such case before us, that the object of the arrangement was that the decree should be capable of execution by the assignee under certain circumstances, and that it should not be capable of execution under other circumstances, and that

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.

PONNUSAMI
NADAR
v.

LETCHMANAN
CHETTIAR.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

the decree cannot be executed because such latter circumstances have happened. The appellants' case is that by the arrangement in question the title to the decree passed to them and not to the first respondent.

It was also argued on the strength of the words "shall not be recognized as a payment or adjustment of the decree" which occurred in section 258 of the old Code that the adjustment in this case may be given effect to as showing want of title in the plaintiffs. The words "as a payment or adjustment of the decree" have been omitted from the new Code, and it is the new Code that governs the application for execution in this case, which was made on the 2nd February 1909. It is therefore not necessary to decide whether the words "as a payment or adjustment of the decree" could in any way help the appellants. But I may say that, having regard to the nature of the transaction alleged in the case, I do not see how, if it cannot be pleaded as an adjustment, it can be relied on as showing want of title in the plaintiffs. The language of the legislature is that an adjustment which is not certified shall not be recognized by the court executing the decree and I find no reason for limiting the prohibition to cases where the decree is sought to be executed by the decree-holder himself. Reliance has been placed on the decision of Sir S. SUBRAMANIA AYYAR, J., in *Rama Ayyan v. Srinivasa Patter*(1). The judgment in that case is really based on the finding of fraud committed by the transferee of the decree against the judgment-debtor. But the learned Judge goes on to observe, with reference to certain suggestions that occurred to him as regards the scope of section 258 of the Code of 1882, it is only when the parties to the transaction adjusting a decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor that the provisions of section 258 would apply. In other words, they would not apply if the transferee of the decree seeks to execute it and the adjustment sought to be pleaded is one which was entered into before the date of the transfer. With all respect to the learned Judge, I am unable to accept this *dictum* as a correct exposition of section 258. 'Decree-holder' includes the transferee of the decree by virtue of section 2 and there is certainly nothing in section 258 itself which would support the conclusion of the

(1) (1896) I.L.R., 19 Mad., 280,

learned Judge. Reference has also been made to a *dictum* of TURNER, C.J., in *Agra Bank v. Cripps*(1). But the general observation of the learned Chief Justice that, if the Bank, which in that case obtained an assignment of the decree against one Pinsent, was merely a benami holder, the decree could not be executed, is made without any reference to section 258 of the Civil Procedure Code. There is a similar *dictum* in *Monmohan Karmokar v. Dwarka Nath Karmokar*(2). There would be force in such observations where the assignee of a decree is a benamidar for a person other than the judgment-debtor, for in such a case no question under Order XXI, Rule 2, would arise.

I would confirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

SUNDARA AYYAR, J.—This appeal is against an order of the Subordinate Court of Negapatam disallowing certain objections raised by the judgment-debtors in (Original Suit No. 18 of 1904, to an application for execution made by the transferee of the decree-holders' rights. The decree was one passed for sale on a hypothecation bond. The applicant's father, Ramanathan Chettiar, obtained a transfer-deed from the original decree-holders on the 11th of April, 1908. The objections raised were:—(1) that the real transferees under the deed of assignment relied on by the petitioner were the judgment-debtors themselves, and that the applicant was not therefore entitled to execute the decree; (2) that out of Rs. 60,000, the total amount due under the decree on the 10th of April, 1908, as per settlement of accounts between the original decree-holders and the judgment-debtors, the latter paid Rs. 15,000 to the former, and the applicant was not therefore entitled to execution, at any rate for the amount so paid; and (3) that the execution application was bad for non-joinder of certain other persons who, according to the judgment-debtors, were jointly entitled with the applicant in case the latter should be the real transferee of the decree. The Subordinate Judge overruled these contentions. The argument at the hearing of the appeal was confined to the first contention. It was decided by the Subordinate Judge on demurrer without taking evidence. It is therefore necessary to set out the defendants' case on the point precisely. The second defendant alleged that after payment of Rs. 15,000 out of

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

(1) (1885) I.L.R., 8 Mad., 455 at p. 463.

(2) (1910) 12 C.L.J., 312.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

the Rs. 60,000 due to the original decree-holders Rs. 45,000 remained to be paid and that the applicant's father, Ramanathan Chetti, agreed to advance that amount as a loan for the judgment-debtors. He then goes on to say: "the said assignment-deed was got up in the name of the said Ramanathan Chettiar (that is, the applicant's father) *benami* for the benefit of myself and others (the others being his co-judgment-debtors). The said Ramanathan Chettiar conducted no proceedings whatever on the said assignment-deed during his life-time. In these circumstances, the petition presented by the petitioner is unsustainable, according to law.

"And there was an arrangement to the effect that for the amount of Rs. 45,000 undertaken to be paid by the said Ramanathan Chettiar as abovementioned and for a further sum of Rs. 5,000 required by me and others, in all for Rs. 50,000, I and the others should execute a mortgage by conditional sale or a usufructuary mortgage-deed in the name of the said Ramanathan Chettiar in respect of the properties mentioned in the decree in question, that the same should be got back after paying the said amount in five years' time, and that the said Ramanathan Chettiar should get executed the documents in respect of the same within some time at his convenience."

The agreement between Ramanathan Chettiar and the judgment-debtors was admitted before the Subordinate Judge to have taken place before the 10th of April, 1908. The deed of assignment of the decree was executed subsequently on the 11th of April. The Subordinate Judge was of opinion that, on the construction of the judgment-debtors' plea set out above, Ramanathan Chettiar was not a mere benamidar for the judgment-debtors. He says: "The assignment of the decree might have been intended to be a sort of help to the defendants, but it can in no sense be regarded as obtained for their benefit. It was admittedly not obtained with the funds of the defendants. Defendants had entered into an agreement with the assignee for effecting a sale or mortgage in satisfaction of the decree." This finding of the Subordinate Judge cannot be supported. The fact that the amount due to the original decree-holders was paid by the assignee may be good reason for holding that he was not a mere benamidar, but this is not a necessary inference from the fact of his paying the consideration which passed to those transferors. The question, for whose benefit the decree was in fact transferred, is one of the intention of

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

the parties. The judgment-debtors' case is that it was intended for their benefit and that the sum of Rs. 45,000 which the assignee paid to the transferors was advanced merely as a loan for the judgment-debtors' benefit. Such an arrangement is not impossible. It is not impossible that the applicant's name was entered as the nominal transferee on account of his advancing the mortgage amount as a loan for the judgment-debtors, and that it was intended that the right to the decree should at once vest in the judgment-debtors and not in the transferee. The applicant's plea that a mortgage-deed was to be executed by him as security for the loan would, if true, probalilise his contention. The Subordinate Judge was wrong in holding that in the circumstances the right to the decree must necessarily vest in the applicant. He was bound to decide the question after taking the evidence which the parties wished to adduce. But the respondents' vakil, Mr. K. Srinivasa Ayyangar, contends that the plea that the appellants were themselves the real transferees of the decree cannot be given effect to, as the plea really amounts to this, that the decree debt due to the original decree-holders was discharged by an adjustment made by means of the stipulations with the first respondent's father referred to above, and that, as the adjustment was never certified to the court, section 258 of the Civil Procedure Code (Act XIV of 1882) would operate as a bar to the plea. Mr. S. Srinivasa Ayyangar, the learned vakil for the appellants, urges in reply, firstly, that section 258 has no application to a contention that the first respondent obtained no title under the transfer relied on by him and that he is not therefore the decree-holder and is not entitled to apply for execution, the section being applicable only where it is contended that the decree is not any further executable at all without any question as to whether the applicant is the decree-holder or not, and, secondly, that the section applies only where the contract of adjustment is made with the decree-holder and not with a third person, and that in this case the adjustment was made with the first respondent's father, Ramanathan Chettiar, before the transfer to him. I am of opinion that the respondents' contention is not entitled to succeed. I am not sure that the case has not to be decided under the provisions of Act XIV of 1882, as the adjustment and the transfer-deed were in April, 1908, and the time within which the judgment-debtors could have obtained a compulsory record of the adjustment also elapsed in 1908, before the new Civil Procedure

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

Code (Act V of 1908) came into operation. There is, however, in my opinion no material difference between the last clause of section 258 of Act XIV of 1882 and the same clause in Order XXI, Rule 2, of Act V of 1908. In the former Act the clause ran as follows:—“Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any court executing the decree.” In Act V of 1908 the clause runs in these terms: “a payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree.” It will be noticed that in the later Act the words “as a payment or adjustment of the decree” have been omitted. But I am of opinion that the meaning of both clauses is the same, the word ‘recognized’ itself implying ‘as an adjustment.’ Now the question to be decided is whether the clause prevents the appellants from proving that the assignment was not intended for the benefit of the first respondent, because the fact showing that it was not for his benefit would also show that the original decree-holders’ decree was adjusted by means of the agreement between the appellants and the first respondent. In my opinion, the clause does not prevent it. The object of the clause, as I understand it, is to provide that everything preventing the execution of the decree should be made a record of the court so as to give the court complete control over its decree and the execution thereof. It is not a part of its object to restrain the transfer of decrees by the decree-holder to any one he chooses. It does not make payments or adjustments which are not recorded or certified to the court invalid, and the court will give effect to such adjustments in proceedings other than the execution of the decree. Neither is the clause a rule of evidence forbidding the proof of uncertified adjustments. It merely forbids effect being given to such adjustments when they are set up as a defence to the execution of the decree by one entitled to do so. As put by Mr. S. Srinivasa Ayyangar, the question of adjustment comes in only after a person who claims to execute the decree as a transferee has proved his right under the transfer. It is only then that the question arises whether the decree of which he has obtained a transfer is a subsisting one capable of execution. When the applicant’s right as transferee is denied by the judgment-debtor he has to bear the onus of proving it. Assuming that the fact that he has a deed of transfer purporting to be in his

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

favour would be *prima facie* proof of his right and that the judgment-debtor would then have to rebut the presumption, I can see nothing in the section to disentitle him to prove any facts which would show that the applicant is not the transferee but some one else, and this would be equally so even if the facts he relies on, must necessarily show that the decree has been adjusted, for he does not adduce them to prove that there is no subsisting decree, but to disprove the allegation that the applicant is the transferee. A provision of law like the one in question should not be stretched beyond its express words and beyond the object which the words were intended to serve. As a matter of fact, however, I do not think that in strictness it is necessary for the appellant for rebutting the plaintiff’s case to go further than to allege that the plaintiff is not the real transferee. If he goes further to say that he is himself the real transferee, it is only to induce the court to believe his assertion that the transferee is not the applicant.

The appellants’ second argument also has, in my opinion, much force. As already observed, the adjustment in this case, except with regard to the payment of Rs. 15,000, was made with the first respondent’s father and before the 10th of April, 1908, and also before he obtained the transfer-deed on the 11th April. He was not then the decree-holder. Section 258 has no application to an adjustment made with a third party. The judgment-debtors could not compel such a person to certify the adjustment to the court. This was the view held by SUBRAMANIA AYYAR, J., in *Rama Ayyan v. Srinivasa Patter*(1) the facts of which case were similar to those in the present one. The circumstance that the first respondent afterwards obtained a transfer of the decree cannot alter the position and would not, I believe, entitle the appellants to compel the first respondent to certify an adjustment which the former did not enter into with the latter as a decree-holder. As put by SUBRAMANIA AYYAR, J., the transfer “can have no retrospective effect so as to deprive the judgment-debtor of his right to establish that the transferee is by the anterior contract precluded from releasing the judgment-debtor.” It may perhaps be contended that the anterior contract is no reason for depriving the assignee of his rights under his transfer, that he is entitled to all

(1) (1896) I.L.R., 19 Mad., 230.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

the rights of his transferor and therefore has the right to execute the decree which has not been satisfied on the record of the court. But to such an argument it may well be replied that, after entering into the contract, he should not be allowed to set up any right in opposition to that contract by virtue of an assignment, and, to my mind, the argument would apply *a fortiori* where the contract is that he should obtain a transfer for the benefit of the judgment-debtor himself.

The appellants relied on another case, *Agra Bank v. Cripps*(1). In that case there is a *dictum* of TURNER, C.J., that if a decree has been adjusted a subsequent transferee could not be allowed to execute it although the discharge has not been certified to the court. It might be alleged in opposition to this *dictum* that in consequence of the adjustment not being certified, the transferor had still an executable right in the decree, and that the transferee was entitled to exercise that right. The answer to this argument no doubt would be that notwithstanding the non-certifying of the adjustment the discharge is valid in law and that the transferee would obtain nothing under the transfer. I do not feel, however, quite satisfied that this answer is conclusive, and I therefore hesitate to rest my judgment on this ground. The view propounded by TURNER, C.J., was, however, taken also by the Calcutta High Court in *Monmohan Karmokar v. Dwarka Nath Karmokar*(2). In that case a mortgagor-judgment-debtor, against whom a decree for sale had been passed, obtained in order to defraud a subsequent purchaser of the equity of redemption a transfer of the rights of the mortgagee-decree-holder whose debts he discharged in the name of a third person who sought to bring the property to sale in execution. The purchaser of the equity of redemption resisted the sale. MOOKERJEE, J., delivering the judgment of the court observes: "in our opinion, he is not entitled to proceed with execution, under such circumstances, because as laid down in section 233 of the Civil Procedure Code of 1882, now section 49 of the Code of 1908, the transferee of the decree holds the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder. In substance, the assignee stands in no better position than the assignor, as regards equities existing between the original

(1) (1885) I.L.R., 8 Mad., 455.

(2) (1910) 12 C.L.J., 312 at p. 321.

parties to the judgment, and takes it subject to all the equities and defences, subsisting at the time of the assignment, which the judgment-debtor could have asserted against it in the hands of the judgment-creditor, notwithstanding the assignee may have had no notice thereof. Hence, as well put in the case of *Sutton v. Sutton*(1), if the assignor has no title to the judgment, he can convey none to the assignee, and, where a judgment, once paid, though not satisfied of record, is assigned by the judgment-creditor, the assignee takes it subject to all defences and equities which were available to the judgment-debtor against the assignor—*Black on Judgments*, Vol. II, section 953; *Freeman on Judgments*, Vol. II, section 427." The further observations made by the learned Judge are applicable to the present case: "If again it is proved that the decree has not been formally satisfied, but that the assignee is a benamidar for the judgment-debtor, he ought not to be allowed to execute the decree as against the representative of the latter, because the assignment in substance operates merely as a satisfaction of the decree." In that case no doubt the assignee and the judgment-debtor acted in collusion against a third party, namely, the purchaser of the equity of redemption. But that fact in my opinion makes no difference with respect to the principle involved in the judgment, namely, that an assignment which operates as a satisfaction of the decree may be relied on to prove that the assignee obtained no valid title under his assignment. It will be noticed that in the Calcutta case the plea that the applicant for execution was not the real assignee was raised by one who claimed to be the representative of the judgment-debtor. In my view, the judgment-debtor is equally entitled to raise the same contention against the transferor in this case.

On the whole my conclusion is that the Subordinate Judge's decision that section 258 is a bar to the defendant's plea of no title in the first respondent is untenable. I would therefore reverse the order of the lower court and remand the application to the lower court for disposal according to law.

Under section 98, Civil Procedure Code, 1908, the appeal is dismissed with costs.

(1) (1886) 26 S.C., 33.

ABDUR
RAHIM AND
SUNDARA
AYYAR, JJ.
—
PONNUSAMI
NADAR
v.
LETCHMANAN
CHETTIAR.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

1911
September 27

P. ABDUL KHADIR (SECOND COUNTER-PETITIONER), APPELLANT,

v.

AJIYAR AHAMMAD SHAIWA RAVUTHAR AND FOUR OTHERS
(PETITIONERS AND FIRST COUNTER-PETITIONER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), s. 48—Evasion of process of arrest is fraud within the meaning of section—Evidence Act (I of 1872), s. 35—Admissibility of returns of serving Officers—Proof of due diligence, necessity for—Whether power conferred by section 48 is discretionary—Fraud of one judgment-debtor, effect of, on execution against others.

Evasion of process of arrest is fraud within the meaning of section 48 of the Code of Civil Procedure, 1908.

Per PHILLIPS, J.—The fraud of one of several judgment-debtors keeps the decree alive against all the judgment-debtors.

Per SUNDARA AYYAR, J.—Returns of process-servers are admissible under section 35 of the Evidence Act as evidence of facts reported by them.

Fraud at some time within 12 years prior to the date of application is sufficient under section 48 to entitle the decree-holder to apply for execution and it is not incumbent on the decree-holder to prove continuous diligence prior to such date or that, but for the fraud or force complained of, he would have realised the fruits of the decree.

It is doubtful whether the language of section 48 was intended to confer on courts a discretion to grant or refuse execution as they might think fit.

The fraud of one of several judgment-debtors will keep the decree alive only against such judgment-debtor.

APPEAL against the order of M. J. Murphy, the District Judge of North Malabar, in Appeal Suit No. 419 of 1909 presented against the order of P. Raman, the District Munsif of Cannanore, in R. E. P. No. 705 of 1900 (in Original Suit No. 591 of 1896).

J. L. Rosario for appellant.

C. V. Ananthakrishna Ayyar for respondent.

The facts of this case are sufficiently set out in the judgment.

SUNDARA AYYAR, J.—The second appeal arises in proceedings in execution of the decree of the District Munsif's Court

* Appeal against Appellate Order No. 45 of 1910.

of Cannanore for money in Original Suit No. 591 of 1896. The present application for execution was presented on the 27th September, 1909. The decree was passed on the 15th January, 1897. So this application was put in more than 12 years after the date of the decree. The judgment-debtors objected that the application was barred by section 48 of the Code of Civil Procedure, as more than 12 years had elapsed since the date of the decree and the decree-holder had made prior application for execution. The application immediately preceding the present one was presented on the 11th January 1909, for attachment of the defendant's moveables and for their arrest. While that application was still pending the present one was put in. In addition to the reliefs asked for in the previous application the plaintiff prayed also for the attachment of immoveable properties belonging to the defendants. The District Munsif disallowed the objection, holding that the defendants were fraudulently evading the execution of the decree and that therefore the bar under section 48, Civil Procedure Code, did not apply. On appeal the District Judge confirmed the Munsif's finding of fraud so far as the first defendant was concerned, as he had evaded the execution of warrants of arrest taken out against him in order to defeat the execution. But he held that no fraud was proved against the second defendant. He was, however, of opinion that, as fraud had been proved against the first defendant, the plaintiff was entitled to execute the decree against both the defendants. The second defendant has appealed to this court against the order of the District Judge. His contentions are (1) that the finding of fraud as against the first defendant is not based on legal evidence; (2) that even if that finding be upheld, it has not been proved in the case that the plaintiff exercised due diligence in the execution of his decree and that he was prevented by the first defendant's fraud from realising the amount due to him and that this court has a discretion to refuse execution in the circumstances; and (3) that, in any event, the first defendant's fraud would not justify the granting of the execution against the second defendant. With regard to the first contention I am of opinion that it is not entitled to prevail. Mr. Rosario's argument on this point is that the District Judge acted illegally in relying on the statements contained in the process-servers' returns as evidence of intentional evasion of the warrants of arrest by the first defendant. But, in my opinion, the returns are

SUNDARA
Ayyar and
Phillips, JJ.

ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAVUTHAR.

SUNDARA
ATTYAR AND
PHILLIPS, JJ.ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAVUTHAR.

admissible under section 35 of the Evidence Act as evidence of the facts reported by the process-servers. Even if the statement of the process-servers that the first defendant left his usual place of residence in order to escape arrest should be regarded as legally inadmissible, it was open to the District Judge to infer from the circumstances of the case that his absence was due to a deliberate attempt to evade arrest. It has been fully established by decided cases that the expression "fraud" in section 48 should be construed in a broad sense, and that a deliberate evasion of the process of the court with intention to defeat the execution of the decree would amount to fraud. I would overrule this contention. I am also of opinion that the second contention is equally unsustainable. Section 48, Civil Procedure Code, provides "nothing in this section shall be deemed to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application." Fraud at some time within 12 years prior to the application for execution being sufficient to entitle the decree-holder to ask for execution, it is clear that it is not incumbent on him to show continuous diligence during all the time prior to the application. The language of the section also shows clearly that the decree-holder is not bound to show that, but for the fraud or force complained of, he would have realised the fruits of his decree. All that has to be proved is that the judgment-debtor, by fraud or force, at some time prevented the execution, that is, in my opinion, made the decree-holder's attempts to execute at the time to which the fraud relates, unsuccessful. It is not necessary, as contended by Mr. Rosario, for the decree-holder to show that the judgment-debtor guilty of fraud had means to pay the decree amount or that the decree-holder could not, at any other time before his last application, have realised his decree. Mr. Rosario relies on *Annamalai v. Rangasami*(1) and *Seshachalam Chetti v. Rajam Chetty*(2) in support of his argument. The former case does not really help him. It is true no doubt that it was found in that case by the lower court that the judgment-debtor was possessed of means to satisfy the decree and that the decree-holder

(1) (1883) I.L.R., 6 Mad., 365.

(2) (1898) 8 M.L.J., 203.

SUNDARA
ATTYAR AND
PHILLIPS, JJ.ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAVUTHAR.

had exercised due diligence in his attempts to execute. But the learned Judges who decided the case did not lay down that either of these conditions should be satisfied. The case is authority only for the position that the expression "fraud" is used in the section in a comprehensive sense so as to include all improper attempts to defeat the execution. The judgment of SHEPHARD, J., in the second case no doubt supports the appellant's argument. But the learned Judges' attention does not appear to have been drawn to the language of the section already referred to, which, in my opinion, clearly shows that the argument cannot be supported. On the other hand *Venkayya v. Raghava Charlu*(1) (in which *Seshachalam Chetti v. Rajam Chetty*(2) was referred to in the arguments) is clearly against Mr. Rosario's contention. The learned Judges who were parties to that judgment, adverting to the language of the section, were of opinion that fraud or force on the part of the judgment-debtor at any stage of the execution would give the decree-holder a fresh starting point and a fresh period of 12 years from that date. See also *Mohsin Ali v. Masoom Ali*(3). With regard to the next contention of Mr. Rosario that the court has a discretion to allow or refuse execution after 12 years even where fraud has been proved, I have serious doubts whether such a discretion exists. *Rai Sham Kissen v. Damar Kumari Debi*(4) no doubt supports the appellant's argument. But I am inclined to hold that the language of section 48, "nothing in this section shall be deemed to preclude a court from ordering the execution of the decree, etc.," was not really intended to give the court power either to grant or refuse execution as it might think fit. The former part of the section says that "no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years, etc." It appears to me that the draftsman, having provided that the court shall be precluded from granting execution after 12 years, merely meant that the rule of limitation thus provided would not be applicable in cases where the judgment-debtor is guilty of fraud or force when he went on to say "Nothing in this section shall be deemed to preclude the court from ordering the execution, etc." The provision that execution should be allowed for 12

(1) (1899) I.L.R., 22 Mad., 320.
(3) (1911) 8 A.L.J., 1020.(2) (1898) 8 M.L.J., 203.
(4) (1906) 11, C.W.N., 440.

SUNDARA
ATTYAR AND
PHILLIPS, JJ.

ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAVUTHAR.

years from the time that fraud or force has been used seems to me to support this view. It is, however, unnecessary to decide this point as I am clearly of opinion that there is no ground in this case for the exercise of any discretion against the decree-holder, and I reserve to myself an opportunity for considering it further when it should be necessary to decide the question.

It remains to deal with the question whether the District Judge having found that the second defendant was guilty of no fraud or force, the plaintiff is entitled to execution against either of the defendants or both. The question really arises only in so far as it concerns the prayer for the attachment of immoveable property, as in other respects the application for execution was only a continuation of the previous application. It is necessary to turn once more to the language of section 48. It gives power to the court to order the execution of the decree "where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application." The learned vakil for the appellant contends that, where there are more judgment-debtors than one, the court cannot allow execution after the expiration of 12 years, at all unless both the judgment-debtors are guilty of fraud or force; while Mr. Ananthakrishnaiyer's contention for the respondent is that the fraud or force of any one of several judgment-debtors who are jointly and severally liable under a decree would give additional time to the decree-holder against them all. Neither of these contentions commends itself to me. Having regard to the object of the section I am of opinion that this is not a case where the singular *judgment-debtor* must be taken to mean the plural *judgment-debtors* where there are several judgment-debtors. It may happen that only one of the judgment-debtors is in solvent circumstances, and it might be profitless for the decree-holder to take out execution against the other judgment-debtors. The result of upholding the appellant's contention would be that, though the only solvent judgment-debtor might be guilty of fraud, the decree-holder would not be entitled to time against him because the other judgment-debtors, who had no means of discharging the debt, were not guilty of any fraud or force. It seems to me clear that the misconduct of any particular judgment-debtor would give the decree-holder further time against him for execution. But would it give him time against his co-judgment-debtors? I think not.

SUNDARA
ATTYAR AND
PHILLIPS, JJ.

ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAVUTHAR.

The expression "the judgment-debtor" may mean either the particular judgment-debtor against whom execution is sought or all the judgment-debtors. But I do not think I would be justified by any rule of interpretation or by the ordinary meaning of the language used as a man of common sense would understand it in holding that the "*judgment-debtor*" means any one of a number of judgment-debtors against whom the decree has been passed. Mr. Ananthakrishnaiyer contends that the policy of the Limitation Act is to treat a decree against a number of persons jointly and severally as entire for the purpose of execution, and that section 48 should be interpreted in the light of this policy. No doubt, where an appeal has been preferred against a decree or the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree, though not all the judgment-debtors may be concerned in the appeal, review or amendment. It is also true that, where an application is made against one of the several judgment-debtors that would give a further starting point as against all including those against whom no application has been made. But it may be that a different policy underlies section 48, Civil Procedure Code. The legislature gives 12 years' time as a reasonable period within which execution may be expected to be finished, and provides for an extension of the time where fraud or force is resorted to by a judgment-debtor. There is nothing improbable in the legislature having wished to confine his special relief based on the ground of fraud to the particular judgment-debtor or judgment-debtors guilty of misconduct. Article 182 of the Limitation Act gives a fresh starting point of limitation, in one class of cases, against some only of several joint and several judgment-debtors. Clause 6 in the third column of that article lays down that, where a notice to show cause why the decree should not be executed against a judgment-debtor is issued under a provision of the Civil Procedure Code requiring such notice, a further starting point is obtained in such a case against those only to whom such notice is issued. The grounds of the extension being the issue of the notice, the legislature seems to have considered it proper to confine it to the person to whom notice is issued. It appears to me that a similar reason probably induced the legislature to restrict the relief under section 48 also so as to be available only against the person guilty of fraud or force. At any rate, I am unable, against what appears to me to be the plain

SUNDARA
ATTAR AND
PHILLIPS, JJ.

ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAYUTHAR.

meaning of the words of the section, to hold that fraud by one judgment-debtor would give relief to the decree-holder against his co-judgment debtors. I must therefore hold that the plaintiff's application is barred as against the second defendant so far as the prayer for attachment of immoveables is concerned. I would modify the order accordingly. The plaintiff and the second defendant must each bear his own costs throughout.

PHILLIPS, J.—This is an appeal by the second defendant against an order allowing a decree to be executed after the expiry of 12 years from its date on account of the fraud of the first defendant. The fraud alleged and proved is the evasion of a warrant of arrest by first defendant, and I agree with my learned brother for the reasons given by him that such evasion in order to prevent execution of the decree does amount to fraud. The most important question to be determined is whether the fraud of the first defendant keeps the decree alive as against the second defendant also. Section 48 (2), Civil Procedure Code, runs as follows: "Nothing in this section shall be deemed to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within 12 years immediately before the date of the application." It is contended that the use of the article "the" before "judgment-debtor" shows that the clause applies only to cases of fraud by a single judgment-debtor, or (in decrees where there are several judgment-debtors) to cases of fraud by all the judgment-debtors—as the use of the singular "judgment-debtor" may also include the plural. If this interpretation were applied, it would follow that, where there was a decree against ten judgment-debtors, and only nine of them had been guilty of fraud, the section would not apply, and I do not think that this was the intention of the legislature, nor do I think that this interpretation need be put upon the section. A further contention is raised that section 48 (2) only enlarges the time for execution as against the particular judgment-debtor who has been guilty of fraud. There is in my opinion nothing in the wording of the section to support this argument, for it merely lays down that, if execution has been defeated by force or by fraud of the judgment-debtor, the execution of a decree may be ordered after the expiry of 12 years and does not say that the execution shall

SUNDARA
ATTAR, AND
PHILLIPS, JJ.

ABDUL
KHADIR
v.
AHAMMAD
SHAIWA
RAYUTHAR.

be limited, and ordered only against the fraudulent judgment-debtor. No authority has been cited for the proposition that a joint decree may be barred against one of the joint debtors and not against the others, whereas explanation I to article 182 of the Limitation Act is authority for the proposition that execution against one of several joint debtors saves limitation as against them all. Applying the same principle to this case, I think that the fraud of one judgment-debtor must be held to enlarge the time for execution not only against himself but also against all the joint judgment-debtors. If execution is to be allowed only against the fraudulent judgment-debtor it would be open to a pauper, who was one of several joint debtors, to prevent by fraud or force the execution of a decree within 12 years, and the result of his action would be to exonerate his solvent fellow-debtors, leaving the unfortunate decree-holder a remedy against the pauper alone. If the article "the" before "judgment-debtor" in section 48 be read in a generic sense, the difficulty of interpretation is in my opinion removed, and I must hold that the section is not intended to enlarge the time for execution of the decree only against the judgment-debtor who is guilty of fraud, but allows execution of the decree against all the judgment-debtors, even though only one of them has been guilty of the fraud or force.

In *Rai Sham Kissen v. Damar Kumari Debi*(1) it was held that the power of a Court under section 230 of the old Code (corresponding to section 48, Civil Procedure Code) was discretionary. Whether this be so or not it is unnecessary to determine now, for in this case, which is one of fraudulent evasion, I think the discretion, if any, should be exercised in favour of allowing execution.

Holding this view it is unnecessary to consider the further plea urged for respondent that the present application for execution should be treated as a continuation of an application put in before the expiry of 12 years from the date of decree. I would therefore dismiss the appeal with costs.

SUNDARA ATTAR, J.—As my learned brother is of opinion that the appeal should be dismissed with costs, it is dismissed with costs under section 98, Civil Procedure Code.

(1) (1906) 11 C.W.N., 440.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
Krishnaswami Ayyar.

CHIDAMBARAM CHETTY *alias* RAMAN CHETTY
(THIRD DEFENDANT), APPELLANT,

v.

KARUPPAN CHETTY AND THREE OTHERS, RESPONDENTS
(RESPONDENTS, LEGAL REPRESENTATIVES OF THE DECEASED PLAINTIFF).*

Limitation (Act IX of 1908), s. 6, art. 164—Application to set aside ex parte decree made after coming into force of Act governed by article 164—Section 7, of old Act XV of 1877, does not apply—Section 6 of General Clauses Act X of 1897 does not make the new Act inapplicable.

A decree was passed *ex parte* against A, a minor, on the 4th September 1894. A became a major on 16th January 1909, and applied on 25th January 1909, to set aside the decree:

Held, that the Limitation Act (IX of 1908) which came into force on 1st January 1909, applied and the application was barred under article 164 of the Act.

Under section 6 of the Act, the plea of minority was available only in the case of suits and applications for execution. Section 6 of the General Clauses Act (X of 1897) had not the effect of making the new Act inapplicable.

Kali Amma v. Palappakkara Manakal [(1910) 20 M.L.J., 347], followed.

APPEAL against the order of C. Gopalan Nair, the Subordinate Judge of Madura (East), dated the 27th March 1909, in I.A. No. 55 of 1909 (in Original Suit No. 25 of 1894).

H. Lubek for appellant.

C. V. Ananthakrishna Ayyar for S. Srinivasa Ayyangar for respondents.

The facts for the purpose of this case are sufficiently set out in the judgment.

JUDGMENT.—This case is covered by the decision in *Kali Amma v. Palappakkara Manakal*(1). An *ex parte* decree was passed on the 4th September 1894. The third defendant, a minor who says he attained majority on the 16th January 1909, applies on the 25th idem to set aside the *ex parte* decree. The new Limitation Act came into force on the 1st of January 1909. If this Act applies, it is clear that the application is barred. Article 164 of the new Act gives thirty days from the date of the decree for the

* Appeal against Order No. 183 of 1909;
(1) (1910) 20 M.L.J., 347.

application. The other alternative of thirty days from the date when the applicant becomes aware of the decree where he was not served with notice, has no application to the facts of this case as it is not alleged that notice was not served. The period of thirty days from the date of the decree would have expired on the 4th of October 1894. The appellant pleads the disability of minority. But under section 6 of the new Limitation Act, it avails only as regards suits and applications for execution. It follows that if the new Act applies the application is barred. But the appellant contends on the authority of *Moro Sadashiv v. Visaji Raghunath*(1) that on general principles apart from section 6 of the Act a fresh period must be held to run from the cessation of minority. Assuming that case to have been rightly decided, it has no application to the present, because section 7 of the old Limitation Act has been deliberately modified so as to confine the operation of disability to suits and applications for the execution of decrees and it will be against all principles of interpretation to allow minority to operate as a ground of disability in cases deliberately excluded from section 6. An application to set aside an *ex parte* decree unlike an application under section 230 of the old Code of Civil Procedure is specially provided for by article 164 which is one of the applications falling within section 3.

It is then contended that section 7 of Act XV of 1877 under which the disability of minority applies to all applications governs this case. Such a contention runs counter to the express provision of section 3 of Act IX of 1908. It runs "subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed" There is nothing in section 6 (of the Act) that applies to this case. We may therefore read the clause so far as this case is concerned without the words "subject to the provisions contained in sections 4 to 25 (inclusive)." The present application is one made after the period of limitation prescribed for it by article 164 of the first schedule. It follows that the application ought to be dismissed. It is argued, however, that section 6 of the General Clauses Act of 1897 renders the new Limitation Act inapplicable. That section provides that unless a different intention appears, the

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AYYAR, JJ.
CHIDAM-
BARAM
CHETTY
v.
KARUPPAN
CHETTY.

(1) (1892) I.L.R., 16 Bom., 586.

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AYYAR, JJ.
—
CHIDAM-
BARAM
CHETTY
v.
KARUPPAN
CHETTY.

repeal of an enactment "shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." Under Act XV of 1877 the applicant had the right or privilege to move the Court to set aside the *ex parte* decree within thirty days from the cessation of minority. It is said that that cannot be affected by the repeal of Act XV of 1877. There are two answers to this contention. First, assuming that the right to apply to set aside an *ex parte* decree is a right within the meaning of the section (as to which see *Colonial Sugar Refining Company v. Irving*(1) such a right to apply is not acquired under the Limitation Act of 1877 but under the Code of Civil Procedure (Order 9, Rule 13). The Limitation Act merely limits the period within which the right given by the Procedure Code may be exercised, see *The Ydam*(2). Clause C of section 6 of the General Clauses Act therefore does not save the application.

Hope Mills v. Vithaldas(3) to which our attention was drawn by the respondents' vakil is a case exactly in point. Another answer to the contention is given by the words "unless a different intention appears," see *Moon v. Durdan*(4). A different intention does appear in section 3 of Act IX of 1908 which expressly makes article 164 of the first schedule to the Act applicable to the case. Moreover section 30 of the Act, which gives a special period of two years in the case of suits for which a shorter period of limitation is provided by the new Act than by the old Act, makes no similar provision in the case of applications. *Expressio unius exclusio aliorum*. The intention seems to be abundantly manifest that the new Act applies.

It was pressed upon us that this was a case of hardship. On the date when the new Act came into force the period provided by it having expired the right which the applicant had is practically withdrawn from him. There is, no doubt, some force in the argument. The facts of the Bombay case did not raise this difficulty, see *MACLEOD, J.*, at page 734(5). But as pointed out in *Kali Amma v. Palappakkara Manakal*(5) the new Limitation Act which was passed in August 1908 and came into force nearly five months later on the 1st of January 1909, gave ample notice to all who would be seriously affected by the change in the law to seek

(1) (1905) A.C., 369.

(3) (1910) 12 Bom. L.R., 730.

(2) (1899) P. 236.

(4) (1848) 78 R.R., 479.

(5) (1910) 20 M.L.J., 347.

their remedy under the old law before the new Act came into operation. There was a mode of relieving one's self from the hardship created by the change in the law which was available to those who were likely to be affected by the change—*Towler v. Chatterton*(1). *The Queen v. The Leeds and Bradford Railway Company*(2). The plain language of section 3 of the Act must be given effect to. The appeal is dismissed with costs.

ABDUR
RAHIM AND
KRISHNA-
SWAMI
AYYAR, JJ.

CHIDAM-
BARAM
CHETTY
v.
KARUPPAN
CHETTY.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

KUTTAYAN *alias* KOSIKAN RAVUTHAN AND EIGHT OTHERS
(PLAINTIFFS, Nos. 1 to 5, 9-10, 13 AND 16), APPELLANTS,

1910.
October 27.

v.

1911.
January 6
and 17 and
March 3.

MAMMANNA RAVUTHAN AND TWENTY-ONE OTHERS (DEFENDANTS
Nos. 2, 3 AND 6, PLAINTIFFS Nos. 6, 7, 8, 11, 14 AND 15 AND 1, 4,
5 AND 7 AND THE LEGAL REPRESENTATIVE OF FOURTH
DEFENDANT), RESPONDENTS. *

*Wakf—Nature of, according to Sunni schools—Injunction between co-owners—
Muhammadian burial-grounds, joint interests in.*

The Court will refuse to a co-owner an injunction to prevent the carrying out of a necessary work by another co-owner upon property held in common.

According to the accepted view of the Sunni schools which comprise the followers both of Imam Abu Hanifa and Imam Shafei it is in the very conception of wakf, which is the name for a grant by which mosques and similar institutions are dedicated, that all proprietary rights of men should be extinguished in the property so dedicated.

SECOND APPEAL against the decree of S. Raghunathaiya, the Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 309 of 1906, presented against the decree of L. R. Ananthanarayana Ayyar, the Acting District Munsif of Alatar, in Original Suit No. 78 of 1904.

C. V. Anantakrishna Ayyar for appellants.

J. L. Rosario for respondents.

(1) (1829) 6 Bing. R., 258 at p. 264. (2) (1852) [N.S.], 21 L.J.M.C., 193.
* Second Appeal No. 239 of 1907.

ABDUR
RAHIM AND
AYLING, JJ.
—
KUTTAYAN
v.
MAMMANNA
RAYUTHAN.

The facts of this case are sufficiently set out in the judgment.

JUDGMENT.—The suit in which the second appeal has arisen was instituted by the plaintiffs representing the Shafei residents of a place called Pudunagaram in Koduvayur Amsam in Palghat taluk under the provisions of section 30, Civil Procedure Code (1882), against defendants as representatives of the Hanafis of the same locality praying for an injunction restraining the latter from enlarging a certain howth or reservoir attached to a mosque which has been found by both the Courts to be in their exclusive management ever since another mosque was built a long time ago by the Shafeis in the same compound, from using some granite stones lying in the compound in the construction of the reservoir and from obstructing a pathway extending from the gate of the older mosque by the side of its reservoir to the mosque which is in the exclusive possession of the plaintiffs alleging that the extension of the reservoir would obstruct the right of way. One of the questions raised by the issues framed by the District Munsif was whether the mosque in which the Hanafis generally say their prayers and the reservoir attached thereto which is intended to enable the congregation to perform ablutions are the common properties of the plaintiffs and the defendants. The Munsif found that as the Hanafis have been in exclusive possession of and using this mosque ever since the other mosque was built by the Shafeis, that is for a period of more than 12 years, the latter have lost their right in the older mosque and its reservoir. The Subordinate Judge, in appeal, has confirmed this finding. It seems to us that the finding must be understood with reference to the subject-matter of the litigation and the real character of the claims put forward by the parties. As we read the pleadings the Hanafis only claim exclusive right of supervision and management of the mosque in which they habitually say their prayers with its appurtenant reservoir while the Shafeis claim a similar right with respect to the mosque in which they say their prayers, and not that either of the parties claims any rights of ownership in these places of public worship as if they were ordinary property or that one party denies the right of the other party to say their prayers in the mosque to which the former habitually resort for their prayers. And Mr. Rosario who appeared for the respondents and Mr. Ananthakrishna Ayyar who appeared for the appellants both very properly agreed before us during the

course of argument that the findings of the Lower Courts on this point must be understood in the sense we have indicated. It will suffice for us, therefore to point out that according to the accepted view of the Sunni Schools which comprise the followers both of Imam Abu Hanifa and Imam Shafei it is in the very conception of a wakf which is the name for a grant by which mosques and similar institutions are dedicated—that all proprietary rights of men should be extinguished in the property so dedicated. The result according to the theory of Muhammadan law is that proprietary rights in the subject-matter of wakfs become revested in God inasmuch as He is originally the owner of all created things and it is by His permission that men acquire rights therein so that when men's right ceases in a particular thing it reverts to the proprietorship of God. (See Hamilton's *Hidaya*, Grady's edition, pages 231, 232.) Further as it is the object of a dedication of the nature of a mosque that the public should say their prayers therein, it is not open to those who are charged with the superintendence and management of a mosque to exclude any Muhammadan who wishes to say his prayers in it, except on the ground of misbehaviour. This question arose in several cases upon a claim made by some Hanafis to exclude certain Muhammadans, known as Wahabis or Ahli Hadith who do not attach themselves to any one of the recognized schools of theology, from mosques founded by Hanafis, on the ground that the former during prayers pronounced "Amen" in a loud tone and practised *rafa'i yadam*, i.e., raised their hands to their ears at certain stages of the prayer contrary to the ritual adopted by the Hanafis. But the Courts in India, and ultimately the Privy Council have decided against such claim (see *Fazl Karim v. Maula Baksh*(1), *Ata-ullah v. Azim-ullah*(2), *Jangu v. Ahmad-ullah*(3), *Abdus Subhan v. Korban Ali*(4) and a claim of this nature would be still more untenable as between the Hanafis and the Shafis, both of whom belong to the Sunni school calling themselves Ahlus Sunnat wal Jamā'a't or the orthodox sect as distinguished from Ahlulbida't, i.e., innovators or heretics. The respective followers of Imam Abu Hanafi, Imam Shafei, Imam Malik and Imam Ahmadibu Hambul no doubt differ among themselves on certain points of canonical and municipal law, but such

ABDUR
RAHIM AND
AYLING, JJ.
—
KUTTAYAN
v.
MAMMANNA
RAYUTHAN.

(1) (1891) I.L.R., 18 Cal., 448.

(2) (1890) I.L.R., 12 All., 404.

(3) (1891) I.L.R., 13 All., 419.

(4) (1908) I.L.R., 35 Cal., 204.

ABDUR
RAHIM AND
AYLING, JJ.

KUTTAYAN
v.
MAMMANNA
RAYUTHAN.

differences are treated as of minor importance compared with the essential principles of law and theology in which they all agree.

As regards the burial-grounds surrounding the two mosques it is found that they originally belonged to the Hanafi and the Shafie residents of the locality and since the new mosque was built the Hanafis have been burying their dead in the ground surrounding the old mosque and the Shafis have been using the ground surrounding the new mosque for the burial of their dead and that there were boundary marks dividing the two burial-grounds. This is not a finding which can be said to be sufficiently clear as showing that one party asserted a right to exclude the other party from use of the ground in which both had an interest. Nor is it clear that the Subordinate Judge meant to find that the burial-grounds are not dedicated to the use of the general public but are private burial-grounds belonging jointly to the descendants of those Shafis and Hanafis who originally owned the land. On the other hand the burial-grounds are spoken of as appertaining to the two mosques which might suggest that they had been dedicated to public use. It would have been therefore necessary to call for clear findings on the questions whether the burial-grounds have been dedicated to the public or are private burial-grounds and whether one party asserted a right to exclude the other party from burying the dead in the ground attached to the mosques in their respective possessions and, if so, when, were it not that this appeal is concluded by the finding of the Subordinate Judge that the extension of the reservoir has become necessary for the proper use of the older mosque as a place of worship. Supposing the plaintiffs have a joint interest in the burial-ground and are entitled to say their prayers in the older mosque it would not be open to them to object to the extension of the reservoir in the way proposed if such extension became necessary, as found to enable the congregation to perform the necessary ablutions before saying their prayers. The Subordinate Judge seems to be doubtful whether a defined pathway, as claimed by the plaintiffs, exists at all by the side of the reservoir but, even if there is such a pathway, it is conceded that upon the allegations of the plaintiffs themselves who claim to be proprietors in common of the burial-ground, there could be no question of easement. The plaintiffs claim the use of the pathway by virtue of their right as joint owners of the land on which the path runs,

but it is not alleged that the destruction of a portion of the pathway by extending the reservoir would to any extent interfere with the user by the plaintiffs of the ground surrounding the old mosque for the burial of their dead, supposing they have such a right. It is found that there is another way, though somewhat longer, by which the plaintiffs can get access to the mosque to which they ordinarily resort for prayers and to the burial-ground attached to it and as the extension of the reservoir in question has become necessary there can be no doubt that the lower Appellate Court was right in refusing to grant the injunction asked for by the plaintiffs. The plaintiffs' claim to the stones is found to have become barred; there is no difficulty in our accepting that finding.

The appeal therefore fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

SHEIK IBRAHIM THARAGAN AND ANOTHER (DEFENDANTS
Nos. 1 AND 2), APPELLANTS,

v.

RAMA AIYAR AND FOURTEEN OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 4 TO 10, 12 TO 15 AND SIXTEENTH DEFENDANT AND LEGAL
REPRESENTATIVES OF THE SECOND RESPONDENT),
RESPONDENTS.*

Hindu law—Joint-family—Payment to one member of joint-family, effect of—Right of manager of undivided family to sue on behalf of the family.

Payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all the members or creditors if the payment is fraudulently made to one and not for the benefit of all.

The manager of a joint-family has, as such manager, the right to represent the family in suits. A suit by him as such manager on behalf of the joint-family will be maintainable without making the other members parties to the suit.

Kishen Prasad v. Har Narain Singh, [(1911) 15 C.W.N., 321], followed.

APPEAL against the decree of K. Ramanathaiyer, the Subordinate Judge of Tinnevely, in Original Suit No. 22 of 1906.

* Appeal No. 69 of 1906.

ABDUR
RAHIM AND
AYLING, JJ.
—
KUTTAYAN
v.
MAMMANNA
RAYUTHAN.

1911.
March 16, 17,
30.

BENSON AND
SUNDARA
ATTAR, JJ.

SHEIK
IBRAHIM
THARAGAN
v.

RAMA AIYAR.

P. Kundu Panicker and the Hon. Mr. T. V. Seshagiri Ayyar for appellants.

K. N. Aiya for thirteenth respondent.

S. Srinivasa Ayyar for first respondent.

The facts for the purpose of the report of this case are sufficiently set out in the judgment.

JUDGMENT.—The suit from which this appeal was preferred was instituted by the plaintiff as the manager of an undivided Hindu family to enforce payment of the amount due on a mortgage bond executed by defendants Nos. 1 to 15. The sixteenth defendant, in whose name the bond stood, is the eldest of the three sons of the plaintiff and was brought in as a party on account of the plea of defendants Nos. 1 to 15 that the debt was due to him alone and not to his family. They also pleaded that they had paid to the sixteenth defendant prior to the suit a sum of Rs. 650 towards the interest due on the bond and that subsequent to the suit they deposited the total amount due on the bond with the South Indian Bank which amount the sixteenth defendant was at liberty to draw on executing a bond to indemnify them against any claims that might be made by the other members of his family. The sixteenth defendant also claimed the debt as his own and set up that the family became divided on the 17th December 1904. The Subordinate Judge held that no division took place as alleged by the sixteenth defendant, that the debt was due to the family of the plaintiff and the sixteenth defendant, that, although the bond was executed in the sixteenth defendant's name, it was really taken by the plaintiff, for the benefit of the family, that the payment of Rs. 650 was not made prior to the suit and that both the payment and the deposit were not *bona fide* acts, but the result of collusion between the defendants Nos. 1 to 15 and the sixteenth defendant with a view to defraud the other members of the sixteenth defendant's family, and he accordingly decreed the whole of the claim made in the plaint. This appeal has been preferred by the debtors. It is confined to the Subordinate Judge's disallowance of credit for the Rs. 650 alleged to have been paid to the sixteenth defendant prior to the suit and to the award of interest on the principal amount subsequent to the deposit made by the debtors in the South Indian Bank and of the plaintiff's costs against the debtors, but the points involved in appeal relate to all the questions decided by the Subordinate Judge.

[Their Lordships upheld on the evidence the findings of *K. Ramanathaiyer*, the Subordinate Judge, that the partition set up by the sixteenth defendant was not proved and that the payment to the sixteenth defendant and the deposit were not *bona fide* but collusive.]

Mr. Seshagiri Ayyar has argued two questions of law arising on these findings. He contends that whenever the payment may have been made it was binding on the plaintiff as payment to one of several joint creditors must in law be deemed a valid payment to all, and he relies on the decision in *Barber Maran v. Ramana Goundan*(1). That decision may be taken to support his contention, but the authority of that decision has been considerably shaken by subsequent rulings of this Court. See *Veeraswamy Naicker v. Ibramsa Rowther*(2) and *Ramasami v. Muniandi*(3). See also *Husainara Begum v. Rahamannessa Begum*(4). The cases in *Ramasami Chetti v. Manikka Mudali*(5) and *Adaikkalam Chetti v. Marimuthu*(6) do not really support the appellant's contention as they proceed on the ground that as the bonds stood in the name of one member only of the family, payment to him would operate as a valid discharge. We do not however consider it necessary to decide the point in this case as the evidence shows clearly that the payment to the sixteenth defendant and the deposit were not made for the benefit of the plaintiff's family but was intended to defraud its members other than the sixteenth defendant and in collusion with him to support his individual claim to the amount due under the bond. Assuming that the payment to one of several joint creditors will in law operate as payment to them all, there can be no doubt that the rule will not apply where the payment is fraudulently made to one of the creditors and not for the benefit of them all. This question has recently been fully discussed by MUKERJEE, J., in *Baikunt Nath Chakrabarti v. Hara Lal Pal Chowdhury*(7) where the authorities on the point have been fully considered. This Court has held the same view in *Veeraswamy Naicker v. Ibramsa Rowther*(2) [see also *Halsbury's Laws of England*, Vol. 7, p 456, paragraph 930, and *Piercy v. Fynney*(8)]. In *Barber Maran*

BENSON AND
SUNDARA
ATTAR, JJ.

SHEIK
IBRAHIM
THARAGAN
v.

RAMA AIYAR.

(1) (1897) I.L.R., 20 Mad., 461.

(3) (1910) 20 M.L.J., 709.

(5) (1899) 9 M.L.J., 155.

(7) (1911) 13 C.L.J., 234.

(2) (1909) 19 M.L.J., 221.

(4) (1911) 13 C.L.J., 3 at pp. 8, 9.

(6) (1899) I.L.R., 22 Mad., 326.

(8) (1871) I.L.R., 12 Eq., 69.

BENSON AND
SUNDARA
AIYAR, JJ.
—
SHEIK
IBRAHIM
THARAGAN
v.
RAMA AIYAR.

v. Ramann Goundan(1) it was observed that the payment in the case was unaffected by fraud. We are therefore of opinion that the payment and deposit in this case could not bind the plaintiff or his family.

The other contention of law argued is that as the debt belongs to all the members of the family and as two of the plaintiff's sons are not parties to this suit either as plaintiffs or as defendants, the suit is not maintainable. It is not denied that the suit was instituted by the plaintiff in his capacity as manager of the family, but this, it is urged, is insufficient. There has been considerable conflict of authority in the Indian Courts on the point raised, but we are of opinion that the decision of the Privy Council in *Kishen Parshad v. Har Narain Singh*(2) has practically settled the point. Before referring to Their Lordships' judgment and considering its effect, it may be desirable to refer very briefly to the state of the case law in this High Court. In *K. P. Kanna Pisharody v. V. M. Narayanan Somayajipad*(3) it was held, with reference to a *Sabha-yogam* or assembly of religious Brahmans in Malabar, that some amongst their members appointed as agents for the management of the property of the assembly could not maintain a suit in their own names for ejectment of a person in unlawful possession of its property. It will be observed that the *Sabhayogam* was merely an artificial combination of persons and that its agents possessed no powers under the law of the country, but derived them solely from their appointment as agents by the *Sabhayogam*. It is no doubt well-established law that a mere agent cannot maintain a suit in his own name with respect to property belonging to his principal whatever powers of management he may have in regard to it. In *Arunachala v. Vythialinga*(4) this Court decided that a suit for possession of family property could be maintained by the managing member alone in his capacity as managing member. The same principle was applied in several subsequent cases where the question was whether a decree against a managing member in his representative capacity would be binding on the family. See *Vnarāgavamma v. Samudrala*(5), *Rāmākrishna v. Namasiwaya*(6), *Muttia v. Virammāl*(7), *Guruvappa v. Thimma*(8). In *Ramayya v.*

- (1) (1897) I.L.R., 20 Mad., 461. (2) (1911) 15 C.W.N., 321.
(3) (1881) I.L.R., 3 Mad., 234. (4) (1883) I.L.R., 6 Mad., 27.
(5) (1895) I.L.R., 8 Mad., 248. (6) (1884) I.L.R., 7 Mad., 295.
(7) (1887) I.L.R., 10 Mad., 283. (8) (1887) I.L.R., 10 Mad., 316.

BENSON AND
SUNDARA
AIYAR, JJ.
—
SHEIK
IBRAHIM
THARAGAN
v.
RAMA AIYAR.

Venkataratnam(1), it was held that when a suit is instituted by the managing member as such, the omission to include the other members of the family as plaintiffs would be regarded only as an error of misdescription, and the suit would be considered as properly laid. In *Alagappa Chetti v. Vellian Chetti*(2), on the other hand, a suit was held to be bad on the ground that all the members of the family, to whom the money sought to be recovered belonged, had not been made plaintiffs before the period of limitation for the institution of the suit had expired. But the decision seems to be based on the ground that all the members of the family were carrying on a partnership trade and that in such a case all the partners should join as plaintiffs. And reliance was placed on *Ramsebak v. Rambal Koondoo*(3), which was also a case of partnership business carried on by the members of a family. See also *Imam-ud-Din v. Liladhar*(4). In *Adaikkalam Chetti v. Marimuthu*(5) a suit by the managing member alone was sustained. But this decision may perhaps be regarded as proceeding on the special ground that the bond sued on in the name of the managing member only. In *Angamuthu Pillai v. Kolondavelu Pillai*(6) a suit for the recovery of land was held to be not maintainable by the managing member alone, even if it appeared that he was suing to enforce the right of the whole family. The question arose again in *Seshan Patter v. Veera Raghavan Patter*(7) with respect to the manager's right to sue for money on behalf of the whole family. In that case the rule laid down in *Alagappa Chetti v. Vellian Chetti*(2) was preferred to the proposition laid down in *Arunachala v. Vythialinga*(8) but several of the other Madras cases referred to above were apparently not brought to the notice of the Court. The rule laid down in *Arunachala v. Vythialinga*(8) was upheld in *Vadilall v. Shah Khushal*(9), although in two previous cases *Kālidās Kevaldās v. Nathu Bhagvān*(10) and *Bālkrishna Moreshekar Kunte v. The Municipality of Mahād*(11) a contrary view had been held, and the latter case had expressly followed. *K. P. Kanna Pisharody v. V. M. Nārāyanan Somāyājipad*(12). The ruling

- (1) (1894) I.L.R., 17 Mad., 122. (2) (1895) I.L.R., 18 Mad., 33.
(3) (1881) I.L.R., 6 Calc., 815. (4) (1892) I.L.R., 14 All., 524.
(5) (1899) I.L.R., 22 Mad., 326. (6) (1900) I.L.R., 24 Mad., 190.
(7) (1909) I.L.R., 32 Mad., 284. (8) (1883) I.L.R., 6 Mad., 27.
(9) (1903) I.L.R., 27 Bom., 157. (10) (1883) I.L.R., 7 Bom., 217.
(11) (1895) I.L.R., 10 Bom., 32. (12) (1881) I.L.R., 3 Mad., 234.

BENSON AND
SUNDARA
ATTYAB, JJ.
—
SHRIK
IBRAHIM
THARAGAN
v.
RAMA AIYAR.

in *Radha Proshad Wasti v. Esuf*(1) was not in accordance with *Arunachala v. Vythialinga*(2). The Allahabad High Court in *Pateshri Partap Narain Singh v. Rudra Narain Singh*(3) supported the manager's right to sue on behalf of the family, but in *Shamrathi Singh v. Kishan Prasad*(4) that Court held that the managing members of a family carrying on a trade on its behalf could not maintain a suit to recover monies due from third persons in connection with the trade without making all the other members plaintiffs. The decision of the Privy Council referred to above was passed on appeal from the decision of the Allahabad High Court in the last case. The judicial committee upheld the manager's right to sue. Their Lordships approved of the decision in *Arunachala v. Vythialinga*(2) and observed that the rule laid down in *K. P. Kanna Pisharody v. V. M. Nārāyanan Somāyajipad*(5) was not applicable "to the members of a business carried on for an undivided Hindu joint family" and distinguished the case from that of mere co-owners, as in *K. P. Kanna Pisharody v. V. M. Nārāyanan Somāyajipad*(5). They also explained *Ramsebuk v. Ramdul Koondoo*(6) and *Imam-ud-din v. Liladhar*(7) as resting on the ground that all who are trading as partners must join in a suit relating to the partnership business and observed that the other members of the family not interested in the partnership business need not be joined as plaintiffs. The case of *Alogappa Chetti v. Vellian Chetti*(8) was distinguished on the ground "that the single plaintiff in that case was not shown to be the managing member of the family or to be the only partner or proprietor of the business with which the litigation was concerned." Their Lordships concluded as follows:—"In the opinion of Their Lordships, the original plaintiffs in this case were entitled, as the sole managers of the family business, to make in their own names the contracts which gave rise to the claim and that they properly sued on such contracts without joining the other members of the family." It is clear to us that Their Lordships' decision is not based on the ground that the contract sued on in the case was in the name of the actual plaintiffs only as they expressly approved of the judgment in *Arunachala v. Vythialinga*(2) and distinguished it from the case of mere co-owners. In fact, the Privy Council had,

(1) (1881) I.L.R., 7 Cal., 414.
(3) (1904) I.L.R., 28 All., 528.
(5) (1881) I.L.R., 3, Mad., 234.
(7) (1892) I.L.R., 14 All., 524.

(2) (1883) I.L.R., 6 Mad., 27.
(4) (1907) I.L.R., 29 All., 311.
(6) (1881) I.L.R., 6 Cal., 815.
(8) (1895) I.L.R., 18 Mad., 38.

BENSON AND
SUNDARA
ATTYAB, JJ.
—
SHRIK
IBRAHIM
THARAGAN
v.
RAMA AIYAR.

even previously to their decision in the above case, practically upheld the right of the managing member to represent the family in litigation. A long line of cases beginning with *Girdharee Lall v. Kantoo Lall*(1) established the right of a creditor of a Hindu family to proceed against the father or other managing member of the family alone and to effectively bind the whole family property, including the shares of those not actually parties to the litigation. It need hardly be said that a decree against a mere agent, or a guardian of an infant, or a sale in execution of such decree could not bind the principal or the minor, for a suit cannot be instituted against the agent or the guardian as the representative of the principal or the minor. The reason why a decree against the manager of a family in his representative capacity is binding on the whole family is, that amongst the powers which he has according to Hindu Law as manager, must be included the power of representing the family in suits. This view has for a long time been consistently held in the case of the manager of a tarwad in Malabar—whether governed by the Marumakkathayam law or Makkathayam law [*Ittiachan v. Velappan*(2), *Barber Maran v. Ramana Goundan*(3)]. There is no reason why a difference should be made between a joint family in Malabar and one elsewhere with respect to the right of the manager to sue or be sued on behalf of the family, the only distinction between the two being that a member of a Malabar family has no right to compel a partition of the family-property. The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of universal application. The language of section 26 of the Civil Procedure Code, 1882, corresponding to Order I, Rule 1 of the present code is "that all persons may be joined in one suit as plaintiffs, in whom the right to any relief . . . is alleged to exist, whether jointly, severally, or in the alternative" Section 30 of the Code of 1882, corresponding to Order I, Rule 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of or for the benefit of themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in

(1) (1874) 22 W.R. (Civ. Rul.), 56 [s.c.] (—) 1—I.A., 321 and (1874), 14-B.L.R., 187.
(2) (1885) I.L.R., 8 Mad., 484. (3) (1897) I.L.R., 20 Mad., 461.

BENSON AND
SUNDARA
AYYAR, JJ.
—
SHEIKH
IBRAHIM
THARAGAN
v.
RAMA AYYAR.

section 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule and there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The judgment of the judicial committee already referred to shows that the case of the manager of a Hindu family is such an exception. We must, therefore, refuse to uphold this contention also.

In the result, we dismiss the appeal with costs.

The sixteenth defendant has preferred a memorandum of objections against the direction of the Subordinate Judge making him liable with defendants Nos. 1 to 15 for the plaintiff's costs of the suit. On the finding that he and defendants Nos. 1 to 15 colluded with each other to put forward an exclusive right himself to the amount of the mortgage-bond, the lower Court's order is right and we must dismiss the memorandum of objections also, with the costs of the plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Munro.

1911.
March 29, 30.
April 24.

SANKA KRISHNAMURTHI, MINOR BY GUARDIAN *ad litem* SRIRAM
LAKSHMI KANTHAM (DEFENDANT), APPELLANT,
v.

THE BANK OF BURMA, LIMITED (PLAINTIFF), RESPONDENT.*

Hindu Law—Guardian of minor who is sole owner of trading firm—Liability of minor for debts contracted by agent of guardian.

A minor member of a joint Hindu trading family is liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of section 247 of the Contract Act (IX of 1872). This rule, however, is applicable to minors who are sole owners of a business, only subject to the general principles regulating the relationship between guardian and ward.

In India, a guardian has no power to bind his ward by a personal covenant. Although a widow and natural guardian may, in India, carry on a family business belonging to a minor son by a manager, such guardian and not the minor is the person personally liable on contracts entered into in the course of business.

* Original Side Appeal No. 49 of 1909.

Creditors of the business have no right of direct recourse against the minor; but as the guardian will be entitled to indemnity for liabilities properly incurred out of the assets of such business, creditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian.

A guardian cannot invest an agent with powers larger than are reasonably proper for carrying on the business; and where as a consequence of giving such powers the guardian has become involved in liability for the fraud of the agent, the guardian has no right of indemnity against the assets of the minor nor are the creditors entitled to claim such right through the guardian.

APPEAL against the judgment and decree, dated the 21st October 1909, of the Hon. Mr. Justice SANKARAN NAIR in the exercise of the ordinary Original Civil jurisdiction of this court in Civil Suit No. 348 of 1908.

V. V. Srinivasa Ayyangar for appellant.

N. Grant and *C. Madhavan Nair* for respondents.

The facts of this case are sufficiently set out in the judgment.

JUDGMENT.—This is an appeal from a judgment of Mr. Justice SANKARAN NAIR sitting on the original side by which the plaintiff Bank recovered judgment against the assets of the minor defendant on five promissory-notes made on the 19th and 24th July, 1908, for Rs. 9,100 in all by one K. A. Lakshminarasimham, acting under a power-of-attorney from the minor's mother and natural guardian who was carrying on business under the style of Sanka Ramasami & Son. The business was a joint family business carried on by the father on behalf of himself and the minor under his own name, and on his death his interest passed by survivorship to the minor who became the sole owner. The notes were signed by K. A. Lakshminarasimham *per proc* Sanka Ramasami & Son and were made in favour of the firm of C. L. Cantham & Co. of which Lakshminarasimham was the leading partner and were discounted by Cantham & Co. with the plaintiff Bank who credited them with the amount of the bills. At the time Cantham & Co. were of good credit, but indebted to Sanka Ramasami & Son in about Rs. 20,000 on a balance of accounts. Within a month they absconded and were adjudicated insolvents and the plaintiffs now seek to recover the amount of these bills from the minor defendant.

According to the evidence the bank were aware that the agent by whom the notes were signed was a partner in the firm of Cantham & Co. in whose favour they were made but did not

WALLIS AND
MUNRO, JJ.

SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

know that the business of Sanka Ramasami & Son belonged to a minor as they omitted to inspect the power-of-attorney. It is however well settled that the signature having been made *per proc* they must be held to have had notice of the contents of the power and therefore of the fact that the business belonged to a minor and of the extent of the agent's authority under the power.

The learned Judge has found that the notes must be treated as made by the mother and guardian herself, and having regard to the recitals in the power that as mother and guardian of her son she was desirous of carrying on business under the style of Sanka Ramasami & Son, and to the power it conferred upon the agent "in her name and on her behalf in her capacity as mother and guardian to carry on the said business and sign, make, draw, accept, endorse and negotiate all cheques, receipts, letters, accounts, promissory-notes, hundis, drafts, bills of exchange, indents, invoices and delivery orders and all other papers whatsoever." I think the learned Judge was right and that the notes must be treated as purporting to be made by the mother and guardian carrying on the business of Sanka Ramasami & Son by her agent under the power.

The case for the respondent is that it was necessary and proper for the mother and guardian to carry on during the minority the ancestral business to which her own son had succeeded, and for that purpose to appoint an agent to carry it on and to give such agent power to draw bills and promissory-notes in her name, on the ground that such a drawing of bills and notes is necessary and incidental to the carrying on of a business and that the business could not be carried on without it, and they contend that the minor though not a party to notes made by his guardian is liable on them to the extent of his estate.

The learned Judge agreed with these contentions and was of opinion that the liability of the minor in these circumstances is similar to that of a minor member of joint Hindu trading family for bills drawn by the managing member. The extent and nature of this liability have recently been considered in *Raghunathji Tarachand v. The Bank of Bombay*(1) where it was held that the minor was liable to the extent of his share in the firm on bills or notes drawn by the managing member in the name of the firm

(1) (1910) I.L.R., 34 Bom., 72.

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

but in fraud of it and for purposes unconnected with it. In so deciding *CHANDAVARKAR, J.*, applied the rule laid down by *SAUSSE, C.J.*, in *Ramlal Thakursidas v. Lakhmichand Muniram et al*(1) that "in carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager (or the adult members acting as managers) which are necessarily incidental to and flowing out of the carrying on of that trade

. . . . The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade." It is, in my opinion, unnecessary to consider the reasoning by which the learned Judge satisfied himself that this ruling was in accordance with the sureties and their commentators because it seems to me the general principles laid down in the above passage are far too well settled to admit of question at the present day. The important point expressly decided for the first time in this case is that minors are to be bound not only on bills or notes drawn or made in the carrying on of the business, but on such bills or notes drawn or given by the persons carrying on the family for purposes unconnected with the business. All that *SAUSSE, C.J.*, says in *Ramlal Thakursidas v. Lakhmichand Muniram et al*(1) is that "Third parties, in the ordinary course of *bonafide* trade dealings, should not be held bound to investigate the status of the family . . . whilst dealing with him on the credit of the family property." This does not seem to mean more than that it is unnecessary to enquire whether there are minors or not. Similarly the remarks of *PONTIFEX, J.*, in *Johurra Bibee v. Sreegopal Misser*(2) are confined to "debts honestly incurred in carrying on such business." Similarly in *Sakrabhai v. Maganlai*(3) it was held that where an ancestral business descends to and is carried on by a widow the reversioners are liable for debts properly incurred by her in connection with the business on the ground that so far as carrying on the business is concerned her position is analagous to that of the manager of a joint Hindu family.

The question of liability on bills drawn for purposes unconnected with the business and in fraud of the family did not arise in these cases, but it seems to me that as held by the learned

(1) (1861) 1 Bom. H. C. R., appx. 51.

(2) (1876) I.L.R., 1 Calc., 470 at p. 475. (3) (1902) I.L.R., 26 Bom., 206.

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

Judges in *Raghunathji Tarachand v. The Bank of Bombay*(1) the minor in such a case is liable to the extent of his interest in the firm, and this for the reason given by BATCHELOR, J., in his judgment that we must be guided by the analogy of the law of partnership as a joint Hindu family business is a peculiar sort of partnership. In England according to the judgment of the House of Lords in *Lovell and Christmas v. Beauchamp*(2) a minor may be a partner, but judgment cannot be obtained against him on a partnership debt, but the adult partner is entitled to insist that the assets should be applied in the first instance in satisfaction of the partnership debts, and if the proper steps are taken this right can be made available for the benefit of the creditors. In India section 247, Indian Contract Act, which allows a minor to be a partner and declares the share of the minor in the property of the firm to be liable for the obligations of the firm, has much the same effect, and renders section 251 so far applicable. Under section 251 each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose; and illustration (a) shows that where A and B are partners and A in the name of the firm draws a bill of which B has no notice and in a transaction in which he has no interest still B is liable on the bill. In the same way it seems to me a minor member of a joint Hindu trading family should be held liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of section 247.

These are the grounds on which BATCHELOR, J., based his judgment and I think the conclusion is not only sound but also in accordance with convenience. There will generally be minors in a joint Hindu trading family, and it is desirable that such families should be in a position to trade as freely as other firms. I am not however prepared to apply the rule to minors who are not trading in partnerships but are sole owners of the business without a separate consideration of the law affecting guardians and minors and the extent to which a minor is liable on contracts made by his guardian. In *Waghela Rajsanghi v. Shekh Masludin*(3) it has

(1) (1910) I.L.R., 34 Bom., 72.

(2) (1894), A.C., 607, appx. 611.

(3) (1887) I.L.R., 11 Bom., 551.

been held by their Lordships of the Judicial Committee that in India a guardian has no power to bind his ward by a personal covenant. There the guardian had alienated part of the ward's land in satisfaction of a debt binding on the ward and had covenanted on behalf of himself and the ward to indemnify the creditor if the land turned out not to be rent free. Though the covenant was apparently beneficial to the minor, their Lordships held it was not binding on him. At page 561 occur the following observations which appear to show how the present case should be approached:—"Now it was candidly stated by Mr. Mayne . . . that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law—if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such power, nor do they see why it should be so in India. They conceive it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward." In *Indur Chunder Singh v. Radha-kishore Ghose*(1) where the guardians had taken certain lands on lease in their own names, but as was alleged for the benefit of the minor their Lordships held that neither the minor nor his estate could be made liable on the contract. On the above decisions it appears to me that neither the minor nor his estate as such can be held liable on the notes sued on. In order to see whether the holders of the notes are entitled in a properly framed suit to any recourse against the minor it is necessary in the first place to ascertain the rule of English law as embodying *prima facie* according to their Lordships' observations the rule of justice, equity and good conscience which we are bound to apply. Further if the minor is the sole owner of the business it does not seem to make much difference whether he has acquired it by birth and survivorship as here or by inheritance or bequest as in England. In either case it seems to me what has to be considered is the interest of the minor. In England a guardian is not ordinarily entitled to carry on a business to which the ward has succeeded and in *Land v. Land*(2)

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

(1) (1892) I.L.R., 19 Calc., 507 at p. 512. (2) (1874) 43 L.J.Ch., 311.

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

Sir George Jessel after a search for precedents held that the Court had no jurisdiction to allow this to be done unless in pursuance of testamentary authority or at the instance of creditors of the estate. Mr. Simpson in his book on "Infants" suggests that the rule is too strictly stated and that one precedent was overlooked. In India at any rate the rule appears to be otherwise. In *Joykisto Cowar v. Nittyanund Nundy*(1) it was held that a widow and natural guardian may properly carry on a family business belonging to a minor son through a manager and I am not prepared to differ from this decision which so far as I know has never been questioned and merely recognizes the usual practice. But it appears to me that even so the same rule must apply as when the legal representative or guardian is allowed to carry on the business in England, and that the guardian or legal representative, and not the minor or beneficiary on whose behalf the business is carried on is the person personally liable on contracts entered into in the course of the business, *Labouchere v. Tupper*(2). Creditors of the business have therefore no right of direct recourse against the minor or his estate, but, as the guardian is entitled to indemnity for liabilities properly incurred out of the assets of the minor embarked in the business, creditors of the business, it has been held, are entitled to proceed directly against such assets. Where however the guardian has no right to indemnity against the assets in the business, as where he has acted improperly, neither have his creditors as held by Sir George Jessel in *In re Johnson*(3) which was followed in *In re Evans*(4). Applying these principles it appears to me that the plaintiff could at most be entitled to a decree against the assets embarked in the business and that the decree against the estate of the minor went too far in my view. In his judgment the learned Judge observed that it was not alleged or proved that the minor had any property not devoted to the trade, but this, it appears to me, is a matter to be ascertained in execution.

Two questions then remain. Is the guardian liable on the notes made by the agent as acting under the apparent authority conferred by the power, *Bryant Powis & Bryant v. Quebec Bank*(5), and is she entitled to indemnity for this liability

(1) (1878) L.L.R., 3 Cal., 733.

(2) (1857) 11 Moo. P.C., 198.

(3) (1880) 15 Ch.D., 548.

(4) (1887) 34 Ch.D., 597.

(5) (1893) A.C., 170 at p. 180.

against the minor's assets in the business? Before dealing with these questions it may be well to refer to the terms of the power and the circumstances under which it was given. No exception can be taken to the particular agent chosen. He had married the minor's sister, had been entrusted with a power of attorney by Sanka Ramasami during his lifetime, and was the head of the large firm of Cantham & Co. then (June 30th) in good credit though it failed within the next two months. It was already probably in difficulties, and we find that on March 18th the agent had raised Rs. 7,600 on promissory-notes executed under the power in favour of his own firm. These sums do not find any place in Sanka Ramasami's account in the books of Cantham & Co., Exhibit V, or in Cantham & Co's. account in Sanka Ramasami's books and as the notes were retired before they fell due, it does not appear whether the use made of the power to raise funds for Cantham & Co. at a time when they were already indebted to his firm came to Ramasami's knowledge before his death in June 1908. Shortly afterwards, on June 30th, the agent procured from the widow the power now in question, Exhibit G, by which he was authorized, among other things, "to be in charge of, look after, manage, conduct and carry on under the style of Sanka Ramasami and Son the family business of general merchant and commission agent heretofore carried on under the style of Sanka Ramasami, to enter into any contracts or agreements of any kind with any other person or persons, firm or firms, company or companies to deposit or withdraw money in or from any bank or banks, company or companies and sign, make, draw, accept, endorse or negotiate all cheques, receipts, letters, accounts, promissory-notes, hundis, drafts, bills of exchange, indents, invoices and delivery orders and all other papers whatsoever." Under this power he executed two promissory-notes for Rs. 4,100 in favour of Cantham & Co. on July 19th and for Rs. 5,000 on July 24th and discounted them with the plaintiff Bank. The substance of the transaction was that the Bank lent money to Cantham & Co. according to the common practice on two signatures its own as indorsers and that of Sanka Ramasami & Son as makers of the notes, the notes being made by the agent under the power in favour of the firm of Cantham & Co. to which he himself belonged. Now it is not at all clear that the words of the power which authorized him to enter into any contracts or agreements of

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHI
v.
THE BANK
OF BURMA.

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHIv.
THE BANK
OF BURMA.

any kind with any other person or persons, firm or firms, authorized him to make a promissory-note in favour of his own firm. And assuming there is no express restriction, it seems to me open to question whether the power authorized the agent to execute promissory-notes in favour of his own firm, and whether holders taking with notice of the fact are entitled to recover upon them. According to the American authorities, an agent is not entitled to execute negotiable paper in his principal's name for his individual purposes, and subsequent holders taking with notice that he has done so cannot recover against the principal. See Danial on "Negotiable Instruments," Section 282, citing *Stainback v. Read & Co.*(1). Lord Blackburn's query in *Jonmenjoy Coondoo v. Watson*(2) points the same way, but in *The Bank of Bengal v. Macleod*(3) their Lordships held that power to indorse included power to indorse in the agent's own favour, and the observations in *Jonmenjoy Coondoo v. Watson* (2) leave the question open. It may be possible to distinguish these cases, but it is unnecessary to decide the point, because in my opinion, assuming the notes to have been duly made in the exercise of the power and the guardian to be liable upon them, neither the guardian nor the holders have any right of recourse against the minor.

SANKARAN NAIR, J., decided in the plaintiff's favour mainly on the ground that it was proper for the guardian to carry on the business through an agent and to give the agent power to execute negotiable instruments and that the business could not be carried on, as he says, without drawing hundis. There is much to be said for this view, especially as a Hindu widow would not generally be competent to reserve the exercise of such a power to herself. At the same time there can be no doubt that the result of so holding must be to expose the minor's estate to a degree of risk that can only be justified on the ground of its being a lesser evil than closing the business, and here it may be observed that the risk to the minor sole owner is undoubtedly much greater than that of the minor member of a joint Hindu trading family whose interests are identical with those of the adult members having control of the business. In these circumstances, it seems clear that the guardian cannot, in any view, be justified in giving any larger powers than are

(1) (1854) 62 Amer Decn., 648.

(2) (1884) 9 A.C., 561 at pp. 563, 569.

(3) (1849) 5 M.L.A., 1.

reasonably necessary. Assuming it to be necessary to give the agent power to draw bills and promissory-notes, it appears to me that it cannot be necessary and it has certainly not been shown to be necessary to give him power to draw in favour of himself or his firm, while to do so must greatly and unnecessarily increase the risk to the minor's estate. The giving of such an unrestricted power is, I think, improper, and if as the result of giving it the guardian finds herself involved in liability for the fraud of the agent, she has no right of indemnity against the assets of the minor in the business nor are her creditors entitled to claim through her. This ground is, in my opinion, sufficient for the reasons already given, to dispose of the case, and the appeal must accordingly be allowed and the suit dismissed with costs throughout.

MUNRO, J — I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

In re KALI MUDALY AND THREE OTHERS (PRISONERS),
APPELLANTS.*1911.
April 25, 26,
27.

Criminal Procedure Code (Act V of 1898), s. 526, cl. 8—Application for adjournment to apply for transfere, when to be made—Hearing, commencement of, in Sessions Court.

The first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused. An application for adjournment under section 526, clause 8, Criminal Procedure Code, must therefore be made before the charge is read to the accused.

Quere.—Whether a contravention of section 526, clause 8, will render the trial illegal?

APPEAL against the order of J. J. Cotton, Additional Sessions Judge of the Coimbatore Division, in Calendar Case No. 101 of 1910.

The facts necessary for the consideration of the point of law raised in this case are set out in the judgment of the Sessions Court as follows :—

The case was posted for trial before the Additional Sessions Court on the 5th of December, 1910. The Court took its seat at

* Criminal Appeal No. 46 of 1911.

WALLIS AND
MUNRO, JJ.SANKA
KRISHNA-
MURTHIv.
THE BANK
OF BURMA.

SUNDARA
 AYYAR AND
 AYLING, JJ.
 —
In re
 KALI
 MUDALI.

11 A.M., pronounced judgment in Sessions Case No. 104 of 1910 and read the charge over to the four accused in the dock. The defence vakil then rose and made an oral application for the transfer of the case as his clients were apprehensive.

As regards the application for adjournment to move for a transfer, the application which was only verbal had been made too late, after the Court had formally commenced the hearing by reading the charge. The vakil was, however, granted two hours time to move Mr. Harding, the Sessions Judge, who sits in the same building, for a retransfer of the case to his own file as the case was ready. Mr. Harding after hearing the vakil found no grounds to retransfer the case to himself and dismissed the motion. At 1 P.M. the trial of the case was proceeded with.

Dr. S. Swaminathan for appellants.

The whole trial is illegal as the learned Sessions Judge acted contrary to the imperative provision of law contained in clause 8 of section 526, Criminal Procedure Code, in refusing to grant a short adjournment so as to enable the accused to apply for a transfer of the case from the Sessions Court. The ruling in *Surat Lall Chowdhry v. Emperor*(1) clearly supports this view. The application to the Judge was only a verbal one and made as soon as the case was called. The learned Judge without heeding the request of the vakil for the accused began to read out the charge. It cannot be said that the hearing commenced within the meaning of clause 8, the moment the reading of the charge was begun. "Hearing" commences only after the accused pleads to the charge. Section 271 of the Criminal Procedure Code provides that "when the court is ready to commence the trial the accused shall appear or be brought before it, and the charge shall be read out in court and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried" and section 272 of the Criminal Procedure Code says "that if the accused refuses to or does not plead or if he claims to be tried the court shall proceed to choose jurors or accessors" In *Queen-Empress v. Bastiano Bin Alexander Silva*(2) it was held that the actual trial does not commence until the charge has been read and the accused claims to be tried.

The Public Prosecutor in support of the conviction.

(1) (1902) I.L.R., 29 Cal., 211.

(2) (1891) I.L.R., 15 Bom., 514.

JUDGMENT.—[The court having decided upon the facts that the convictions must be set aside, the judgment proceeded—.] In the view we have taken of the case, it is perhaps unnecessary to pronounce an opinion on the point raised by Dr. Swaminathan that the whole trial should be set aside as illegal on the ground that the Judge acted contrary to the provisions of section 526, clause 8 of the Criminal Procedure Code, in refusing to grant an adjournment of the trial to enable the accused to apply for a transfer of the case to some other court. The application for adjournment was made after the charge had been read and explained to the accused. Section 526, clause 8, does not require the court to adjourn a case when the application is not made before the commencement of the hearing. The learned counsel for the appellants contends that the "hearing" can be said to commence only after the accused plead to the charge. We cannot agree with this contention. The hearing or trial must be taken to include all the proceedings taken to determine a case, and the first step in the hearing at a sessions trial is the reading and explaining of the charge to the accused. In Wharton's 'Law Lexicon' the meaning of the word is given as "the investigation of a controversy." We must hold that the application for adjournment in this case was not made before the commencement of the hearing. We are not to be understood to accede to the argument that the trial could be held to be illegal, assuming that the court was bound to grant the application. We should find much difficulty in agreeing with the view of the Calcutta High Court in *Surat Lall Chowdhry v. Emperor*(1), if it were necessary to decide the question.

The conviction and sentences are reversed : and the appellants directed to be set at liberty.

(1) (1902) I.L.R., 29 Cal., 211.

SUNDARA
 AYYAR AND
 AYLING, JJ.
 —
In re
 KALI
 MUDALI.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Phillips.

1911.
September
6, 21.

SREEVADHU YERRANNA (PLAINTIFF), APPELLANT IN ALL,

v.

DONKIRA KANNAMMA AND FIVE OTHERS (DEFENDANTS),
RESPONDENTS IN SECOND APPEAL No. 1569 OF 1909,

ADDOORU VIRANNA'S WIFE YERRAMMA AND SEVEN OTHERS,
RESPONDENTS IN SECOND APPEAL No. 1570 OF 1909,

ADDOORU VIRANNA'S WIFE YERRAMMA AND EIGHT OTHERS,
RESPONDENTS IN SECOND APPEAL No. 1571 OF 1909, AND

MELUSI SAMBAYYA AND FIVE OTHERS (DEFENDANTS), RESPONDENTS
IN SECOND APPEAL No. 1572 OF 1909.*

Service inam, resumption of—Resumption not a fresh grant and does not put an end to prior encumbrances—Regulation VI of 1831, s. 2—Emoluments granted for gadaba service not within regulation.

Resumption consists in putting an end to the grant, remitting the services and requiring the grantee to pay the full assessment. It has not the effect of putting an end to prior encumbrances.

Gadaba or bearer service is of a personal nature and an *inam* for such service does not fall within Regulation VI of 1831. Where the grantee of an *inam* for *gadaba* service mortgages the *inam* and the *inam* is afterwards resumed by Government, such resumption does not extinguish the mortgages.

SECOND APPEALS against the decrees of D. Raghavendra Rao, the Temporary Subordinate Judge of Vizagapatam, in Appeals Nos. 113, 120, 121 and 112 presented against the decrees of P. Rama Rao, the acting District Munsif of Chodavaram, in Original Suits Nos. 41, 45, 42 and 44, respectively.

The facts are thus stated in the judgment of the Court of First Instance.

“Defendants Nos. 5 and 6 are the holders of certain service inam lands in Kinthali Vallapuram situate in Madgole estate. The Collector of the district recommended them to the Board of Revenue for resumption on 17th July 1898 (Exhibit A) and the

latter approved the resumption thereof on 17th September 1898 (Exhibit A-1). In columns 3, 5, 6 and 7 of Exhibit A, it was stated that the said inams were granted to *gadabas* for bearer service and that service was being rendered, but as it was unnecessary being purely of a personal nature, resumption was recommended. An assessment of Rs. 18 a year was imposed thereon (Exhibit B) and a ryotwari patta No. 2 was granted to defendants Nos. 5 and 6 (Exhibit R-2) for Rs. 19-14-0 including the cesses payable thereon. Defendants Nos. 5 and 6 sold the said lands to plaintiff by a registered sale-deed, dated 4th November, 1899, for Rs. 25 before the issue of a patta to them and agreed therein to make the necessary application for transfer thereof in plaintiff's name when issued (Exhibit O-1). They presented such an application to the Deputy Tahsildar of the taluk on 25th June, 1900 (Exhibit L-4) and the reason alleged for the transfer is the sale referred to above. The Deputy Tahsildar accepted it and ordered on the same day that the village officers of Kinthali Vallapuram should enforce it for fasli 1309. The necessary mutation of names was effected in the revenue registers (Exhibits M and M-1) and a fresh patta (Exhibit G-2) was granted to plaintiff. Plaintiff endeavoured, in vain, to obtain possession of the lands with the aid of revenue authorities, but he was referred to a civil suit (Exhibit J). Hence this suit.

These lands were mortgaged with possession to defendants Nos. 1 and 2 by a registered deed, dated 29th July 1892 (Exhibit VI) and first defendant resisted the suit on the strength thereof. Fifth defendant also opposed the suit. Their opposition is based upon the following grounds :—(1) that the suit lands were originally granted for katta kalva (channel repairing and clearing) service, (2) that the resumption by Government is illegal, (3) that it cannot operate to extinguish the previously acquired right of the alienees, (4) that the sale to plaintiff is nominal.”

The Court of First Instance found that the inams were for bearer service, that the resumption was binding and that the previous mortgages were valid against plaintiff. The plaintiff's suit was dismissed. This decree was confirmed by the lower Appellate Court. A fresh point taken by the plaintiff that the mortgages were invalid under Regulation VI of 1831 was decided against the plaintiff.

The plaintiff appealed.

55-A

ABDUR
RAHIM AND
PHILLIPS, JJ.
—
SREEVADHU
YERRANNA
v.
DONKIRA
KANNAMMA.

* Second Appeals Nos. 1569 to 1572 of 1909.

ABDUR
RAHIM AND
PHILLIPS, JJ.

SREEVADHU
YERRANNA
v.
DONKIRA
KANNAMMA.

S. Srinivasa Ayyangar for appellant.

V. Ramesam for respondents.

JUDGMENT (*Second Appeal No. 1569 of 1909*).—The plaintiff (appellant) is the vendee of fifth defendant and sixth defendant's deceased husband, who held the plaint lands as service inam. They mortgaged the lands to defendants Nos. 1 and 2 in 1892 and in 1898. Government resumed the inam and imposed full assessment. On the strength of his sale-deed patta was transferred in plaintiff's name.

Two main questions are raised in this appeal. It is first contended that the resumption by Government put an end to all prior encumbrances and that the issue of a ryotwari patta amounted to a re-grant. Admittedly Government have actually resumed possession of the land, which was in the possession of the mortgagees from the date of mortgage. We think therefore that the so-called resumption did not operate to extinguish prior encumbrances. In a somewhat similar case of resumption by a zamindar the Privy Council remarked: "The resumption consists in putting an end to the grant, remitting the services and requiring them to pay the full assessment." It does not appear that an absolute dispossession was either attempted or intended in *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo*(1). A similar view was taken in *Gunnaiyan v. Kamakchi Ayyar*(2) and by the Full Bench in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(3) in the case of enfranchised inam. The case reported in *Ekambara Ayyar v. Meenatchi Ammal*(4) is only an authority in cases of forfeiture by a tenant and is inapplicable here. We must accordingly find this point against appellant.

The second contention is that the mortgage to defendant Nos. 1 and 2 was invalid—the inam being inalienable under section 2 of Regulation VI of 1831. This point was not taken in the first Court, but was raised in the lower Appellate Court, because first defendant had proved in the trial that the original grant had been made for *gadaba* (bearer) service and also for *katta kalva* (repairs of channels) service. This plea had been put forward as an argument against the validity of the resumption by Government, and

(1) (1858) 7 M.I.A., 128 at p. 142.

(3) (1907) I.L.R., 30 Mad., 434.

(2) (1903) I.L.R., 26 Mad., 339.

(4) (1904) I.L.R., 27 Mad., 401.

the applicability of Regulation VI of 1831 does not appear to have been considered in that Court. It has been proved that the original grant of the plaint inam, which was before the Inam Settlement was for both services and no doubt *katta kalva* service partakes of the nature of a public service. In recent times, however, we find that the *inam* has been treated as one purely for *gadaba* service. It was so treated by Government on resumption and it was so treated by plaintiff in his plaint. Section 2 of Regulation VI of 1831 runs as follows: "All emoluments derived from lands which have been annexed by the state to hereditary village and other offices in the revenue and police departments . . . are inalienable." Even if it can be said that the *katta kalva* service is rendered by the holder of such an office,—which is very doubtful—the *gadaba* service is undoubtedly a personal service and outside the regulation and in this case the emoluments were originally granted for both services and have recently been treated as belonging to the *gadaba* service alone. In our opinion, therefore, plaintiff has failed to prove that the plaint-land comes within the provisions of Regulation VI of 1831. We may remark that this is not surprising as no evidence was let in on the point, which did not form part of plaintiff's original case.

In view of the above it is unnecessary to decide whether plaintiff's claim is barred by limitation as the alienation to defendants Nos. 1 and 2 is valid and binding on plaintiff.

The appeal is dismissed with costs.

Second Appeals Nos. 1570, 1571 and 1572.—These cases follow Second Appeal No. 1569 of 1909 and for the like reasons as are recorded in our judgment therein, we dismiss these appeals also with costs.

ABDUR
RAHIM AND
PHILLIPS, JJ.

SREEVADHU
YERRANNA
v.
DONKIRA
KANNAMMA.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Ayling.

1911.
February 28.
March 24.

VEDAPURATTI *alias* VALIA THAMPURATTI AND SEVEN
OTHERS [DEFENDANTS (Nos. 5 and 8 to 14), APPELLANTS],

v.

M. KOPPAN NAIR (DIED) AND TWENTY-SEVEN OTHERS
[PLAINTIFF AND DEFENDANTS (Nos. 1 to 14), 6 AND 7, LEGAL
REPRESENTATIVES OF THE PLAINTIFF], RESPONDENTS,
(in S. A. No. 1089 of 1906)*

M. MOPPII NAIR *alias* RAMAN UNNI (FIRST DEFENDANT),
APPELLANT,

v.

M. KOPPAN NAIR (DIED) AND TWENTY-TWO OTHERS
(PLAINTIFF AND THE LEGAL REPRESENTATIVES OF THE PLAINTIFF),
RESPONDENTS (in S.A. No. 1210 of 1906).*

*Elephant, nature and extent of liability for damage done by—An elephant belongs
to a dangerous class of animals—Liability of owner and person in possession.*

It may be laid down as a rule of law that in India the elephant belongs to a dangerous class of animals. A person who keeps an animal belonging to a class that is dangerous takes the risk of any damage it may do.

The liability of a person for any harm done by his animal independently of any intent or negligence on his part does not depend on the manner or extent to which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed.

Liability for damage done by an elephant attaches to the owner of the elephant as well as to a person in whose possession the elephant happens to be when it commits such damage.

SECOND APPEALS against the decree of J. W. Munro, the District Judge of South Malabar in Appeals Nos. 166 and 159 of 1906, presented against the decree of S. Raghunathaiya, the Subordinate Judge of South Malabar at Palghat, in Original Suit No. 21 of 1904.

The facts of this case are sufficiently set out in the judgment.

Second Appeal No. 1089 of 1906.

C. V. Ananthakrishnaiyar for appellants.

The Hon. the Advocate-General and *K. Govinda Menon* for respondents Nos. 9 and 17 to 29.

Kunjunni Nair for second respondent.

Second Appeal No. 1210 of 1906.

J. L. Rosario and *Kunjunni Nair* for appellants.

The Hon. the Advocate-General for respondents Nos. 3 to 10.

K. Govinda Menon for respondents Nos. 3 and 11 to 23.

SANKARAN
NAIR AND
AYLING, JJ.
—
VEDAPURATTI
v.
KOPPAN
NAIR.

JUDGMENT.—The first defendant Mannarghat Nair had in his possession the elephants—both tuskers—of the plaintiff and of defendants Nos. 5 to 14 (who represent the Mankada Kovilagam) which he had obtained from them for processional purposes in a temple. The Mankada elephant gored the plaintiff's elephant to death. The plaintiff brought this suit for damages. The Subordinate Judge found that the Mankada elephant was known by the defendants to be vicious and accordingly awarded damages against the first defendant and the Mankada Kovilagam. In appeal the Judge, Mr. Munro, held that the Mankada elephant is an animal *ferae naturae* and it was therefore unnecessary to consider whether it was vicious or there was any negligence and confirmed the decree of the Subordinate Judge.

It is contended in appeal that this finding is not correct in law and in the absence of any negligence or knowledge on the part of the defendants of the vicious nature of the elephant, if it is vicious, the defendants are not liable. There is also a further contention on the part of the fifth defendant that she is not liable in any event, as the elephant was in the possession of the first defendant when it killed the plaintiff's elephant.

The leading case is *Filburn v. People's Palace and Aquarium Company*(1). In that case Lord Esher lays down "The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous." As to the latter class he lays down that there are some animals which everybody recognizes as not being dangerous on account of their nature, though they might be *ferae naturae* so far as rights of property are concerned: there is another set which the law has recognized in England as not being

* Second Appeals Nos. 1089 and 1210 of 1906.

(1) (1890) 25 Q.B.D., 258 at p. 260.

SANKARAN
NAIR AND
AYLING, JJ.
—
VEDAPURATTI
v.
KOPPAN
NAIR.

of a dangerous character, such as horses, dogs, oxen, etc. Unless an animal falls within these two classes, the man who keeps it must take the responsibility of keeping it safe. It is impossible to say, as the same learned judge points out, that an elephant is harmless by nature. The contention before us is that it falls within the same category as a horse. The test according to Lord Esher for determining this is whether years ago and continuously up to the present time the progeny of this class of animals has been found by experience to be harmless. In that case the law assumes the result of his experience to be correct. It is true that in ancient Rome it is said that elephants were bred in captivity and the Romans made use of them in war, in the amphitheatre and in military pageants. The results of their experience have not been handed down to us. Though common in those days, elephants are said to have been almost unknown for centuries in Europe after the decline of the Roman Empire. The kings of ancient India, like the Carthaginians, employed them in wars, but whether they were then bred in captivity, it does not appear. It is certain, however, that, though elephants have been known to breed in captivity, it is of the rarest occurrence in India, although in Burma it is said such births are common owing to the fact that domesticated females are allowed to roam in jungles. Domesticated or tamed animals in India have been reclaimed from the wild state—and it is conceded in this case that the Mankada elephant was caught when wild—even after they are tamed their nature often asserts itself. If therefore we apply the test laid down by Lord Esher, in India, we cannot presume that the elephant is not of a dangerous nature. LINDLEY, L.J., and BOWEN, L.J., also lay down that the question is whether the particular class of animals is dangerous, though individuals may be tamed, and if a person keeps an animal belonging to a class which is dangerous, he takes the risk of any damage it may do. Elephants undoubtedly as a class are dangerous though individuals may be tamed and perhaps domesticated.

In Salmond on the 'Law of Torts,' page 365, the law is stated in the following terms: "Whether any particular kind of mischief is natural or not to a particular species of animal is, it seems, a question of law. Thus it is a rule of law, and not a mere proposition of fact that it is not natural for a dog to bite mankind. 'The law,' says Lord Holt, 'takes notice that a

SANKARAN
NAIR AND
AYLING, JJ.
—
VEDAPURATTI
v.
KOPPAN
NAIR.

dog is not of a fierce nature, but rather the contrary.' So it has been decided that it is natural for strange horses to kick one another when left at large in a field, or for a stallion to bite and kick a mare, but that it is not natural for a horse straying in the highway to kick a human being." It is clearly in the nature of a tusker when left at large to attack another. The case of *Mahadar Mohanta v. Balaram Gagoi*(1) refers to rights of property. It has no bearing on the question before us. A case *Maney-Kyaw Dev v. Makyin and Narayanan Chetty*(2) has been cited, in which Mr. Justice White, sitting as a single Judge, laid down the law in these words: "It could not, I think, be laid down in this country that a man is liable for any damage done by his elephant without any proof of negligence or that he knew it to be of a vicious disposition. In view of the manner in, and extent to, which elephants are employed in this country such proposition would be manifestly unjust." These remarks apply to Burma, where the circumstances are not altogether similar to those in India, but it was argued before us that, considering the extent to which elephants are employed in India, the same principle should be followed. The absolute liability of a person for any harm done by his animal, independently of any intent or negligence on his part, does not depend, as we have pointed out, on the manner in, or extent to, which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed.

We think that the Mankada Kovilagam, the owner, also is liable. Both the owner and the first defendant are responsible for the loss sustained by the plaintiff. No authority has been cited to support the fifth defendant's contention that the first defendant alone is liable. Whether on account of any implied contract between her and the first defendant the latter was not bound to take due care to prevent any damage and is not therefore bound to compensate the fifth defendant, is not a question that now arises for consideration. The second appeals are dismissed with costs of the plaintiff.

(1) (1908) I.L.R., 35 Calo., 418. (2) Upper Burma Rulings, Vol. II, p. 570.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

MESSRS. RAMSAY & Co. (PLAINTIFF), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (DEFENDANT),
RESPONDENT.*

*Trustee—Banker and customer—Trustee mixing trust money with his own—
Indian Insolvency Act [11 and 12 Vict. Cap. XXI], Sec. 24—Voluntary payment.*

By a resolution, dated 31st July 1906, the Directors of the Madras Equitable Insurance Company resolved that a sum of Rs. 75,000 standing to the credit of the company with Messrs. Arbuthnot & Co., its secretaries and treasurers, should be invested in Government promissory notes. Messrs. Arbuthnot & Co. purchased for the Insurance Company Rs. 25,000 worth of Government promissory notes on 7th August 1906, Rs. 25,000 on 9th October 1906, and Rs. 10,000 on 20th October 1906, the securities being credited to the Insurance Company. On 22nd October 1906, Arbuthnot & Co. failed:—

Held, that Arbuthnot & Co. held the securities as trustees for the Insurance Company which was entitled to rank as a secured creditor.

Held, also that the fact that Arbuthnot & Co., before purchasing the Government promissory notes mixed up the Insurance Company's money with their own and used it in their banking business, did not amount to misappropriation of the money, the trust having a lien on the aggregate amount in the hands of the trustee and any sum which may have been drawn for the trustee's own use being deemed to have been taken out of his own money.

Held, further that even if Arbuthnot & Co. could be held to have misappropriated the trust money a subsequent payment in reparation by them would not amount to a "voluntary" payment within the meaning of section 24 of the Indian Insolvency Act, 11 and 12 Vict. of 1848, Cap. XXI of 1848.

APPEAL from the judgment of the Hon. Mr. Justice BAKEWELL, dated the 25th August 1909, in the ordinary Original Civil Jurisdiction of this Court made in Civil Suit No. 210 of 1907.

The facts of this case are set out in the judgment of the Court of First Instance as follows:—

"The Madras Equitable Assurance Society is a Life Assurance Society governed by a special Act (Madras Act No. VI of 1869) and this suit is brought by the present secretaries of the Society under a provision which enables them to sue on behalf of the

Society. By section 4 of this Act the available balance of the General Fund is directed to be invested in the names of three of the directors of the Society in securities of the Government of India, or of which the interest is guaranteed by that Government or by the Secretary of State for India in Council. Under section 8 the directors have the control and management of the Society; and under section 9 a secretary and a treasurer are to be appointed at a general meeting, who "shall receive and pay such sums as the directors shall direct, and shall in all respects be accountable to the directors."

In the year 1906, and for a considerable time prior thereto, the firm of Arbuthnot & Co. were the secretaries and treasurers of the Society, and Sir George Arbuthnot, a member of the firm, was the chairman of the directors. On the 31st July 1906 an entry was made in the minute book of the Society, Exhibit I (a),—setting out the monies held by the Society, Rs. 1,62,695-6-0, the claims payable thereout, Rs. 73,423-0-5, and showing an available cash balance of Rs. 89,272-5-7.

Below this memorandum there is a note in the handwriting of, and initialled by Sir George Arbuthnot, which is as follows:—

"I think we should purchase Rs. 75,000 Government paper. This will leave a small balance after providing as customary for the outstanding claims all of which will no doubt be presented for adjustment before any more money comes in which will not be for about five months."

The minute book was circulated among the directors who placed their initials below this note in accordance with the usual practice.

On the 7th August 1906, Arbuthnot & Co. purchased on behalf of the Society Government promissory notes of the nominal value of Rs. 25,000, as to which no question arises in this suit. On the 9th October 1906, the firm bought in their own name five three-per-cent. Government promissory notes of the nominal value of Rs. 25,000 from the National Bank, which were entered in a suspense account (Exhibit 5) and not in the purchases and sales account (Exhibit 6), in which securities bought for their customers were usually entered. It appears from the firm's books of accounts that on the 11th October the cost of these securities was transferred from the suspense account to that of the Society and debited against them (Exhibits O-1, O-2, N-1 and N-2). It

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

1911.
March 22, 27
and 28.
April 28.

* Original Side Appeal No. 37 of 1909.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

has been proved that the local banks do not disclose the names of the buyers or sellers of securities for whom they are acting; and the plaintiffs' case is that these securities which were purchased by the firm for the Society, stood in the firm's name for a short time and were then endorsed over to the directors.

On the 20th October 1906, the firm's books show that the account of the society was debited with the cost of a Government promissory note of the 3½ per cent. loan of the nominal value of Rs. 10,000 and the firm's Government securities account was credited accordingly (Exhibits P-1, P-2, Q and R).

Counsel for the plaintiffs admitted that this security was the property of Arbuthnot & Co. and was purchased by the Society from them.

On the 22nd October 1906, Arbuthnot & Co. presented their petition in insolvency and a vesting order was made in favour of the Official Assignee. At this date all the abovementioned securities as well as other securities of the Society stood in the names of Sir G. Arbuthnot and two directors of the Society. In consequence of his insolvency the directors desired that these securities should be endorsed over to other directors, and on the 28th November 1906 a letter (Exhibit 2) was sent from the Public Debt office to the Official Assignee requesting him to certify that certain specified Government notes were the property of the Society and that in consequence Sir G. Arbuthnot was authorised to endorse them. In his reply of 6th December (Exhibit U) Mr. Read, who then held the office of Official Assignee, stated that Sir G. Arbuthnot was authorised to endorse all the securities with the exception of the abovementioned notes for Rs. 25,000 and Rs. 10,000, which had been bought by the insolvent firm so near to the date of their suspending payment that in the interests of the creditors he could not for the present recognise the Society's title. The attitude thus taken up by Mr. Read has been maintained by him and his successors in office up to the present time and the Public Debt office has refused to recognise Sir G. Arbuthnot's endorsement in favour of the directors of the Society or to pay the interest accruing on these notes.

The present secretaries of the Society have accordingly brought this suit against the Official Assignee and pray for a declaration that the plaintiffs for and on behalf of the Society are

entitled to the notes in question free from all claims and interference by the defendant and to have the endorsement by Sir G. Arbuthnot to the directors of the Society recognised as valid and conferring a good title on the date when made.

The main question in this case is that set out in the fourth issue "Did the insolvents voluntarily convey and transfer the promissory notes or any of them while they were in insolvent circumstances?"

Counsel for the plaintiffs admitted during the course of the trial that on the 9th October 1906, Arbuthnot & Co. knew that they were insolvent, and the evidence put in also establishes the fact that the firm was in insolvent circumstances when the notes were transferred to the Society. The minute made on the 31st July [Exhibit I (a)], though informal, is admitted by the defendant in his written statement to have been a resolution directing the insolvents, as secretaries and treasurers of the Society, to invest monies in their hands in the purchase of Government promissory notes. It has been argued on behalf of the plaintiffs that the insolvents held the monies of the Society as their agents, that is in a fiduciary character and that the relation between the parties was that of trustees and *cestuis que trustent*, and that the question whether the transfers were voluntary does not really arise in this case.

The question to be determined therefore is whether the transfers of the notes were voluntary assignments by a debtor to his creditor.

It has been proved that monies payable to the Society were paid into the banking department of Arbuthnot & Co., entered in the cash sheets and carried to the account of the Society in the firm's ledger, in the same manner as monies paid to the firm by their other constituents. The transactions of the Society with the firm were also entered in the Society's pass book (Exhibit E), and the Society's journal and ledger were entered up therefrom. The Society did not draw upon the firm by cheque but small sums were paid out by the firm's banking department upon debit slips or orders sent to the shroff by the Society's clerk and larger sums were paid by cheques drawn by Arbuthnot & Co. upon their account at the Bank of Madras, which were prepared in the firm's cash department upon the advice of the same clerk.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

Arbuthnot & Co. received a commission, but no salary for their services, and did not allow the Society any interest on the balance of its monies in their hands.

The annual balance sheets of the Society always showed the cash balance as "Cash with the secretaries and treasurers."

Sir G. Arbuthnot was chairman of the directors, none of whom has been called, and even apart from the direct evidence of Mr. Cronan that the directors were aware of the way in which business was done, I think, that the directors who had the control and management of the Society and to whom the secretaries and treasurers were accountable must be taken to have had full knowledge of and to have consented to the course of business described above.

From the accounts of the parties and the other evidence in the case, I think that Arbuthnot & Co. employed the Society's monies in their business with the consent of the directors and were in fact its bankers as well as its agents, and that the Society having thus chosen to treat its agents as debtors cannot now be allowed to say that they were trustees. It is clear that the relation between banker and customer is that of debtor and creditor merely (*The Official Assignee of Madras v. Smith*(1), and cases there cited).

The insolvents were, therefore, in the position of bankers who had received instructions from their clients to dispose of monies standing to the client's account in a particular manner, that is, of a debtor upon whom a demand for payment has been made by his creditor. I think that it must be taken in this case that the demand was for immediate payment because the resolution of the directors contemplates an immediate investment, and the insolvents in fact fulfilled part of their instructions a week after the resolution. They took no further step in the matter until more than two months had elapsed, and in the meantime no pressure was put upon them to comply with the resolution, and no further resolution or request of the directors relating to the purchase or transfer of Government securities appears in the minute book of the Society. It appears to have been the practice of the insolvents to enter in this minute book a note showing in what manner a resolution of the directors for investment of funds had been complied with but no such note appears to have been made subsequently to the resolution of the 31st July 1906.

(1) (1909) I.L.R., 32 Mad., 68.

At the date of the failure in October, the Government securities account in the Society's ledger had not been written up since 31st December 1905, so that none of the securities in question had been entered. There is no evidence as to whether the directors held board meetings, or ever met at all, or that anything was done by them except to initial the resolution of 31st July; but I do not think that it should be assumed that they were so ignorant or neglectful of their duty to the Society as to abstain from all inquiry as to the manner in which their resolution had been carried out or with respect to the absence of any note thereon in their minute book. It has been shown that it was possible to buy the required amount of Government promissory notes at any time between 31st July and 22nd October 1906.

I am of opinion that the only inference which can be drawn from these facts is that the directors either expressly or impliedly gave time to the insolvents to carry out the instructions contained in their resolution and that the purchase of securities on the 9th and the transfer on the 20th October, were made by the insolvents of their own motion and without any further request or instructions from the directors.

Section 24 of the Insolvency Act provides that if an insolvent shall voluntarily convey, transfer, or make over any security or money to a creditor, his act shall, if made when in insolvent circumstances and within two months before the date of his petition, be deemed fraudulent and void as against the assignee.

Under the law of Bankruptcy in England at the time this Act was passed, a bankrupt could not by any voluntary act favour any one creditor, because it was the policy of the law that all his creditors should be equally treated; but if such an act was done in consequence of the fear of legal proceedings even though mistaken, or other pressure upon the mind of the insolvent, even though that pressure might not be caused by the threats or actions of the creditor, then it was held that his act was not one of free will—see *Sharp v. Jackson*(1).

Thus a payment in the ordinary course of business is not a voluntary payment, because a trader must either pay his trade debts or close his business [*Harman v. Fishar*(2); *In re R.O. Clay & Sons*(3)]. If a creditor demands payment pressure is not

(1) (1899) A.C., 419 at pp. 423 and 425.

(2) 98 Eng. Rep. 998 [(1774) 1 Cowper 117 at p. 123]. (3) (1896) 3 Manson, 31.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

necessary on his part to take it out of the class of voluntary payments; a payment is voluntary when it originates from the bankrupt himself [*Brown v. Kempton*(1). *In re Dhanjibhai Kharetji Ratnagar*(2)]. Thus if the debtor is given time to meet his obligation and afterwards fulfils it of his own motion his act is voluntary one [*In re Eaton & Co.*(3)].

In the present case I think that the inaction of the parties for two months after the resolution of the 31st July, shows that the creditor's demand was not insisted upon, that the debtors were allowed such time as they wished to comply with their instructions, and that their acts of 9th and 20th October were made of their own motion and were therefore voluntary.

The form of this suit and the procedure adopted by the plaintiffs appear to me to be open to several objections. In the first place the securities in question are now vested in three of the directors of the Society for whom they are trustees and these directors are therefore the proper persons to sue in respect of the trust property (Code of Civil Procedure, 1882, section 437; Lewin on "Trusts," 11th Edition 1070) and it has not been alleged that they have refused to sue nor has any application been made to bring them on the record.

Secondly a Government promissory note is a negotiable instrument differing no doubt from other negotiable instruments in some respects (See Indian Securities Act, 1886, sections 5, 6 and 9) but resembling them in that it evidences an obligation undertaken by the Secretary of State to pay a certain sum together with interest thereon to a certain person or his indorsee. It is alleged that the payer of the notes has refused to recognise the title of the indorsees, and yet none of these persons is party to this suit, and any decision to which the court may come in this case will not be binding upon them (see the Specific Relief Act, 1877, section 43).

Assuming that an obligation to pay a sum of money is "property" within the meaning of section 42 of that Act, upon which question no authority has been cited, and that these proceedings were, as stated by counsel for the plaintiffs, intended to be a friendly suit, to obtain the opinion of the court, I do not think that it would be a proper exercise of the discretion given by that section of the court to make a declaration upon a matter which

(1) (1850) 19, L.J.C., p. 169.

(2) 10 Bom. H.C.R., 327, at p. 334.

(3) (1897) 2 Q.B., 18.

may be again litigated between other parties (see *Bhujendro Bhusan Thatterjee v. Trigunath Mookerjee*(1)).

The insolvent Arbuthnot held the securities in question as one of several trustees for the society and upon his being declared an insolvent I think that it was competent to the other directors to appoint a trustee in his place under section 73 of the Indian Trusts Act, 1882, and thereupon under section 75 the securities would vest in the new trustee jointly with the other directors. It is only securities held by the insolvent in his own right which vest in the Official Assignee by virtue of the vesting order made under section 7 of the Insolvency Act, and property held by him as trustee only does not pass to the assignee (Insolvency Act, s. 25, and Williams on 'Bankruptcy,' 8th edn., 185, Lewin on 'Trusts,' 11th edn., 232, and cases there cited).

Section 4 of the Indian Securities Act, 1886, is, I think, intended to protect Government against claims by persons who are not indorsees, and not to prevent an indorsee from showing that his predecessor in title was a trustee whose interest has become vested in him.

I am of opinion therefore that the proper course to be adopted by the directors was either to take proceedings against the Secretary of State upon his refusal to recognise their title or to apply to the Commissioner in Insolvency that the Official Assignee might be directed to concur in the endorsement of the notes to the directors.

Since other remedies were open to the parties, I think a suit for a declaratory decree merely will not lie (see *Kunhamed v. Kutti*(2) and *Man Kuar v. Tara Singh*(3)).

There is considerable force in the contention of counsel for the plaintiffs that several points raised by the defendant at the trial should have been taken at the first hearing of this suit, but since we have decided the substantial matter in issue as well as these subsidiary questions in favour of the defendant, I think that he is entitled to costs of suit but I decline to certify for 2 counsel.

This suit is accordingly dismissed with costs."

Plaintiff appealed.

N. Grant for appellants.

D. M. C. Downing and K. Ramanath Shenai for respondent.

(1) (1882) I.L.R., 8 Cal., 761 at p. 765.

(2) (1891) I.L.R., 14 Mad., 167.

(3) (1885) I.L.R., 7 All., 583.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

MUNRO, J.—The facts are fully set out in the judgment of BAKEWELL, J., and need not be repeated. The first question which arises for determination is whether, as found by the learned judge, Messrs. Arbuthnot & Co. were the society's bankers. I am clearly of opinion on the evidence that they were not. Messrs. Arbuthnot & Co. were the Secretaries and Treasurers of the Society. They also carried on a banking business, and the evidence proves no more than that they dealt with the funds of the society in the same manner as they dealt with monies received from their banking constituents, probably in the first instance for no other reason than that of convenience. It was not alleged in the written statement that Messrs. Arbuthnot & Co. held the society's money as bankers, nor was there any issue which raised the question. On the other hand the written statement and the issues treat the society's money as held by Messrs. Arbuthnot & Co. as secretaries and treasurers, and in the annual balance sheet the society's cash balance is always shown as "cash with the Secretaries and Treasurers." The manner in which the society's funds were entered in the accounts of the Banking department does not prove anything in the circumstances of the case. The argument for the respondent on this point was mainly based upon the existence of Exhibit E, which is a book showing receipts and disbursements on account of the society. This book is in the same form as the pass books issued by Messrs. Arbuthnot & Co. to their banking constituents, but in my opinion it also proves nothing. Convenience will furnish an ample explanation. Messrs. Arbuthnot & Co., requiring an account book, not unnaturally utilised a book which was ready to their hand. No cheque book was ever issued to the society, though we find printed in Exhibit E, a notice that constituents can only draw upon their banking accounts on the forms furnished by the Bank.

The position then simply is this. Messrs. Arbuthnot & Co. held the funds of the society as its secretaries and treasurers, and consequently in a fiduciary capacity, and they committed a breach of trust in using the money in their banking business and in not carrying out the directions given to them in the minute of the 31st July 1906. This being found, there is no dispute that Messrs. Arbuthnot & Co. became debtors to the society; and it is contended for the respondent that the society can only rank with the unsecured creditors in respect of the amount represented by

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

the Government promissory notes now in question. The answer to this is that it was the duty of Messrs. Arbuthnot & Co. not to mix the money of the society, which they held as its secretaries and treasurers with their own money, and that the society's money is recoverable from the unspent balance in their hands at the time of the insolvency—see *In re Hallett's Estate*(1) referred to in *The Official Assignee of Madras v. Smith*(2). It is not contended that the assets of Messrs. Arbuthnot & Co. are not sufficient to meet this and other preferential claims. In these circumstances, the question of fraudulent preference does not arise, and I think the plaintiffs are entitled to the declaration asked for, unless certain other objections taken by the learned judge to the grant of the declaration are good. The learned judge held that the plaintiffs were not entitled to sue. But the counsel for the respondent concedes that the plaintiffs who are the secretaries of the society are entitled to sue and under Act VI of 1869 the secretaries are the proper persons to sue. The learned judge was of opinion that all the necessary parties were not joined in the suit, but no objection on this score was taken in the written statement. No doubt any decree that may be passed in this suit will not bind the Secretary of State as he is not a party, but it is so extremely unlikely that he will raise any difficulty about recognising the title declared by the Court that I do not think his absence is sufficient reason for refusing a declaration—see *Hem Chunder Sanyal v. Sarnamoyi Deb*(3). Finally the learned judge held that the suit for a declaratory decree was bad, because other remedies were open. What those other remedies were are not, to my mind, clearly indicated, and no objection on this score was taken in the written statement, nor was there any specific issue about it. Counsel for the respondent suggests that the plaintiff might have sued the Secretary of State for the interest due on the promissory notes. But as held above, the Secretary of State is not an absolutely necessary party to this suit and is not likely to require a suit to make him pay the interest to the party found entitled to the notes. I would therefore reverse the decree of the learned judge, and give the plaintiffs a decree as prayed with costs throughout.

ABDUR RAHIM, J.—I have also come to the conclusion that the judgment of the learned judge cannot be sustained.

(1) (1879) 13 Ch.D., 696.

(2) (1909) I.L.R., 32 Mad., 68.

(3) (1895) I.L.R., 22 Cal., 354 at p. 359.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

Messrs. Arbuthnot & Co. who carried on the business of bankers, were appointed Secretaries and Treasurers of the Madras Equitable Assurance Society which is a Life Assurance Society governed by a special Act, and in their capacity as such Secretaries and Treasurers received monies belonging to the society. On the 31st July 1906, it appears that Arbuthnot & Co. had an available cash balance of Rs. 89,272-5-7 belonging to the society and it was resolved on that date by the directors that out of this sum, Rs. 75,000 should be invested in the purchase of Government paper. In pursuance of that resolution Arbuthnot & Co. bought Government promissory notes of the nominal value of Rs. 25,000 on behalf of the society on the 7th of August 1906. No question has been raised as to those notes. On the 9th October 1906 the firm of Arbuthnot & Co. bought in their own names Government promissory notes of the value of Rs. 25,000 from the National Bank. This purchase was first entered in a suspense account, but on the 11th October, that is, two days afterwards, the society was debited with the cost of these securities. On the 20th October the firm of Arbuthnot & Co. sold Government promissory notes of the value of Rs. 10,000 to the society and the securities were entered to the credit of the society. On the 22nd October Arbuthnot & Co. presented a petition in insolvency and a vesting order was made. On that date the Government promissory notes for Rs. 25,000 and Rs. 10,000, to which this suit relates, stood in the names of Sir George Arbuthnot, Chairman of the Directors of the Society, and of the two other Directors of the Society.

Upon these facts, the first question that arose was whether Arbuthnot & Co. who held the society's funds as Secretaries and Treasurers, held them as trustees. There can be no doubt that when Arbuthnot & Co. received the monies of the society in their capacity as Secretaries and Treasurers of that Society they received them as trustees.

It has been contended on behalf of the Official Assignee, and that seems also to be the finding of the learned judge, that the society was an ordinary customer of Arbuthnot's Bank. There is no evidence to show—and in fact it was never alleged—that the society at any stage opened an ordinary current or deposit account with Arbuthnot & Co.'s Bank. The society was never given a cheque book and it never drew money by means of cheques. But

it is argued that, as a matter of fact, Arbuthnot & Co.'s Bank did, with the sanction of the directors, treat the society's money like their ordinary customers' money and this is what the learned judge finds. With all respect to him, there is really no evidence to justify such a conclusion. All that is relied upon in order to make out that the society somehow or other became a customer of Arbuthnot & Co.'s Bank, although it never had a cheque book nor drew money by means of cheques and did not have a deposit account is that the society's account which Arbuthnot & Co. as Secretaries and Treasurers had to keep, was copied from the ledger into a pass book. No doubt the book in which these entries are made is one of the ordinary pass books issued by the Bank to its customers. To my mind, however, this proves nothing; having regard to the other circumstances it is clear that a pass book was used in this case, merely for the sake of convenience, and not because the society had a banking account with Arbuthnot & Co. which in fact it had not. Reliance is also placed on a vague and general statement elicited in cross-examination from one of the witnesses, Mr. Cronan, to the effect that there was no difference between monies paid to the credit of the society and those paid to the credit of any other client of Arbuthnot & Co. This statement does not mean that the society was, in fact, a customer of the Bank. On the other hand, the rest of Mr. Cronan's evidence is absolutely clear to show that the society never had any account with Arbuthnot & Co. and this evidence agrees with the admitted facts of the case. In fact it does not appear to have ever been the case of the Official Assignee that the society was a customer of Arbuthnot & Co.'s Bank.

It is next contended on behalf of the Official Assignee that the firm of Arbuthnot & Co. at any rate misappropriated the society's money and therefore the society must be content to rank with the general creditors of the insolvents. But all that has been proved in this connection is that Arbuthnot & Co. mixed up the money of the society with their own money. They had an account with the Bank of Madras and it appears that moneys belonging to the society used also to be paid by Arbuthnot & Co. into the Bank of Madras in the same account. No doubt it was the duty of Arbuthnot & Co. as Secretaries and Treasurers of the Society not to mix up the society's money with their own money and it might be that such mixing up was

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

a breach of trust on their part as secretaries and treasurers, but that in itself does not amount to misappropriation by them of the society's money. It is a well-established rule of equity that if trust money is mixed up with the trustee's private money then the trust will have a lien on the aggregate amount and any sum which may be drawn by the trustee for his own use will be deemed to have been taken out of his own money. However wrong it was on the part of Arbuthnot & Co. to blend the society's money with their own in the first instance, they must be held to have subsequently ear-marked and separated the trust money from their own money when they made purchases of the Government securities in question on behalf of the society. It is difficult to see in these circumstances how it can be said that Arbuthnot & Co. appropriated the sums in question to their own use.

If there was no appropriation, then no question of "voluntary" payment to, or preference of, the society within the meaning of section 24 of the Indian Insolvency Act arises. But, even if it could be held in the circumstances of this case, that Arbuthnot & Co. did, as a matter of fact, misappropriate the society's money and thereby turned themselves into an ordinary debtor of the society, I should have no hesitation in holding that what took place on the 9th, 11th and 20th October did not amount to a "voluntary" payment or preference within the meaning of the Bankruptcy law. It has been contended by the learned counsel for the Official Assignee that section 24 of the Indian Insolvency Act, which forbids all voluntary payments within two months of the act of insolvency if the insolvent was in insolvent circumstances at the time, lays down a rule of wider scope than the rule of English law which requires that a payment by an insolvent must be with a view to give fraudulent preference before it can be impeached. But I do not think that there is really any substantial difference between the English law on the point and the law as enacted in section 24 of the Indian Act, so far as the present question is concerned ((*In re Dhānjibhāi Kharsetji Ratnāgar*(1)). Under the English law, if a payment is made with a view to give preference to one creditor over other creditors, it will be invalid and the English decisions go to show that a payment would be regarded as being made with a view to give preference to a particular

(1) (1873) 10 Bom. H.C.R., 327.

creditor if it was made voluntarily (see Halsbury's 'Laws of England,' vol. II, p. 383). Then judging by the test of what is or is not a "voluntary" payment within the meaning of the Bankruptcy law as expounded in the English cases on the subject, there can be no question but that the payment in this case could, in no sense, be called "voluntary." The test of a "voluntary" payment is whether it was spontaneously made by the debtor of his own motion; if so it will be presumed to have been made with a view to give preference to one creditor over the others. If, on the other hand, the payment was made under the pressure of a demand from the creditor or because of pressure arising from outside circumstances and influencing the mind of the creditor, such as the existence of a special agreement or a possible danger of prosecution or if the payment was made in the ordinary course of business, such payment would not be deemed to be voluntary. (Halsbury's Laws of England, vol. II, pp. 284-5.) It is for the Official Assignee to make out affirmatively that a particular payment was "voluntary," that is, the payment was in fact made in order to, or with a view to, give preference to a particular creditor.

In this case, if Arbuthnot & Co. had misappropriated the trust money, and thereby committed a breach of trust and subsequently wanted to repair the breach of trust by making the purchases in question, which apparently was their intention, the cases of *Sharp v. Jackson*(1) and *In re Lake*(2) show that the payment would not be regarded as "voluntary". Besides, on the 31st July, there was a distinct direction by the directors of the society for the purchase of Government paper of the value of Rs. 75,000 and there cannot be the least doubt that the Government promissory notes bought on the 9th October and 20th October were bought for the society in order to carry out that direction in the same way as the Government paper of the value of Rs. 25,000 which was bought on the 7th August. The learned judge has distinguished the latter purchase from the other two purchases because of the delay of nearly two months intervening between the date of the resolution and the purchases in dispute. This delay, in my opinion, is not sufficient to show that the purchases in question were not made in pursuance of the resolution

(1) (1899) A.C., 419.

(2) (1901) 1 Q.B., 710.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

MUNRO AND
ABDUR
RAHIM, JJ.
—
RAMSAY
& Co.
v.
THE
OFFICIAL
ASSIGNEE
OF
MADRAS.

of 31st July. I do not find any authority for the proposition that when there has been a demand or a special agreement of the nature proved in this case it should be immediately carried out or otherwise any payment though made in pursuance of it must be deemed to be "voluntary." The proposition seems to me untenable. The cases, where a creditor gives time to the debtor to pay, have, in my opinion, no application to the facts of this case. Arbuthnot & Co. in view of the resolution of the 31st July might well have regarded themselves as legally bound, and in fact they were so bound, to make the payment which they did actually make. That would be sufficient to take the case out of the rule relating to voluntary payments. (See *In re Crawford*(1).)

I am therefore of opinion that looking at the case from any point of view, the claim of the plaintiffs must be allowed.

As regards the technical objection regarding the form of the suit, it is enough for me to say that I agree with my learned brother that there is no substance in those objections and such objections should not have been raised at the last stage of the suit.

The appeal will therefore be allowed and the plaintiffs will have a decree as prayed for with costs of this appeal and before the learned judge of the court below.

Messrs. David and Brightwell, Solicitors for appellants.

Messrs. Short and Bewes, Solicitors for respondent.

APPELLATE CIVIL.

Before Mr. Justice Ayling.

RAMAIYAR AND ANOTHER (PLAINTIFFS), PETITIONERS,
v.

P. S. SAMINATHA AYYAR AND THREE OTHERS (DEFENDANTS),
RESPONDENTS.*

*Trespass, suit for damages for—Provincial Small Cause Courts Act (IX of 1887),
art. 31, sch. II—Jurisdiction under.*

Where the plaint alleged that the defendants had trespassed upon plaintiff's land and removed his crop and assessed damages at the profit thus wrongfully obtained by defendants: *Held*, that the suit was one for damages for a single act of trespass and not exempted from the jurisdiction of the Provincial Small

(1) (1874), 9 Ch. App., 752.

* Civil Revision Petition No. 493 of 1910.

Cause Courts by article 31, schedule II of the Provincial Small Cause Courts Act (IX of 1887).

Annamalai v. Subramanyan [(1892) I.L.R., 15 Mad., 298], followed.

Venkoba Rao v. Muthu Aiyar [(1908) 18 M.L.J., 88] dissented from.

AYLING, J

RAMAIYAR

v.

SAMINATHA

AYYAR.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the order of the Subordinate Judge of Mayavaram, dated 16th February, 1910, in Small Cause Suit No. 2070 of 1909.

An act of trespass was committed upon certain lands belonging to the plaintiff and the crops were taken away. Plaintiff sued for the profits realised from the sale of the crops. The Munsif held that the suit was one for the profits of immoveable property belonging to the plaintiff which had been wrongfully received by the defendant within the meaning of article 31 of schedule II of the Provincial Small Cause Courts Act (IX of 1887) and was as such exempted from the jurisdiction of a Small Cause Court.

Savarimuthu v. Aithurusu Rowthar(1) referred to.

T. R. Venkata Rama Sastri for petitioner.

T. V. Muthukrishna Ayyar for the Hon. Mr. *T. V. Seshagiri Ayyar* for respondents.

JUDGMENT.—The only point for decision is whether the suit is exempted from the jurisdiction of a Small Cause Court by reason of article 31 of schedule II of Act IX of 1887.

From the plaint it seems to me that the suit must be regarded as one for damages for a single act of trespass, the said damages, being measured by the landlord's share of the standing crop to which the plaintiffs were entitled and which the defendants carried away. It is not denied that the plaintiffs were in possession (under a *razinama* decree) prior to the trespass and there is no allegation that the defendants remained in possession at the time of suit.

On this view I consider the case to be similar to that of *It* with in *Annamalai v. Subramanyan*(2) and the suit to be cognisable by a Small Cause Court. I do not find anything in *Savarimuthu v. Aithurusu Rowthar*(1) incompatible with this. The first respondent's vakil refers me to the case of *Venkoba Rao v. Muthu Aiyar*(3). I do not see how that case can be

(1) (1902) I.L.R., 25 Mad., 103.

(2) (1892) I.L.R., 15 Mad., 298.

(3) (1908) 18 M.L.J., 88.

ATLING, J. distinguished from the present one; but with great respect to the learned judge who decided it, I think the decision of a divisional Bench in *Annamalai v. Subramanyan*(1) must be followed in preference. The latter is moreover in accordance with my own view of the true meaning of article 31. (*Damodar Gopal Dikshit v. Chintaman Balkrishna Karve*(2) has no bearing on the present question.

The Subordinate Judge will be directed to receive the plaint on the Small Cause side and dispose of it according to law. The cost will abide the result.

ORIGINAL CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

A. RANGANAICKI AMMAL (PLAINTIFF),

v.

A. RAMANUJA AIYANGAR AND FIVE OTHERS
(DEFENDANTS).*

1911.
April
1, 12 and 19.

Hindu Law—Marriage of a daughter of deceased Hindu may be performed by his widow—Reasonable marriage expenses recoverable from joint-family property.

The widow of a deceased member of an undivided Hindu family is entitled to perform the marriage of a daughter of the deceased even when the father of the deceased and the other male members of the family have not wrongly or improperly refused to perform such marriage and she is entitled to recover the reasonable expenses of such marriage out of the joint-family property.

CASE stated under section 69 of the Presidency Small Cause Courts Act (XV of 1882), by J. H. BAKEWELL, the Chief Judge of the Small Cause Court, Madras, in suit No. 401 of 1909.

The facts of this case, as set out in the letter of reference, appear in the judgment.

T. R. Venkatarama Sastriar and T. S. Rajagopala Ayyar for the plaintiff.

T. Ethiraja Mudaliyar for the first and third defendants.

JUDGMENT.—This is a reference by the Presidency Small Cause Court in a suit instituted by the mother of a minor Hindu girl

against the undivided coparceners of her father to recover the expenses of the girl's marriage defrayed by the mother. The question referred to this Court is: "Is the widow of a deceased member of an undivided Hindu family entitled to perform the marriage of a daughter of the deceased, when the father of the deceased and the other male members of the family have not wrongly or improperly refused to perform such marriage and to recover the reasonable expenses of such marriage out of the joint family property. The letter of reference sets out the facts as follows:—

"The plaintiff is the widow of one Sudarsna Aiyangar, deceased, who was the son of the first defendant and brother of the other defendants and undivided from them. Plaintiff had a daughter Lakshmi by the deceased, aged 10, who was asked in marriage for one Sundara Ramanuja Aiyangar. The marriage was agreed upon by all the parties and the *nischithartham* or betrothal ceremony was performed by the first defendant at his own expense and a day was fixed for the marriage. Before the marriage day arrived, the father of the bridegroom wrote to the first defendant demanding that certain properties should be given by him to the boy. The first defendant did not wish to comply with this demand and proposed to give the girl to another bridegroom to whom plaintiff objected on the ground that he was a widower of 34 years of age.

Thereupon the plaintiff herself entered into negotiations with the family of Sundara Ramanuja Aiyangar, the bridegroom first proposed, and carried out the marriage of her daughter with him, without calling upon the defendants to perform it, and without proper notice to them of her intention. The plaintiff seeks in this suit to recover the expenses incurred by her in performing this marriage. The learned judge found that the defendants did not improperly or wrongfully refuse to perform the marriage of the plaintiff's daughter and held that the plaintiff was not therefore entitled to perform the marriage herself, and to demand the costs of so doing from the defendants, and he accordingly dismissed the suit with costs."

The learned first and second judges of the Small Cause Court are of opinion that the plaintiff is not entitled to recover the expenses from the defendants, while the learned third judge is of a contrary opinion. The ground on which the former opinion is based is that the first defendant, the father of the deceased, had

BENSON
AND
SUNDARA
AIYAR, J.
RANGANAICKI
AMMAL
v.
RAMANUJA
AIYANGAR

* Referred Case No. 4 of 1910.

(1) (1892) I.L.R., 15 Mad., 298.

(2) (1893) I.L.R., 17 Bom., 42.

BENSON
AND
SUNDARA
AYYAR, JJ.

JANGANAIAKI
AMMAL
v.

RAMANUJA
AIYANGAR.

a preferable right to select a bridegroom for the girl and to dispose of her in marriage and as he did not wrongly or improperly refuse to perform the marriage the widow acted wrongly in performing it herself.

The first question we have to decide is, whether the plaintiff was entitled to perform the marriage of her daughter in the circumstances set out in the letter of reference. The rules of Hindu Law, on which the answer to this question must depend, are by no means clear. Ordinarily, it would be regarded as the function of the guardian of a minor girl whoever that person might be to arrange for her marriage and to select the bridegroom. The Hindu Law, however, contains very little authority on the question of guardianship (Mayne's Hindu Law, section 211). There are some texts relating to the persons who are to give a girl in marriage which have often been referred to in deciding who is entitled to select a bridegroom and which have to be considered in this case. We shall first refer to the state of the authorities on the question of guardianship. The texts of the Hindu Law refer only to the property and not to the person of the minor. According to Manu, it is the duty of the Sovereign to protect the property of minors [see chapter VIII, section 27]. The same rule is laid down by Vishnu, Sankha and Likhita, Bondhayana and Katyayana [see Colebrook's Digest, volume II (1874 edition), pages 575-76]. According to these texts, none of the relations of the minor has a right to be the guardian; but the king is to appoint a proper person to protect the minor's property. Jagannatha says "but it should be here remarked that the property of a minor should be entrusted to heirs and the rest appointed with his concurrence, or, if the infant be absolutely incapable of discretion, with the consent of a near unimpeachable friend, such as his mother and the rest." And again, commenting on the text of Katyayana enjoining the undivided kinsman of an infant son not to divide the common estate until the minor attains majority he says "in practice, the mother is the guardian of the minor and all his property If the widow be old and incapable of governing her own conduct, there is no harm in permitting the estate to be guarded by kinsman selected by her, for it is only directed that a widow and the rest shall guard the property by any possible means." Thus it is observable that the mother's right of guardianship was recognized very early. W. H. Macnaghten,

in his "Principles of Hindu Law," Vol. I, page 103, observes:—"A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship. But where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations; and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen, according to the degree of proximity but the appointment of guardians universally rests with the ruling power." Sir Thomas Strange, in his book on Hindu Law published in 1830, volume I, page 71, says that the king is, "to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendent of those, who cannot take care of themselves. In this capacity, it rests with him, i.e., with the judicial power, exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor, or female. It is stated that, in practice, the mother is the guardian; but, as a Hindu widow is herself liable to the same sort of tutelage, it is more correct to regard her as proper, if capable, to be consulted on the appointment of one;—and, if of competent understanding, the concurrence of minor himself is not to be disregarded; all which only shows how much the choice is a matter of sound discretion." Mr. Mayne says—see section 211—

"The father, and next to him the mother, is his natural guardian. In default of her, or if she is unfit to exercise that trust, his nearest male kinsmen should be appointed." Mr. Trevelyan also observes:—"The Hindu Law does not seem to prescribe any positive rules with respect to the rights of guardianship, but by practice and custom the rights of certain relations of a Hindu minor have now almost acquired the force of law. For instance, the rights of the father, and of the mother after the death of the father, have been so long and universally acknowledged as to be now indisputable" (page 64).

BENSON
AND
SUNDARA
AYYAR, JJ.
RANGANAKI
AMMAL
v.
RAMANUJA
AIYANGAR.

BENSON
AND
SUNDARA
AYYAR, JJ.
RANGANAIKI
AMMAL
v.
RAMANUJA
AIYANGAR.

In *Mooddoo Krishna Naik v. Tandavaray Naik*(1) the Suddar Court held that the mother may act as guardian at partition. On these authorities it may be taken as clearly established that the mother is entitled to the guardianship of a minor boy or girl after the father and that the paternal kindred are postponed to her. Where the family is undivided the surviving coparceners of the father would, no doubt, be entitled to hold possession of the family estate until partition, but this does not affect her right of guardianship in other respects; (see *Namasevayam Pillay v. Annammai Ummal*(2) and *Muni Reddi v. Venkata Reddi*(3)). The right to give a girl in marriage should ordinarily be regarded as part of the general right of guardianship unless it be expressly vested by law in a different person. See *Shridhār v. Hirālāl Vithal*(4) and the mother's right to select a bridegroom would be prior to that of any of the paternal *Dayadis* of the deceased father.

We have therefore next to examine the texts relating to the marriage of a girl. These are collected in the *Vyavastha Chandrika* of Shyam Charan Sircar, vol. II, pp. 445 to 447. The principal text is that of *Yagnavalkya*, slokas 63 and 64. "A father, paternal grandfather, brother, *sakulya*, the mother likewise are the givers of a girl in marriage. The right to do so devolves on them successively, so that on the failure of the first, the next in order is entitled to perform the ceremony if of sound mind." The expression translated "on failure" is *Nasay* which means literally "on the death," but it is explained that the same rule applies to absence in a distant place. The verse occurs in a context relating to the ceremonies to be performed at the marriage. The text goes on to say "If they do not give (her in marriage), they become guilty of destroying an embryo at every menstruation of the damsel." The prescription of a spiritual penalty often indicates in the Hindu Law that the obligation is not a legally binding one. Vignaneswara observes "This, however, must be understood in the case of a bridegroom endowed with the qualities as mentioned being procurable. The word translated into 'procurable' by Shyama Charan Sircar is 'Sambhave' which literally means 'on the happening.' This shows that the obligation is not to seek out a bridegroom but only to make the gift of the bride to a bride-

BENSON
AND
SUNDARA
AYYAR, JJ.
RANGANAIKI
AMMAL
v.
RAMANUJA
AIYANGAR.

groom when he is available." If the relations mentioned in the text neglect their duty, the girl is, after the lapse of a certain time, entitled to give herself in marriage to a bridegroom. Having regard to the language and the context, it is certainly doubtful whether on its proper construction the text does not relate merely to the ceremonial act of giving so as to make the religious rite most efficacious, although it is true that it has been assumed in several reported cases and in the writings of some modern authors on Hindu Law to include the right of disposing of the girl by selecting a bridegroom for her. Kamalakara in his "*Nirnaya Sindhu*" in commenting on the text says, that "where the father is dead, if the brother of the girl be *asamskritha*, that is, 'uninitiated,' the mother should make the gift," which indicates that in the author's view ceremonial competency is what the text deals with. It will be noticed that the author prefers the mother to the other *sapindas* of the girl's father. Narada and Vishnu have also got texts similar to Yagnavalkya's, though Narada places the maternal grandfather and the maternal uncle before the *sakulyas* and the mother and Vishnu also places the maternal grandfather before the mother. The language of all these texts is moreover that of an obligation laid on the relations mentioned and not of a right conferred on them. This was the view taken in *Venkatacharyulu v. Rangacharyulu*(1) where the obligation is one enforceable in law, it would no doubt follow that the person under obligation has also a corresponding right to perform the act which he is bound to do, but it can hardly be held that any of the persons mentioned in the texts can be legally compelled to give the girl in marriage or be cast in damages for failure to do so. (See *Namasevayam Pillay v. Annammai Ummal*(2).) The consequence attached to the failure according to the Hindu law-givers is as already observed that the person failing would be guilty of a heinous sin—a pronouncement which would indicate that the obligation is only a moral and not a legal one. It has also been held that the provision as to the proper person to be the giver of the girl is only directory in its character. See *Khushālchānd Lalchand v. Bāi Māni*(3) and *Venkatacharyulu v. Rangacharyulu*(1) both of which cases related to the invalidity of the marriage in consequence of the gift having

(1) (1852) Madras Decisions 105.

(2) (1869) 4 M.H.C.R., 339 at p. 342. (3) (1866) 3 M.H.C.R., 241 at p. 244.

(4) (1888) I.L.R., 12 Bom., 480 at p. 484.

(1) (1891) I.L.R., 14 Mad., 316.

(2) (1869) 4 M.H.C.R., 339 at p. 344.

(3) (1887) I.L.R., 11 Bom., 247.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
RANGANAIKI
AMMAL
v.
RAMANUJA
AIYANGAR.

been made by the mother without the consent of the father. A contrary interpretation of the texts by holding them to be obligatory with reference to the proper person to make a gift of the bride would work serious inconvenience in practice. In practice, as a matter of fact, the mother is the person who exercises the right of choice of a bridegroom when the father is dead. That such is the case when the family is divided or when she is not living with the undivided *dayadis* of her husband there can be no doubt, although the texts of Yagnavalkya and other Smṛithi writers do not make any distinction between a divided and an undivided family. We are inclined to hold that the texts really deal only with the religious right of making the gift or *danam* of the bride (*Namasevayam Pillay v. Annammai Ummal*(1)) that they are only directory and not obligatory even from a religious point of view, that they create no legal right or obligation, that they do not prescribe any special rule with respect to selecting a bridegroom or of disposing of a girl in marriage (as opposed to the ceremonial act of giving) and that the right to select a bridegroom must therefore be taken to vest in the guardian of the girl as part of the general rights of guardianship. In *Maharanees Ram Bunsee Koonwaree v. Maharanees Soobh Koonwaree*(2) where the question was whether the step-mother was entitled to the custody of her step-daughter with a view to giving her in marriage in preference to the paternal grandmother of the girl, LOCH and MACPHERSON, JJ., no doubt observe:—"We are inclined to think that the texts already referred to, lay down a special rule with respect to the right to dispose of a girl in marriage, different from the right of guardianship." The learned judges, however, abstained from deciding the point as they held that the paternal grandmother had the preferable right of guardianship, as she was more nearly related to the girl than her step-mother. The *dictum* in the above case was adopted by FARRAN, J., in *Nānābhāi Ganpatrāv Dhairyavan v. Janārdhan Vāsudev*(3), but the learned judge was dealing with the right of the father of a girl as against the mother, and the question arose before him moreover in an application by the father for *ad interim* injunction restraining his wife from performing the daughter's marriage, pending the suit for a declaration of his right of

(1) (1869) 4 M.H.C.R., 339 at pp. 343 and 344. (2) (1867) 7 W.B., 321.
(3) (1888) I.L.R., 12 Bom., 110 at p. 120.

BENSON
AND
SUNDARA
AYYAR, JJ.
—
RANGANAIKI
AMMAL
v.
RAMANUJA
AIYANGAR.

guardianship. It is further not clear from his judgment that he did not intend to decide the question on the ground of the father's superior right of guardianship, for he observed "in the absence of authority, I am unable, on a rule of this kind, to hold that the plaintiff has forfeited his parental right to give his daughter in marriage, or that the defendants are justified in marrying her without her father's consent, and against his wish. That important question must be determined when the case comes to a hearing." For the reasons already mentioned, we doubt the correctness of the dictum of the Calcutta High Court in *Maharanees Ram Bunsee Koonwaree v. Maharanees Soobh Koonwaree*(1). But assuming that the above-mentioned texts propound a special rule with respect to the right to give a girl in marriage, we agree with the view expressed in *Namasevayam Pillay v. Annammai Ummal*(2) that they are obsolete so far, at any rate, as the mother's right is concerned. In that case the divided brother of a deceased Hindu sued the widow for a declaration of his independent legal right to give in marriage her infant daughter to a person of his own choice without her intervention. It was enough for the purpose of the case to decide that he had no such unqualified right, and the Court consisting of SCOTLAND, C.J., and INNES, J., abstained from deciding more. But their observations show that in their opinion the mother's right to select a bridegroom is superior to the brother's. They observe "the strictly legal position and rights of the defendant (that is, the mother) as the guardian of her daughters and the possessor of her husband's property presents still stronger grounds of objection in opposition to the plaintiff's claim. It was conceded in argument that the law has always recognised a mother's right to be the guardian of her minor son or daughter upon the death of her husband in preference to his in-laws. Such a recognition is very inconsistent with the disposal of her daughters in marriage by her husband's brother or other relation without reference to her and tends forcibly to support the view we have expressed with respect to the state of dependency imposed on women. Thus the recognition of her position as guardian militates against the law ever having given her the exclusive right contended for. But now that the texts declaring such a state of dependency have become, as did the Roman

(1) (1867) 7 W.B., 321.

(2) (1869) 4 M.H.C.R., 339 at pp. 343 and 344.

BENSON
AND
SUNDARA
AYYAR, JJ.

RANGANAIKI
AMMAL
v.
RAMANUJA
AIYANGAR.

law relating to the *Iatela Muliebris* obsolete and a woman acts independently as guardian and such acts are perfectly legal, it would amount to almost an absurd contradiction to hold that, although competent and capable to be guardian, a mother has no right to be consulted in the choice of a husband for her daughter." In *Kristo Kissor Neoghy v. Kadermoye Dossee*(1) and *Shridhār v. Hirālāl Vithāl*(2) the right of both parents to bestow a girl in marriage was regarded as being stronger than, and of a different character from, that of other persons. In *Tulsha v. Gopal Rai*(3) it was held that the mother is the "most natural and proper person" to arrange for the marriage of a girl and in *Kaulesra v. Jorai Kasaundhan*(4) even an outcasted mother was held not to have forfeited her right of guardianship.

We are, therefore, of opinion that the plaintiff as the proper personal guardian of her minor daughter was entitled to select a bridegroom for her and to give her in marriage and that in order to entitle her to do so it is not necessary for her to show that the father of the deceased wrongly and improperly refused to perform the marriage. In the present case, on the facts stated in the letter of reference, her act must, in any event, be regarded as proper, as the choice of the bridegroom had been approved by the first defendant. This view is in accordance with the decision of this Court in Second Appeal No. 566 of 1889, where COLLINS, C.J., and PARKER, J., held that the mother could not be held to be acting in fraud of the rights of the father where the latter had approved of the bridegroom, and the only difference between him and his wife was regarding the amount of money that should be received as 'bride-price.'

We now proceed to deal with the second question, namely, "whether the mother is entitled to recover the reasonable expenses of such marriage out of the joint-family property." The decision of this question has been made by the learned judges of the Small Cause Court to rest on the applicability or otherwise of section 69 of the Indian Contract Act. That section lays down that "a person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other." It is undoubted law that where a

(1) (1878) 2 C.L.R., 583.

(3) (1884) I.L.R., 6 All., 632.

(2) (1888) I.L.R., 12 Bom., 480.

(4) (1906) I.L.R., 28 All., 233.

Hindu coparcener dies, leaving an unmarried daughter, his survivors are bound, out of the joint-family property, to defray the expenses of the marriage. This does not at all involve the conclusion that they are entitled to select a bridegroom for her though they are of course bound to pay only the reasonable expenses of the marriage, according to the circumstances of the family, and not any amount which might have been actually spent for it. In *Vaikuntam Ammangar v. Kallipiran Ayyangar*(1) a decree was passed in favour of the mother of a minor girl for the expenses of her marriage, it being held, that where the mother had lawfully performed the marriage of her daughter and had in consequence incurred expense, she was entitled to recover it from her husband's undivided brother. The judgment is not expressly based on section 69 of the Contract Act though it was referred to in argument. In *Vaikuntam Ammangar v. Kallipiran Ayyangar*(2) in which the parties were the same as in *Vaikuntam Ammangar v. Kallipiran Ayyangar*(1) the decision is based on section 69. In our opinion it is doubtful whether that section is applicable to such a case, as it apparently contemplates cases where one person is bound by law to pay money and another is interested in the payment of it. It apparently has relation to payment to a third person and it is difficult to apply it to a case where the person is bound under the law to make a payment directly to the person who has incurred the expense. Moreover, as observed in *Subramania Iyer v. Rangappa Reddi*(3) to which one of us was a party, the interest referred to in the section is apparently a pecuniary interest. See also Pollock and Mullah on "Contracts," page 287. It is immaterial, however, in our opinion, whether section 69 of the Indian Contract Act is applicable or not. Under the Hindu Law the defendants are bound to provide the expenses of the plaintiff's daughter's marriage out of the joint family property in their hands, and if, as we hold, the plaintiff was entitled to perform the marriage, she has under the law a right of action against them to recover the expenses of the marriage. There is no reason for holding that the provisions of the Contract Act are exhaustive of all cases in which a person under the English law would be taken to have a right of action against another as for

BENSON
AND
SUNDARA
AYYAR, JJ.
RANGANAIKI
AMMAL
v.
RAMANUJA
AIYANGAR.

(1) (1900) I.L.R., 23 Mad., 512.

(2) (1903) I.L.R., 26 Mad., 497.

(3) (1910) I.L.R., 33 Mad., 232.

—NISON
AND
SUNDARA
AYYAR, JJ.

RANGANAIKI
AMMAL
v.
RAMANUJA
ATTANGAR.

money paid to his use. It has been held that the Contract Act is not an exhaustive Code as the preamble to the Act itself shows. See the *Irrawaddy Flotilla Company v. Bugwandas*(1), *Narayanasami Reddi v. Osuru Reddi*(2), *Goverdhandas Gocullas Tejpal v. The Bank of Bengal*(3), *Chandra Sekhar Kar v. Nafar Chandra Kundu*(4). In *Bradshaw v. Beard*(5) where the brother of a lady who had separated from her husband on account of a quarrel, performed her burial without communicating with the husband, it was held that he was entitled to recover the cost of the burial from the husband as money paid to his use. WILKES, J., observed :—"Where the deceased has a husband, the performance of that last act of piety and charity devolves upon him. The law makes that a legal duty which the law of nature and society make a moral duty. And, upon his default, the law obliges him to recoup the reasonable expenses of the person who performs it for him. . . . I am not, therefore, surprised to find that there are two authorities in this court—*Jenkins v. Tucker*(6) and *Ambrose v. Kerrison*(7)—which support this view; and I feel no alarm that this doctrine may induce a stranger to thrust himself in between husband and wife for the mere purpose of preventing the husband from performing that duty himself. Generally speaking, parties are not allowed to claim in respect of moneys expended for others without request. If the plaintiff here had been shown to have been guilty of any fraud, in concealing from the husband the fact of his wife's death, and so preventing him from performing the last duty to her remains, the case would have presented a very different aspect. But I see no reason for imputing any such misconduct to the plaintiff. Therefore I think the plaintiff is entitled to recover the reasonable expense incurred by him in the performance of that duty which the defendant ought to have discharged, but has failed to discharge." See also *Dalel Kunwar v. Ambika Partap Singh*(8), *Vrijbhukandas v. Bai Paravati*(9); Keener on Quasi-contract, pp. 341 to 344. The present case is much stronger than *Bradshaw v. Beard*(5) as in this case, according to our view the law gave the plaintiff the right to perform the

(1) (1891) I.L.R., 18 Cal., 620 [P.C.].

(3) (1891) I.L.R., 15 Bom., 48 at p. 60.

(5) (1862) 12 C.B.R. (N.S.), 344 at p. 348.

(7) (1851) 10 C.B., 776.

(9) (1908) I.L.R., 32 Bom., 26.

(2) (1902) I.L.R., 25 Mad., 548.

(4) (1906) 4 C.L.J., 555.

(6) 1. H.B.I., 91.

(8) (1903) I.L.R., 25 All., 266.

marriage and threw on the defendants the obligation to pay for it. We hold, therefore, that the plaintiff is entitled to recover the expenses of the marriage out of the joint-family property of the defendants.

We answer both parts of the question referred to in the affirmative. The Small Cause Court will provide for the costs of this reference.

—NISON
AND
SUNDARA
AYYAR, JJ.

RANGANAIKI
AMMAL
v.
RAMANUJA
ATTANGAR.

ORIGINAL CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

In re VENKATESWARA SASTRI (ACCUSED), PETITIONER.*

Presidency Magistrates' Courts, jurisdiction of, inter se—Transfer, High Court has power of, from court of Chief Presidency Magistrate to court of another Presidency Magistrate—Criminal Procedure Code (Act V of 1898), ss. 21, cl. (2); 526, cl. (ii) — Charter Act, s. 15.

1911.
July 24, 25.
August 2.

The Court of the Chief Presidency Magistrate and those of the other Presidency Magistrates are "courts of equal jurisdiction" within the meaning of section 526, clause (ii), Criminal Procedure Code (Act V of 1898).

The High Court has power to transfer a case from the file of the Chief Presidency Magistrate to that of another Presidency Magistrate.

APPLICATION praying the High Court to order the transfer of Calendar Case No. 11453 of 1911 from the file of the Chief Presidency Magistrate's Court, Madras, to that of the Fourth Presidency Magistrate.

The facts of this case are set out in the order.

P. Narayanamurti for the petitioner.

The Crown Prosecutor on behalf of the Crown.

ORDER.—This is a petition for the transfer of Calendar Case No. 11453 of 1911 (a charge under section 293, Indian Penal Code) from the file of the Chief Presidency Magistrate to that of the Fourth Presidency Magistrate.

The learned Crown Prosecutor raises the preliminary objection that the Court of the Fourth Presidency Magistrate is not one of "Equal or Superior Jurisdiction" to that of the Chief Presidency Magistrate as contemplated in section 526, Criminal Procedure

* Criminal Miscellaneous Petition No. 201 of 1911.

AYLING
AND
SPENCER, JJ.

In re
VENKA-
TESWARA
SASTRI.

Code, and hence this court has no power to order the transfer prayed for.

It has been suggested that although this court may not possess the power in question under section 526, Criminal Procedure Code, it may possess it under clause 29 of the Letters Patent Act or under section 15 of the Charter Act. But the same limitation of the power to transfer is found in each of these and in our opinion no matter which enactment is considered our power to transfer depends entirely on whether, for the purpose of the sections quoted, we can regard the Court of a Presidency Magistrate as of equal jurisdiction to that of a Chief Presidency Magistrate.

We have not been referred to any ruling bearing on the point. In *In re T. Murugesu Mudaliar*(1), BHASHYAM AYYANGAR, J., expressed a doubt as to whether this court could transfer a case from the file of one Presidency Magistrate to that of another on the ground that they were magistrates presiding over the same court. But the learned judge expressed no definite opinion on the point and *Emperor v. Harischandra*(2) is a direct authority to the contrary. We do not feel precluded from taking action under this view.

We have therefore simply to determine the meaning of the phrase "equal jurisdiction." The word "jurisdiction" is nowhere defined in the Criminal Procedure Code and it is one which is used in various senses. In Webster's 'Dictionary' it is thus defined: "The legal power or authority of hearing and determining causes; the power of executing the laws and distributing justice; the right by which judges exercise their power; judicial authority over a cause; as, certain suits or actions, . . . are within the jurisdiction of a court, that is, within the limits of its authority or commission." Applying the above definition to the use of the term in the present connection we think we shall not be wrong in saying that two courts are of equal jurisdiction when they are empowered by law to entertain the same class of cases and dispose of them in the same way.

Now it is not denied that the powers of a Chief Presidency Magistrate are the same as those of an ordinary Presidency Magistrate both as to the entertainment and disposal of cases. Both are empowered to dispose of the same class of cases and to

(1) (1903) 13 M.L.J., 69.

(2) (1908) 10 Bom. L.R., 201.

inflict the same punishments. The procedure before both is identical and each has territorial jurisdiction over the whole Presidency Town. Appeals from both lie to the same court and under similar conditions.

Applying these considerations to the definition of jurisdiction above quoted, they seem to fully warrant us in holding the two courts to be of equal jurisdiction, and we do not think this conclusion is in any way affected by the arguments of the learned Crown Prosecutor directed to show that in certain particulars not affecting their ordinary jurisdiction in the sense above indicated the Presidency Magistrates are subordinate to the Chief Presidency Magistrate. The extent of the subordination of Presidency Magistrates to the Chief Presidency Magistrate is under section 21, clause (2) of the Criminal Procedure Code, to be defined by the Local Government. In Bombay it has been declared to be similar to that of Subordinate Magistrates to a District Magistrate under section 17 (1). But in this Presidency the defining order is under G.O. No. 168, Judicial, dated 2nd February 1900; and it is somewhat noteworthy that although asked by the then Chief Presidency Magistrate to pass a similar order the Government of Madras directed that the subordination should be limited to the purposes of sections 124 (1), 144 (4), 192 and 528, Criminal Procedure Code, of which sections not one of these can in our opinion be properly deemed to affect the jurisdiction of the Presidency Magistrates in the sense in which we understand the term. Section 528 alone might at first sight seem to do so; but the fact that the Chief Presidency Magistrate has the power to transfer a particular case of which a Presidency Magistrate has taken cognisance does not affect the primary jurisdiction of the latter, which is what should be looked to.

We may add that on general principles it is most natural and desirable that the High Court should possess the power of transferring a case from the file of the Chief Presidency Magistrate to that of a Presidency Magistrate. It is easy to conceive of circumstances under which it might be very undesirable for a Chief Presidency Magistrate to dispose of a case of which he had taken cognisance and if the power now in question does not exist, the only course open to the High Court would be to try the case itself or direct committal before itself—both cumbersome remedies quite unsuitable for certain classes of cases. Again, the object of limiting the power of transfer is simply to prevent even the High

AYLING
AND
SPENCER, JJ.

In re
VENKA-
TESWARA
SASTRI.

AYLING
AND
SPENCE, JJ.
—
In re
VENKA-
TESWARA
SASTRI.

Court from nullifying the provisions of law which secure that particular classes of cases shall be tried before different grades of Courts corresponding to the gravity of the offence involved. That is to say it was not contemplated that even this court should be authorised to empower a Third-class Magistrate to try an offence which, as the law enacts, should be tried only by a Magistrate of the first or second class. A case like the present stands on an entirely different footing.

For the above reasons we hold that this court is authorised to transfer a case from the file of a Chief Presidency Magistrate to that of a Presidency Magistrate. We have dealt with the question at same length as it has been fully argued and the learned Crown Prosecutor has pressed for a ruling on the point.

On the merits of the case we do not feel called upon to interfere. It is not alleged that the Chief Presidency Magistrate on whose file the case now stands is prejudiced or unfitted to try it. All that is said is that he does not possess the amount of scholarship in Telugu and Sanskrit which is necessary to understand and interpret correctly without the aid of translation the books in respect of which the charge is lodged, and others to which it may be necessary to refer for comparison. The difficulty, such as it is, is one necessarily of common occurrence in a country like this with so many vernaculars and has to be overcome by the help of translations for the preparation of which in the present case there exist the best facilities. Even assuming that the Fourth Presidency Magistrate, from his knowledge of Telugu and Sanskrit would enjoy certain advantages in dealing with the case (which is the utmost that can be said) we do not think this circumstance warrants us in interfering with the discretion of the Chief Presidency Magistrate who has considered and refused the petitioner's request. The petition is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

RAJAH VENUGOPAL BAHADUR, PETITIONER,

v.

T. K. K. N. R. KADIRVELUSWAMI NAICKER (MINOR, BY
V. THOYAMMAL), RESPONDENT.*

*Guardians and Wards Act (VIII of 1890), section 31, sub-section (4)—
Construction of words "any person."*

The words "any person" in the last part of sub-section (4), Guardians and Wards Act (VIII of 1890), are not limited by the words "relative or friend" in the previous part of the section. The court is competent to hear a person who is not a relative or friend.

PETITION, under section 115 of Civil Procedure Code (Act V of 1908), praying the High Court to revise the order of the District Judge of Madura in I.A. No. 100 of 1911 (in Original Petition No. 475 of 1910).

The facts of this case are sufficiently set out in the judgment below.

C. P. Ramaswami Ayyar for petitioner.

T. Rangachari for respondent.

JUDGMENT.—Both the parties requested us to dispose of this petition along with Civil Miscellaneous Petition No. 866 of 1911. The petitioner, who alleges that the guardian of the minor Zamindar of Gandamanaikanur entered into a contract with him to grant a prospecting and mining lease of the zamindary, applied to the District Judge of Madura to be heard in the application made by the guardian of the Zamindar under section 31 of the Guardians and Wards Act for an order sanctioning a lease to be granted by the guardian to another person. The learned Judge refused to hear him holding that the petitioner not being a relative or friend of the minor was not entitled to be heard. We think this is a wrong view of sub-section (4) of section 31 of the Act. It says "Before granting permission to a guardian to do an act mentioned in section 29, the Court may cause notice of the application for the permission to be given to any relative or friend of the ward

* Civil Revision Petition No. 317 of 1911.

1911.
August 8.

ABDUR
RAHIM AND
SUNDARA
AIYAR, JJ.

RAJAH
VENUGOPAL
BAHADUR
v.
KADIRVELU-
SWAMI
NAICKER.

who should, in its opinion, receive notice thereof and shall hear and record the statement of any person who appears in opposition to the application." Mr. Rangachari, who appears on behalf of the guardian, contends that "any person" in the last part of the subsection must mean a friend or relative, but the language does not require such a narrow construction. The legislature appears to have purposely used language wide enough to cover an application by persons other than relatives or friends of the minor and in this view we are fortified by the provisions of section 43, which enables the Court to entertain the application of any person interested to obtain an order regulating the conduct or proceedings of a guardian. The petitioner before us was, in our opinion, entitled to be heard and we must therefore set aside the order of the District Judge, dated the 31st March 1911, and direct him to dispose of the petition of the guardian (Original Petition No. 475 of 1910) after hearing the petitioner in so far as it relates to the sanctioning of the lease.

The petitioner will have costs of this application to be paid out of the estate.

APPELLATE CIVIL.

*Before the Chief Justice Sir Charles Arnold White
and Mr. Justice Phillips.*

1911.
August 24.

P. ANKINEDU AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

v.

P. SUBBIAH AND FOUR OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 3 TO 6), RESPONDENTS.*

*Mortgage, usufructuary—Equity of redemption, clog or fetter on—Lease—Right
to retain possession as lessee after satisfaction of mortgage.*

A provision in a mortgage deed whereby the mortgagee is to remain in possession after payment of the mortgage debt is unenforceable as it acts as a fetter upon the right to redeem.

When a mortgage deed is accompanied by a lease the effect of which is to keep the mortgagor out of possession notwithstanding the discharge by him of

* Appeal No. 292 of 1909.

the mortgage debt there is a fetter on the equity of redemption which the Court ought not to enforce.

APPEAL against the decree of T. T. Rangachariar, the District Judge of Guntur, in Original Suit No. 66 of 1908, dated the 6th November 1909.

The facts necessary for the report of this case are as follow:—

By Exhibit II, an instrument of mortgage, dated 14th April 1902, the sixth defendant mortgaged to the first defendant certain immoveable properties as security for the principal of Rs. 800 then advanced by the latter to the former and interest thereon at the rate of As. 14 per cent. per month. The instrument contained the following stipulations:—

(a) That on demand the mortgagor was liable to pay to the mortgagee the principal and interest due thereunder.

(b) That the mortgagee should be in possession of the mortgaged property enjoying the usufruct for twelve years from 1903 to 1914, both inclusive, and out of Rs. 247-8-3 fixed as rent for each of the first five years and out of Rs. 341-6-5 fixed as rent for the remaining seven years the mortgagee should pay the land revenue and cesses and appropriate the balance first towards the interest that accrued due during the year and the surplus, if any, towards the principal.

(c) That even after the whole debt should have been discharged at any time the mortgagee should yet continue to be in possession of the mortgaged property till the end of 1914 only paying rent to the mortgagor.

Subsequently sixth defendant executed a second mortgage of the same or similar nature by two connected and simultaneously executed instruments (Exhibits III and IV) bearing date 18th June 1903 in favour of one Rachapudy China Seshayya giving the same property as security for the principal sum of Rs. 2,000, and interest thereon at Rs. 1-8-0 per cent. per month. The said sum of Rs. 2,000 was made up of various items inclusive of an item Rs. 898-15-0 which the said China Seshayya undertook to pay in discharge of the amount due under the first mortgage. The instruments contained the following stipulations:—

(a) That on demand the mortgagor was liable to pay the mortgagee the principal and interest, provided that the yearly interest on the principal should be paid at the end of the year and in default, the same should carry interest at the above rate.

WHITE, C.J.,
AND
PHILLIPS, J.
—
ANKINEDU
v.
SUBBIAH.

WHITE, C.J.,
AND
PHILLIPS, J.
—
ANKINEDU
v.
SUBBIAH.

(b) That the mortgagee should be in possession of the mortgaged property for a period of twenty years from the commencement of the year 1915 enjoying the usufruct and out of Rs. 341-6-5 fixed as rent the mortgagee should pay the land revenue and cesses and appropriate the balance towards the mortgage debt.

(c) That even after the whole debt should have been discharged in any manner and at any time, the mortgagee should still continue to be in possession of the mortgaged property only paying rent to the mortgagor.

Subsequent to the two mortgages first defendant became the purchaser of 5 acres (undefined) out of the whole area of 17 acres and 07 cents. He also took an assignment, by two instruments, dated 19th August 1905, of the second mortgage described above.

By three registered instruments, dated 10th September 1907, 2nd January 1908 and 27th September 1908 (Exhibits E, F and G) plaintiff purchased the remaining 12 acres and 07 cents as well as the right to receive the proportionate rental on the 5 acres purchased by the first defendant for twenty-seven years from 1907 to 1934, the proportionate rental amounting to Rs. 72-8-0 for 1907 and Rs. 100 for subsequent years.

Plaintiff claimed to be entitled to redeem the mortgaged property by payment to the first defendant of the amount still due under the two mortgages, and to recover the possession of 12 acres and 7 cents out of 17 acres and 7 cents, the stipulations to the contrary in the instruments referred to above, being inequitable and illegal and hence unenforceable. He also claimed to be entitled to a declaration of his right to recover the rental in respect of the 5 acres at the rate specified above.

Second defendant was the undivided minor son of the first defendant. Defendants Nos. 3 to 5 were impleaded as being in possession of the mortgaged properties with the first defendant, sixth defendant being the vendor.

Plaintiff prayed (*inter alia*)—

(a) For an account of the amount still due to the first defendant, for permission to pay the amount and upon such payment for the execution of a registered document acknowledging all the rights under Exhibits II, III and IV to have been extinguished.

(b) For possession of 12 acres and 07 cents of the land.

(c) For a declaration that he was entitled to receive the proportionate rental on the remaining 5 acres at Rs. 100 a year for twenty-seven years from 1908 to 1934 both inclusive.

The defendants Nos. 1 and 2 contended that the stipulation in Exhibit II that the mortgagee should without reference to the discharge of the mortgage debt hold the mortgaged land on lease for twelve years was valid and binding on the sixth defendant and the plaintiff; that Exhibits III and IV were independent transactions and the lease must have full operation irrespective of the mortgage which was one without possession and even if the two were treated as a single transaction the stipulation as to the lease was valid and binding on the sixth defendant and the plaintiff; that the rents reserved under the leases were the highest that could be secured and the said stipulations did not operate as clog on the right of redemption. Further that the sale-deed (Exhibit F), executed by the sixth defendant to the plaintiff was fraudulent, void and legally inoperative as she (sixth defendant) had no subsisting interest in the mortgaged property at the time of the sale.

Defendants Nos. 3 to 5 were *ex-parte*.

The sixth defendant pleaded that as she had sold the plaintiff properties to the plaintiff for proper consideration she was not a necessary party to the suit and claimed to be exonerated.

The District Judge held that Exhibits III and IV evidenced but one transaction; that the stipulations in Exhibits II and IV as to enjoyment of the lands by the mortgagees for twelve and twenty years respectively till 1934 notwithstanding the extinguishment of the mortgages, were invalid and unenforceable, they imposing fetters upon the equity of redemption; that no liability rested in first defendant to pay rent for the 5 acres and 07 cents to the plaintiff, as on the date of Exhibit G, sixth defendant (plaintiff's transferor) did not possess any right to recover it.

The Hon. Mr. P. S. Sivaswami Ayyar for appellants.

V. Visvanatha Sastri for first respondent.

JUDGMENT.—As regards Exhibit II, it is not contended that under that instrument the plaintiff is not entitled to pay off the mortgage debt at any time. He has in fact paid it and we understand that the mortgagee has received it, but the Advocate-General has contended that, notwithstanding this, the mortgagee is entitled to remain in possession until the expiry of the twelve

WHITE, C.J.,
AND
PHILLIPS, J.
—
ANKINEDU
v.
SUBBIAH.

WHITE, C.J.,
AND
PHILLIPS, J.
—
ANKINEDU
v.
SUBBIAH.

years the period of the mortgage as provided in the deed. The question of whether the provisions of the deed are unenforceable on the ground that they fetter the right to redeem, of course only arises if the parties intended when they executed the deed that the mortgagee should be allowed to remain in possession in the event which has in fact happened in this case, viz., discharge of the debt by the mortgagor. On the construction of Exhibit II we do not think the parties so intended. The Advocate-General relies on the provision in the deed that as soon as the debt is discharged the mortgagee shall pay rent to the mortgagor. The contingency contemplated in the deed was the satisfaction of the mortgage amount out of the property before the expiry of the twelve years. In this event the mortgagee was to be entitled to remain in possession until the expiry of the twelve years on payment of the rent provided in the deed.

The deed contains no express provision under which the mortgagee can claim to remain in possession if the mortgagor himself discharges the debt. In our opinion, so far as Exhibit II is concerned, on payment of the mortgage debt by the mortgagor, the mortgagor is entitled to redeem. Even if on the true construction of the instrument the parties intended that the mortgagee should remain in possession after the payment of the mortgage debt, we think such an agreement would be unenforceable as fettering the right to redeem.

As regards Exhibits III and IV which were executed on the same day and which must undoubtedly, in our opinion, be read together, the case stands on a different footing. Under these instruments the mortgagee claims the right to be in possession as from 1915. The question of his right to possession under these instruments has therefore not yet arisen and will not arise until 1915. In any view it seems to us that so far as these documents are concerned, he has no right to possession now. When Exhibit III was executed the mortgagor could not put the mortgagee into possession since on that date the mortgagee under Exhibit II was already in possession. This is probably the reason why it was thought necessary to execute two documents. The fact that there were two documents does not of course in itself show there were two independent transactions. The lease (Exhibit IV) is a lease for twenty years as from 1915. It recites the mortgage and expressly provides for the payment of the mortgage debt by

the mortgagor. It contemplates the mortgagee remaining in possession notwithstanding this payment and provides that after deducting expenses the balance shall be paid to the mortgagor as rent. We do not think the lease can be regarded as an independent transaction. It is part and parcel of the mortgage transaction and its effect is to keep the mortgagor out of possession of the mortgaged property notwithstanding the discharge by him of the mortgage debt. Leases between a mortgagor and a mortgagee to last during the pendency of a mortgage, are not bad in themselves [*Mahomed v. Ezekiel*(1)]. But in the case before us the documents expressly contemplated the continuance of the lease after the discharge of the mortgage debt. We think this is a fetter on the equity of redemption which the Court ought not to enforce. See *Ramasami Pattar v. Chinnun Asari*(2), *Morgan v. Jeffreys*(3). The appeal is dismissed with costs.

WHITE, C.J.,
AND
PHILLIPS, J.
—
ANKINEDU
v.
SUBBIAH.

(1) (1905) 7 Bom. L.R., 772.

(2) (1901) I.L.R., 24 Mad., 449.

(3) (1910) I. Ch., 620.

