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CORRIGENDA, VOLUME XLIII.

Page 40, to footnote, reference (1), add (F.B.)

„ 41 to „ „ (1), „ „

„ 45 to „ „ (2), „ „

„ 46 to „ „ (6), „ „

„ 53 for „ „ (3), read reference 4.

„ 53 „ „ „ (4), „ „ 3.

„ 56, to „ „ (1), add (F.B.)

„ 62, to „ „ (2), „ (F.B.)

„ 63, for „ „ (1), read [1893] 1 Q.B., 564.

Pages 63 and 64, for *Sultan Harbour Improvement Company v. Hitchens* read *Sutton Harbour Improvement Company v. Hitchens*.

Page 73, for footnote, reference (4), read [1905] 2 K.B., 667.

„ 118 „ „ „ (7), „ (1907) 17 M.L.J., 321.

„ 131, to „ „ (1), add (P.C.)

„ 136 „ „ „ (1), „ (F.B.)

„ 137, for „ „ (5), read (1919) I.L.R., 42 Mad , 821 (F.B)

„ 138, „ „ „ (4), read [1891] 1 Q.B., 230.

„ 139, to „ „ (1), add (P.C.)

„ 139 „ „ „ (4), „ „

„ 140 „ „ „ (5), „ „

„ 150, for *Colonial Bank of Australasia v. Williams* read *Colonial Bank of Australasia v. Willan*.

„ 150, for footnote, reference (5), read (1874) L.R. 5 P.C., 417.

„ 228, for *Mussamut Amanee v. Meer Meher Ally* read *Meer Meher Ally v. Mussamut Amanee*.

„ 228, for footnote, reference (1), read (1868) 10 W.R., 370, Note

„ 371, to „ „ (4), add (F.B.)

Page 434, to footnote, reference (1), add (F.B.)

„ 505, for „ „ (7), read (1910) 2 K.B., 32

„ 724, to „ „ (2), add (F.B.)

„ 785, for „ „ (1), read (1875) 10 Ch. App., 373,

„ 804, line 30, for “The judgment of the Court was delivered by
SPENCER, J.” read “The judgment of the Court was
delivered by KRISHNAN, J.”

Pages 805 to 807, in the side notes for “SPENCER, J.” read KRISH-
NAN, J.”



THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

Senior Law Reporter.

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VOL. XLIII—1920.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council.

BY THE BOOK DEPOT BRANCH OF THE LEGISLATIVE DEPARTMENT
OF THE BENGAL SECRETARIAT, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;
AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD.

JUDGES OF THE HIGH COURT.

1920,

1ST JANUARY TO 31ST DECEMBER.

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(1920) I.L.R., 43 Mad.

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 248, CL. (a)—Attachment under decrees known to judgment-debtor—Application for sale more than a year after previous application—Sale without notice to judgment-debtor, validity of.] A sale of a judgment-debtor's property is not void for want of notice to him of the application for sale made more than a year after a prior application for execution, if the sale is held in pursuance of a subsisting attachment known to the judgment-debtors. *Raghunatha Das v. Sundar Das Khetri*, (1915) I.L.R., 42 Cal., 72 (P.O.), and *Shyam Mandal v. Satinath Banerjee*, (1917) I.L.R., 44 Cal., 954, distinguished.

Sitaramayya v. Gopalakrishnamma ... (1920) I.L.R., 43 Mad., 57

(ACT V OF 1908), SEC. 2 (2)—Decree—Order refusing to recognise a person as legal representative of deceased plaintiff—Appeal from order, maintainability of.] An order rejecting the claim of a person to be the legal representative of a deceased plaintiff and to continue the suit amounts to a decree dismissing the suit and thus gives him a right of appeal from the order. As he would not be a party to the subsequent order of abatement of the suit, he would have no right of appeal from that order. *Rama Rao v. The Rajah of Pittapur*, (1919) I.L.R., 42 Mad., 219, applied; *Lakshmi Achi v. Subbarama Ayyar*, (1916) I.L.R., 39 Mad., 488, distinguished; *Suppu Nayakan v. Perumal Chetty*, (1916) 30 M.L.J., 486, considered.

Ayya Mudali Velan v. Veerayee ... (1920) I.L.R., 43 Mad., 812

SEC. 11, EXPLANATION V AND O. I., R. 8—Res judicata—Private right claimed in common by several persons—Suit by some, others being impleaded as defendants—Bona fide litigation—Decision, whether binding on representative of deceased defendant, not brought on record.] Explanation V to section 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under Order I, rule 8, but also to cases where some of the persons claiming a private right in common with others litigate bona fide on behalf of themselves and such others. A decision in a suit, instituted and conducted bona fide by some only of the aghaharamdars of a village against the zamindar and the other aghaharamdars, for a declaration as to the kattubadi payable by them to the zamindar, is *res judicata* against the representative of an aghaharamdar who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the Appeal or the Second Appeal. *Rangamma v. Narasimha Charyulu*, (1916) 31 M.L.J., 26, followed.

Gopalacharyulu v. Subbamma ... (1920) I.L.R., 43 Mad., 487

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 21—Want of territorial jurisdiction—Objection whether allowable by appellate or revisional Court—Objection whether allowable in execution proceedings—Powers of executing Court to which decree transferred.] The provisions of section 21, Civil Procedure Code, apply to objections regarding want of territorial jurisdiction. Such an objection, not taken as provided by the section, must be considered cured for all purposes, and cannot be allowed in execution proceedings. A party who does not raise an objection to jurisdiction when a preliminary mortgage decree is made absolute, is not entitled to plead in execution that the order was passed without jurisdiction.	
<i>Zamindar of Ettiyapuram v. Chidambaram Chetty</i> ... (1920) I.L.R., 43 Mad. (F.B.),	675
SEC. 35—Costs—Change in law, effect of, on award of costs.] It is a good cause for depriving the successful respondent of his costs of the appeal that the law has been altered since the filing of the appeal.	
<i>Ramasami Naiken v. Venkatasami Naiken</i> ... (1920) I.L.R., 43 Mad.,	61
SEC. 35, O. XXII—Abatement of suit—Dismissal of suit—Costs against estate of plaintiff, whether can be awarded to defendant—Pleader's fee—Only one-half to be allowed.] If on the death of a sole plaintiff the right to sue does not survive and the suit is dismissed in consequence, the Court has power under section 35, Civil Procedure Code, to make an order granting the costs of the defendant out of the estate of the deceased. If the suit abates after the framing of issues, only one-half of the pleader's fee should be awarded.	
<i>Chenchayya v. Balayya</i> ... (1920) I.L.R., 43 Mad.,	284
SEC. 47—Decree—Sale in execution of decree—Stranger purchaser in execution of money decree whether representative of decree-holder—Stranger purchaser in execution of decree—Applicability of section 47, Civil Procedure Code.] A stranger purchaser at Court-auction is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree under execution decided under section 47, Civil Procedure Code. Per ABDUR RAHIM, OFFG. C.J.—A stranger purchaser by private contract is also so bound and entitled. Whether a purchaser either by private contract or at Court-auction in execution of a money decree is to be considered the representative of the decree-holder or judgment-debtor depends upon the nature of the question raised and on who the contesting party is. Per OLDFIELD and SRSHAGIRI AYYAR, JJ.—The inclusion in the proceedings of a stranger purchaser at Court-auction is justifiable on the ground of his interest in their result and without reference to his possession of any representative character. <i>Prosunno Kumar Sanyal v. Kali Das Sanyal</i>, (1892) I.L.R., 19 Calc., 683 (P.O.), considered and applied. An auction purchaser of property in execution of a money decree is not a representative of the decree-holder for the purpose of these execution proceedings. Per OLDFIELD, J.—Such an auction purchaser is the representative of the judgment-debtor for the purpose of inquiring into a question relating to the subsequent execution of a distinct decree against the same judgment-debtor affecting the same property. Per SRSHAGIRI AYYAR, J.—Where question relates to the rights of the parties to the decree, the matter should be decided in execution, although strangers are benefited by or interested in the result of such a decision.	
<i>Veyindramuthu Pillai v. Maya Nadan</i> ... (1920) I.L.R., 43 Mad. (F.B.),	107
SEC. 47 AND 145—Third party executing surety bond for a judgment-debtor—Suit for a declaration that the bond is void for fraud and undue influence and for cancellation of the bond, maintainability of.] A person not a party to the suit, who stands surety for a judgment-debtor for the due performance of a decree, has no independent right, under section 47 of the Civil Procedure Code, to apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud and undue influence. His only remedy is by way of suit. He is a	

party to the suit within the meaning of section 47, Civil Procedure Code, only for the limited purpose mentioned in section 145 of the Code, namely, for appeal.

Ramanathan Pillai v. Doraiswami Aiyangar ... (1920) I.L.R., 43 Mad., 325

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 66, SUB-SEC. (1):—See SALE IN EXECUTION OF DECREE 643

SEC. 73—Rateable distribution—Right of a decree-holder to impeach the decree of another before distribution—Suit for declaration whether maintainable.] One decree-holder cannot dispute the right of another decree-holder against the same judgment-debtor to share in a rateable distribution of the assets, merely on the ground that the latter's decree was not based on a real debt, unless there was collusion between him and the judgment-debtor in obtaining that decree. Per SADASIVA AYYAR, J.—A decree-holder may file a suit for a declaration that another decree-holder is not entitled to rateable distribution under section 73, Civil Procedure Code, and for an injunction even before the distribution of the assets by the Court.

Venkatarama Aiyar v. The South Indian Bank, Limited ... (1920) I.L.R., 43 Mad., 381

SEC. 92—Suit by two persons, one of whom had no interest under the section—Leave under the section obtained subsequently by two others having such interest—Latter joined as additional plaintiffs—Suit, whether maintainable.] Where a suit was instituted under section 92, Civil Procedure Code, by two plaintiffs, one of whom had no interest such as that required by that section, and two other persons having the requisite interest subsequently obtained leave under the section and were joined as additional plaintiffs in the suit. Held, that the suit was maintainable under section 92 of the Code, and ought to be tried on the merits. *Ramayyengar v. Krishnayyengar* (1887) I.L.R., 10 Mad., 185, applied.

Jekkam Reddi v. Sir S. Subramania Ayyar ... (1920) I.L.R., 43 Mad., 720

SEC. 92, O. I, R. 10 (2)—Suit by plaintiffs after obtaining consent of Advocate-General—Application by Advocate-General to be added as co-plaintiff—Power of Court to add parties.] In a suit under section 92, Civil Procedure Code, instituted by persons who had obtained the requisite consent of the Advocate-General, the Court can, on the application of the Advocate-General, add him as a co-plaintiff.

Ambalavana Pandara Sannadhigal v. The Advocate-General of Madras ... (1920) I.L.R., 43 Mad., 707

SEC. 135, O. XXXVIII, R. 8—Surety for appearance of defendant—Defendant present in Court to conduct his case—Application by surety to be released from obligation—Voluntary surrender—Consent decree without assent of surety—Contract Act (Indian) (IX of 1872), section 135.] A surety, for the appearance of a defendant who had been arrested before judgment, is not entitled to be discharged from his obligation under Order XXXVIII, rule 3, when the defendant appears in Court to conduct his case, as such appearance is not a voluntary surrender within the meaning of the rule, nor is he entitled to such discharge because the defendant submitted to a consent decree without his assent. Section 135 of the Indian Contract Act does not apply.

Appunni Nair v. Isack Mackadan ... (1920) I.L.R., 43 Mad., 272

O. IX, R. 13—Ex parte decree, power of Court to set aside.] A Court has no power, apart from the provisions of Order IX, rule 13, Civil Procedure Code, to set aside an ex parte decree passed by itself. *Somayya v. Subbamma*, (1903) I.L.R., 26 Mad., 599, overruled.

Neelaveni v. Narayana Reddi ... (1920) I.L.R., 43 Mad. (F.B.), 94

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 2—Adjustment of partition decree—Adjustment as to partition of immoveable property—Necessity for certification by decree-holder—Sale by one decree-holder to another of his share in some of the lands decreed—Sale, not certified to Court, effect of—Subsequent application in execution by vendor for partition of lands sold and for other reliefs—Bar of execution.] Order XXI, rule 2, Civil Procedure Code, applies to partition decrees which provide for the payment of money as well as for other relief, such as a partition of immoveable property, and to adjustments with regard to such property. Such an adjustment cannot be recognized, unless certified or recorded as required by the rule. <i>Abdul Lathif Sahab v. Bathula Bibi Ammai</i>, (1914) 15 M.L.T., 338, and <i>Sethurama Sahab v. Chota Raja Sahab</i>, (1917) M.W.N., 327, followed; <i>Kelu Nair v. Meenakshi</i>, (1918) 25 M.L.J., 688, not followed.	
<i>Ramakrishna Rao v. Balakrishna Rao</i>	(1920) I.L.R., 43 Mad., 476
REGISTRATION ACT (XVI OF 1880), SEC. 17, SUB-SEC. (2)	O. XXI, R. 2:—See REGISTRATION ACT (XVI OF 1880), SEC. 17, SUB-SEC. (2)
PROPERTY ACT (IV OF 1882), SEC. 53	O. XXI, R. 68:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53
MADRAS ESTATES LAND ACT (I OF 1908), SS. 111 AND 118	O. XXI, RR. 90 AND 92:—See MADRAS ESTATES LAND ACT (I OF 1908), SS. 111 AND 118
R. 1—Transfer of Property Act (IV of 1882), ss. 52 and 51, clause (f)—Lis pendens—Sale in execution of a money decree pending a suit on mortgage of the property sold—Possession obtained by purchaser—sale in execution of mortgage decree—Right of the latter purchaser to oust the former from possession—Order as to possession—Appeal—Suit.] Where lands were attached in execution of a money decree, and afterwards a suit for sale on a mortgage of the same lands was filed, but the attaching creditor was not made a party thereto, the purchaser of the lands in execution of the money decree is not entitled to retain possession of them as against the subsequent purchaser in execution of the mortgage decree. Where claim proceedings under Order XXI, Civil Procedure Code, fall also under section 47 of the Code, Order XXI, rule 103, does not prevent an appeal against an order therein, as it falls under section 47 of the Code.	O. XXI, R. 103, AND O. XXXIV, R. 1:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 52 AND 51, CLAUSE (F)—LIS PENDENS—SALE IN EXECUTION OF A MONEY DECREE PENDING A SUIT ON MORTGAGE OF THE PROPERTY SOLD—POSSESSION OBTAINED BY PURCHASER—SALE IN EXECUTION OF MORTGAGE DECREE—RIGHT OF THE LATTER PURCHASER TO OUST THE FORMER FROM POSSESSION—ORDER AS TO POSSESSION—APPEAL—SUIT.] WHERE LANDS WERE ATTACHED IN EXECUTION OF A MONEY DECREE, AND AFTERWARDS A SUIT FOR SALE ON A MORTGAGE OF THE SAME LANDS WAS FILED, BUT THE ATTACHING CREDITOR WAS NOT MADE A PARTY THERETO, THE PURCHASER OF THE LANDS IN EXECUTION OF THE MONEY DECREE IS NOT ENTITLED TO RETAIN POSSESSION OF THEM AS AGAINST THE SUBSEQUENT PURCHASER IN EXECUTION OF THE MORTGAGE DECREE. WHERE CLAIM PROCEEDINGS UNDER ORDER XXI, CIVIL PROCEDURE CODE, FALL ALSO UNDER SECTION 47 OF THE CODE, ORDER XXI, RULE 103, DOES NOT PREVENT AN APPEAL AGAINST AN ORDER THEREIN, AS IT FALLS UNDER SECTION 47 OF THE CODE.
<i>Veyindramuthu Pillai v. Maya Nadan</i>	(1920) I.L.R., 43 Mad., 608
REGISTRATION ACT (IX OF 1908), ARTS. 44 AND 144	O. XXXII, R. 4 (1):—See LIMITATION ACT (IX OF 1908), ARTS. 44 AND 144
a guardian appointed for a minor by a competent authority—Suit and decree against such minor represented by another guardian, validity of.] If a minor has a guardian appointed for him by a competent authority he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the Court acted in ignorance of the existence of such appointed guardian is not binding on the minor. <i>Rashid-un-nisa v. Muhammed Ismail Khan</i> (1909) I.L.R., 31 All., 572 (P.O.), followed. <i>Dammar Singh v. Pirthu Singh</i> (1907) I.L.R., 29 All., 290, not followed.	O. XXXII, R. 4 (2)—Existence of a guardian appointed for a minor by a competent authority—Suit and decree against such minor represented by another guardian, validity of.] If a minor has a guardian appointed for him by a competent authority he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the Court acted in ignorance of the existence of such appointed guardian is not binding on the minor. <i>Rashid-un-nisa v. Muhammed Ismail Khan</i> (1909) I.L.R., 31 All., 572 (P.O.), followed. <i>Dammar Singh v. Pirthu Singh</i> (1907) I.L.R., 29 All., 290, not followed.
<i>Bhimaji v. Hussain Sahib</i>	(1920) I.L.R., 43 Mad., 808
LAW	O. XXXIV, R. 8:—See HINDU LAW
Decree for recovery of plaintiff's share on payment to alienees on a certain date—Payment on subsequent date—Jurisdiction of Court to extend time for payment—Construction of decree.] A decree in a suit for partition provided inter alia that the plaintiffs could recover certain properties from the alienees on payment of a sum of money into Court by a certain date, without any	O. XXXIV, R. 8—Partition suit—Decree for recovery of plaintiff's share on payment to alienees on a certain date—Payment on subsequent date—Jurisdiction of Court to extend time for payment—Construction of decree.] A decree in a suit for partition provided inter alia that the plaintiffs could recover certain properties from the alienees on payment of a sum of money into Court by a certain date, without any

provision as to effect of non-payment. Plaintiffs, however, paid the money on a subsequent date. *Held*, that the decree was in terms and in effect one for redemption; and that the Court had jurisdiction under Order XXXIV, rule 8, to extend the time for payment.

Idumba Parayan v. Pethi Reddi (1920) I.L.R., 48 Mad., 357

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 10—Security for costs—Pauper appellant—Jurisdiction of Court to order a pauper appellant to furnish security for costs of respondent. The Court has jurisdiction to order an appellant, who has been given leave to appeal in forma pauperis, to furnish security for the costs of the respondent under Order XLI, rule 10, Civil Procedure Code. *Seshayyengar v. Jainulavadin* (1880) I.L.R., 3 Mad., 66, followed. *Khemraj Shrikrishnadas v. Kisanlala Surojmal* (1918) I.L.R., 42 Bom., 5, dissented from.

Saidanha v. Henry Hart (1920) I.L.R., 43 Mad., 902

O. XLI, R. 33:—See MORTGAGE. 803

COMPANY—Charge given by resolution of Company to its Secretary on unpaid calls for special services rendered to the Company—Failure to register charge—Duty of officers to register neglected—Indian Companies Act (VI of 1882), sec. 68—Explanation—Mode of construction—Proceedings in Legislative Council cannot be referred to to aid construction.] The question in this appeal was whether a charge given to the appellant, the Secretary of a Limited Company upon unpaid calls, could be enforced by him although not registered as required by section 68 of Act VI of 1882 (Indian Companies Act), which section required registration of all mortgages and charges specifically affecting property of the company, and imposed a penalty upon any official of the company who knowingly and wilfully authorizes or permits the omission of such entry in the register. The decision of this question depended on the proper interpretation of the explanation to the section which was as follows:—"Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves 'as such' of a mortgage or charge specifically affecting property of the company and not so registered." *Held* that the construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words. *Held* that the words 'as such' in their proper construction should not be read as denoting the capacity in which the officers take the mortgages or charges, as contended by the appellant, nor do they refer to the following words 'of a mortgage or charge' as contended by the respondents. They are introduced simply as giving the reason for the inability to take advantage of the securities which is that officers entrusted with a duty as to registration could not take advantage of a security to them as to which they had neglected this duty. In the circumstances of the case, therefore, it was held that the appellant could not avail himself of the charge even though he had ceased to be an officer.

Krishna Ayyangar v. Nallaperumal Pillai ... (1920) I.L.R., 43 Mad. (P.C.) 550

CONTRACT ACT (IX OF 1872), SEC. 16 (1)—Undue influence—Onus of proving undue influence—Suit to cancel contract on ground of undue influence—Domination of will must be put in action.] To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. But both by the Law of India and the Law of England more than mere influence must be established so as to render it, in the language of the law, 'undue.' It must be established that the person in a position of domination has used that domination to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. When the relation of influence as above set forth has been established, and it is also made clear that the bargain is with

the person who influences the other, and is in itself unconscionable, then the person in a position to use his dominating power has the heavy burden thrown on him of proving affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. In the circumstances of the present case their Lordships were of opinion it has not been proved as an essential part of the plaintiff's case that the contract of sale came to was unconscionable in itself or constituted an advantage unfair to the plaintiff.

Poosathurai v. Kannappa Chettiar ... (1920) I.L.R., 43 Mad. (P.O.), 546

CONTRACT ACT (INDIAN) (IX OF 1872), SEC. 135:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 135, O. XXXVIII, R. 8 ... 272

COSTS—Vendor and purchaser—Covenant to indemnify against defective title—Attack on title—Liability of vendor to pay not merely taxed costs but all reasonable costs as between vakil and client. Upon a covenant by a vendor of lands to indemnify the purchaser against all losses that the latter might be put to in defending his title or enjoyment of the lands, from adverse claims, the vendor is bound to pay the purchaser not merely taxed costs as between party and party, of a suit in which he had to defend his title, but the actual costs which he had to pay to his legal advisers, and which are reasonable in the circumstances of the case. *Smith v. Compton* (1882) 8 B. & Ad., 407, followed.

Venkataramayya Appa Rao v. Varaprasada Rao ... (1920) I.L.R., 43 Mad., 898

COURT FEES ACT (IV OF 1870), SCH. II, ART. 6:—See STAMP ACT (II OF 1899), SEC. 2 (5), ARTS. 15 AND 40, SCH. I ... 863

COURT FEES ACT (VII OF 1870), SCH. II, ART. 17 (6):—Suit for partition by a tenant-in-common in possession. A suit for partition of immovable property by a person who alleges he is in possession of it as co-tenant on behalf of himself and others is governed by Schedule II, article 17 (6) of the Court Fees Act (VII of 1870). *Referred Case No. 5 of 1894* (1894) 4 M.L.J., 110, not followed; *Tara Chand Mukerji v. Afzal Beg*, (1912) I.L.R., 84 All., 184 and *Ahamuddin Tamijuddin v. Amiruddin* (1918) 44 I.C., 216 (Cal.), followed.

Gill v. Varadaraghavayya ... (1920) I.L.R., 43 Mad., 396

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 107, 350, PROVISIO (1)—Transfer of Magistrate—Trial de novo—Right of accused. Section 350 (1), proviso (a), Criminal Procedure Code, applies to proceedings under section 107, Criminal Procedure Code, and the accused is entitled in a security case to a trial de novo on the Magistrate being transferred.

Venkatachinnayya v. King-Emperor ... (1920) I.L.R., 43 Mad. (F.B.), 511

(c)—**Necessity of setting out substance of information received, in order under section 112—Trial of accused on charges under clauses (a) and (f) of section 110—Evidence of general repute—Inadmissibility to prove charge under clause (f)—Evidence to prove charge under clause (a).** Where an order under section 112, Criminal Procedure Code, which does not clearly disclose the substance of the information received by the Magistrate, the proceedings cannot be regarded as legal. *Kripasindhu Naiko v. Emperor* (1918, 47 I.C., 277, followed. To prove a charge under clauses (a) to (e) of section 110, Criminal Procedure Code, evidence of repute is admissible. *Per SESHAGIRI AYYAR, J.*—Such evidence must relate to particular instances which have come to the knowledge of the deponent and must be specific. Mere belief and opinions without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within the meaning of section 117, clause 3. *Per MOORE, J.*—The evidence that is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of the accused's reputation. It must be the general opinion and not merely the repetition of what certain persons have said to the witnesses.

To prove a charge under clause (f) of section 110, Criminal Procedure Code, evidence of repute is inadmissible. The evidence must be of definite acts and instances. Where a person is tried jointly under clause (f) and any of the other clauses of section 110, evidence of repute admitted with regard to the latter cannot be taken into consideration in deciding the charge under clause (f).

Ranga Reddi v. King-Emperor ... (1920) I.L.R., 43 Mad., 450

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 183, 185, 188 AND 189—Issue of notice by Subdivisional Magistrate—Option to appear and show cause before a Second-class Magistrate—Appointment of a jury—Verdict submitted to Subdivisional Magistrate—Jurisdiction in Subdivisional Magistrate to deal with verdict and dispose of case. A Subdivisional Magistrate, who issues notice under section 188, Criminal Procedure Code, calling upon a person to do something within a specified time, or to appear before another Magistrate to have the order set aside, is not deprived of his jurisdiction but has power to deal with the matter under section 189, Criminal Procedure Code, on receiving the verdict of the jury appointed by him under section 188. The word 'Magistrate' in section 189 (1) refers to the Magistrate who issued notice.

Angappa Mudali v. Perumal Chetty ... (1920) I.L.R., 43 Mad., 316

SEC. 190 (c).—**District Magistrate receiving information of offence, as President of District Board—Right to take cognizance under section 190 (c).** The fact that a District Magistrate, who happens to be also the President of a District Board, receives in the latter capacity information as to the commission of an offence by a servant of the Board, does not debar him from taking cognizance of the offence under section 190 (c) of the Criminal Procedure Code. *Thakur Pershad Singh v. The Emperor* (1906) 10 C.W.N., 775, dissented from.

Sundarasan v. King-Emperor ... (1920) I.L.R., 43 Mad., 709

SEC. 195—**Sanction, duty of Court granting—Claim before Official Assignee, whether a 'proceeding in Court' and claimant whether a 'party'—Insolvency Court, sanction by, for offences under sections 193 and 465, Indian Penal Code, committed before Official Assignee.** A Court granting sanction under section 195, Criminal Procedure Code, ought to abstain from analysing the evidence or expressing any opinion as to the probability or otherwise of a conviction. All that the Court should feel is that the matter is one which on the face of it requires investigation by a Magistrate. The granting of sanction is in no way tantamount to an intimation that a *prima facie* case has been made out. If a claimant files a false affidavit and a forged document, in support of a claim, before the Official Assignee, and thereby commits offences under sections 193 and 465, Indian Penal Code. *Held*, that the offences are committed in a 'proceeding in Court' and the claimant is a 'party' within the meaning of section 195, Criminal Procedure Code; and that the Insolvency Court can grant sanction. *Krishnamma v. Chitturi Chenna Perraju*, (1915) 17 M.L.J., 15, followed; dictum of SESHAGIRI AYYAR, J., in *Palaniappan Chettiar v. Ramaswami Chettiar* (1917) 32 M.L.J., 54, dissented from.

Hajee Mahomed Habibulla Badsha Sahib, In re ... (1920) I.L.R., 43 Mad., 1

SS. 215 AND 478—**Letters Patent, clause (15)—Order of commitment by a Judge of the High Court on the Original Side—Appeal on questions of fact only whether permissible.** A witness in a Civil suit before the High Court was committed to the High Court Sessions for trial on charges of perjury. On appeal against the order of commitment, *held*, that assuming such an appeal could be preferred under the general words of clause (15) of the Letters Patent, section 215, Criminal Procedure Code, which enacts that an order of commitment made by any Court can be quashed only on a point of law, modified to that extent the general provisions of clause (15) of the Letters Patent, and that as no point of law is involved in the appeal the order of commitment cannot be

quashed. *Quære*, whether an appeal lies under clause (15) of the Letters Patent from an order of commitment by a High Court Judge trying a Civil suit.

Venkatagiri Ayyar v. N. M. Firm ... (1920) I.L.R., 43 Mad., 361

CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 256 AND 257—*Right of accused after charge to recall prosecution witness for further cross-examination—Absolute or qualified right—Applicability of section 256 to witnesses not present before Court—Waiver by counsel, whether binding on accused—Entering upon defence, meaning of—Evidence Act (I of 1872), sec. 33—Deposition of prosecution witness cross-examined before charge—No opportunity for further cross-examination after charge—Deposition whether admissible at the trial.* Section 256, Criminal Procedure Code, confers an absolute and unqualified right on the accused to recall for further cross-examination only such of the witness as are still before the Court and have not been discharged from further attendance. After the charge had been framed the accused pleaded not guilty and mentioned to the Court that he had witnesses to examine; *held*, that he had entered upon his defence and an application for further cross-examination of a witness discharged from attendance must be deemed to have been made under section 257. Waiver by counsel of further cross-examination in case a charge is framed cannot prejudice the right of the accused under sections 256 and 257, Criminal Procedure Code. A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross-examining him before the charge and there was no opportunity for further cross-examination after charge.

Lockley v. King-Emperor ... (1920) I.L.R., 43 Mad., 411

... ss. 308 AND 307—*Verdict of jury—Reasons for their verdict—Power of Sessions Judge to question jury as to their reasons for their verdict—Question, if permissible, for determining whether reference to High Court necessary.* A Sessions Judge is not entitled under section 308 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict, even if he intended to make a reference to the High Court under section 307 of the Code. Reference No. 80 of 1919, dissented from; *Emperor v. Siranadu* (1907) I.L.R., 30 Mad., 469, and *Public Prosecutor v. Abdul Hameed* (1918) I.L.R., 38 Mad., 589, followed. Though a Sessions Judge is neither bound nor entitled to put such questions to the jury, still his having done so for the purpose of determining whether he should make a reference is not improper or a sufficient ground for not accepting the reference.

Subbiah Thevan v. The Assistant Sessions Judge of Tinnevely ... (1920) I.L.R., 43 Mad., 744

... ss. 435 AND 436—*Refusal of District Magistrate to interfere and commit to sessions before completion of inquiry before Sub-Magistrate—Power of Sessions Judge to commit suo motu after discharge by Sub-Magistrate.* An order of a District Magistrate refusing to call for the records and commit to the Sessions an accused person while the charge against him is still under inquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order committal of the accused to the Sessions Court after his discharge by the inferior Magistrate. *Kalimuthu v. Emperor* (1908) I.L.R., 26 Mad., 477, distinguished.

Gandi Appa Razu v. King-Emperor ... (1920) I.L.R., 43 Mad., 330

CROWN GRANTS ACT (XV OF 1895), ss. 2 AND 8:—*See REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 90, CL. (1) (d)* ... 65

ESTATES LAND (MADRAS) ACT (I OF 1908), SEC. 3, SUB-SEC. (2) (d) AND SEC. 189—*Grant of inam village—Leases by inamdars to tenants—Claim by tenants to rights of occupancy—Presumption as to transfer of kudivaram—Suits in Civil Court for ejectment—'Estate' under Estates Land Act—No evidence of any permanent occupancy rights—Jurisdiction.* The appellant was the inamdar of a village consisting of both cultivated and waste lands, and he

held it under a grant made to his ancestor in 1748, and since confirmed and recognized by the British Government. To suits in the Civil Court for ejectment against tenants of waste lands, the defence was that the respondents had permanent rights of occupancy, and that as the inam village was an 'estate' under section 3, sub-section (2), clause (d) of the Madras Estates Land Act, 1908, the Civil Court had no jurisdiction to entertain the suits. *Held*, that since the decision of the Board in *Suryanarayana v. Patanna* (1918) I.L.R., 41 Mad., 1012 (P.C.), which was decided subsequently to the judgment now appealed from, there was no presumption of law that an inam grant of a village did not include the kudivaram. Each case must be considered on its own facts, and in order to ascertain the effect of the grant, resort must be had to the terms of the grant, and to the whole circumstances, so far as they could now be ascertained. *Held*, having regard to the facts, the terms of the grant, the history of the estate, and the conclusions to be drawn from the other documentary evidence in the case, they were all inconsistent with the existence of any permanent occupancy rights, and lead to the conclusion that the inam grant carried not the land revenue alone but the whole proprietary interest in the property. The lands in suit therefore were not an 'estate' within the meaning of the Act, and section 189 did not apply. The Civil Courts consequently had jurisdiction to entertain the suits.

Venkata Sastrulu v. Seetharamudu ... (1920) I.L.R., 43 Mad. (P.C.), 166

ESTATES LAND (MADRAS) ACT (I OF 1908), ss. 5 AND 132—*Decree for rent—Transfer of execution of decree to a Civil Court—Landholder's right of first charge on holding—Decree holder ceasing to be landholder at the time of execution, effect of, on first charge.* A landholder's right to enforce in execution a decree for rent passed under the Madras Estates Land Act as a first charge upon the tenant's holding is available only if the decree is executed in a Revenue Court and not when its execution is transferred to a Civil Court. *Held* further by SADASIVA AYYAR, J.—The landholder is entitled to claim the first charge for rent only if he continues to be landlord at the time the claim for rent is sought to be enforced. *Forbes v. Maharaj Bahadur Singh* (1914) I.L.R., 41 Cal., 926 (P.C.), followed.

Venkata Lakshamma v. Seetayya ... (1920) I.L.R., 43 Mad., 786

... ss. 111 AND 118—*Civil Procedure Code, O. XXI, rr. 90 and 92—Sale of ryot's holding for arrear of rent—Irregularity in conduct of sale—Application to Revenue Court by landholder to set aside sale—Jurisdiction of Revenue Court—Order setting aside sale—Suit by purchaser in Civil Court for declaration that order is ultra vires and void, whether maintainable.* When summary proceedings under sections 111 and 118 of the Madras Estates Land Act, have been instituted by a landholder for recovery of rent by the sale of a ryot's holding and property has been sold, the Revenue Court has no jurisdiction, on an application by the landholder, to set aside the sale on the ground of irregularity in the publication, or conduct, of the sale; and if such an order is passed the purchaser can institute a suit in a Civil Court for a declaration that the order is a ultra vires and void. Order XXI, rules 90 and 92, Civil Procedure Code, do not apply to sales held under sections 111 and 118 of the Madras Estates Land Act.

Jagannadha Charyulu v. Satyanarayana Varaprasada Rao ... (1920) I.L.R., 43 Mad., 861

... ss. 155 AND 192 (e)—*Set-off of money allowances against claim for rent.* Except in the case provided for by section 155 a tenant has no right under the Madras Estates Land Act to set-off amounts due to him from the landholder against a demand for rent.

Raja of Ramnad v. Venkatarama Aiyar ... (1920) I.L.R., 43 Mad., 69

... SEC. 189 (8)—**CIVIL PROCEDURE CODE (V OF 1908)**, sec. 11—*Res judicata—Suit to enforce acceptance of patta—Decision by Revenue Court—Decision as to occupancy right or title to land claimed as part of the holding—Subsequent suit in a Civil Court for ejectment of tenant as trespasser—Decision of Revenue Court, whether binding as*

res judicata in the suit in Civil Court.] Section 189 (3) of the Madras Estates Land Act does not constitute the decisions of the Revenue Courts, on an issue as to title to land or occupancy rights therein arising incidentally in suits to enforce the acceptance of pattas which are cognizable exclusively by such Courts, *res judicata* in a subsequent suit in a Civil Court instituted by the landlord for ejectment of the tenant from such land.

Appa Rao v. Gurraju ... (1920) I.L.R., 43 Mad., 859

EVIDENCE ACT (I OF 1872)—*Admissibility of evidence recorded in a previous proceeding—Consent of parties.* Evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding, by the consent of both parties. *Sri Rajah Prakasaramani Garu v. Venkata Rao* (1915) I.L.R., 33 Mad., 180, approved. *Ponnusami Pillay v. Singaram Pillay* (1918) I.L.R., 41 Mad., 731, overruled.

Jainab Bibi Saheba v. Hyderally Sahib ... (1920) I.L.R., 43 Mad. (F.B.), 609

EXECUTION—*Attachment and sale of lands—Transfer of territorial jurisdiction of Court—Order of Court which did not pass the decree but to which execution was transferred—Attachment and sale of lands by Court after deprivation of territorial jurisdiction, validity of—Estoppel against judgment-debtor, how far binding upon auction purchaser.* A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immovables in execution, if at the time of the order such Court had no territorial jurisdiction over the immovables. Though a judgment-debtor, who does not object to a confirmation of a sale by such Court, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate against a subsequent purchaser of the same property in a sale held by a Court having jurisdiction in execution of another decree against the same judgment-debtor. *Mahomed Mozuffer Hossein v. Kishori Mahun Roy* (1845) I.L.R., 22 Cal., 909, explained; *Prayag Roy v. Sidhu Prasad Tewari* (1908) I.L.R., 35 Cal., 877 and *Parsidh Narain Singh v. Janaki Singh* (1907) 7 C.L.J., 644, dissented from. *Veerappa Chetty v. Ramasami Chetty* ... (1920) I.L.R., 43 Mad., 135

—*Pre-decree arrangement that decree should be inexecutable in part, whether recognizable in execution proceedings.* An arrangement made prior to decree in a suit that the decree that might be passed should be inexecutable in part is one that cannot be enforced in execution; hence a sale held in execution of such a decree in spite of the arrangement is good. *Chidambaram Chettiyar v. Krishna Pathiyar* (1917) I.L.R., 40 Mad., 233 (F.B.), distinguished.

Arumugam Pillai v. Krishnaswami Nayudu ... (1920) I.L.R., 43 Mad., 725

EXECUTION SALE—*Purchase in Court sale of specific properties when judgment-debtor an undivided member—Subsequent decree for partition—Allotment to judgment-debtor of some items purchased and other properties—Right of execution purchaser for compensation by way of substitution.* A purchaser bought in Court auction specific items of properties said to belong to a member of a joint Hindu family. Subsequently there was a partition decree and only some of these items fell to the share of the judgment-debtor. Held, that the purchaser was entitled to only such of the items as are common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could not compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale certificate.

Sabapathi Pillai v. Thandavaraya Odayar ... (1920) I.L.R., 43 Mad., 309

HIGH COURT RULES 35, 36, 38—*See PRACTICE* ... 282

HINDU LAW—*Adoption—Brother's daughter's son, adoption of, whether valid—Custom—South Kanara—Kshatriyas—Custom whether established.* Adoption of a brother's daughter's son is allowed by custom which has been proved to exist among a community of Rajputs of the Kshatriya caste settled in South Kanara.

Booratha Singa v. Kanaka Singa ... (1920) I.L.R., 43 Mad., 867

HINDU LAW—*Adoption by widow who has no authority from her husband—Mitakshara law as administered in the Dravada district of the Madras Presidency—Consent of sapindas.* Under the law of adoption as administered in the Dravada district a Hindu widow, in the absence of any authority from her husband to adopt a son to him, may make such an adoption with the consent of his sapindas. *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1868) 12 M.I.A., 897. There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband; *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174; I.L.R., 4 I.A., 1. The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relations whose assent is likely to be influenced by improper motives. *Veeru Bisavaraaju v. Bala-surya Prasad Rao* (1918) I.L.R., 41 Mad., 998 (P.C.); I.L.R., 45 I.A., 205. The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused. *Venkamma v. Subrahmanyanam* (1907) I.L.R., 30 Mad., 50, 53; I.L.R., 34 I.A., 22, 28. It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it; *Sri Pirada Prataja Raghunatha Deo v. Sri Brozo Kishono Patta Deo* (1876) I.L.R., 1 Mad., 69 (P.C.). In this case, on a consideration of the evidence, the widow was proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained, and the adoption was invalid.

Kristnayya v. Lakshmiopathi ... (1920) I.L.R., 43 Mad. (P.C.), 650

—*Adoption of daughter's son or sister's son, validity of—Custom among Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter's son, whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption subsequent adoption, whether barred—Subsequent upanayanam, whether competent.* Adoption of a daughter's son is valid by custom among the Brahmans of the Andhra or Telugu portion of the Madras Presidency as it is in the southern districts. Consent of the sapindas to an adoption by the widow is material as guaranteeing the propriety of the widow's action in making the adoption. Where such consent has not been shown to have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption, and the Court's right to scrutinize the sapindas' reasons extends only to cases in which consent is refused, and not to cases where it is granted. A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a *gnati*, and Bhinnagotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption. An upanayanam is not valid unless performed by the father or, in his absence, by another kinsman in the family to which the boy concerned actually belongs. The performance of the upanayanam in a family, into which the boy is wrongly believed to have entered by an invalid adoption, is a nullity and is no bar to his subsequent adoption.

Viswasundara Rao v. Somasundara Rao ... (1920) I.L.R., 43 Mad., 876

—*Alienation—Alienation by widow—Onus of proof of legal necessity—Suit to set aside an alienation after long lapse of time—Presumptions to complete proof.* The suit which gave rise to this appeal was one by a reversioner to set aside an alienation by a widow made in 1830 on the ground that it was made without legal necessity. The widow died on the 15th December 1900, and the suit was instituted on 12th December 1912 involving an inquiry into the circumstances of a transaction more than 82 years

after it took place. The District Court found that there was no legal necessity for the sale and decreed the suit. The High Court held that legal necessity had been proved and reversed the judgment of the Trial Judge. In the course of their judgment they said, "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time." Their Lordships of the Judicial Committee in affirming the decision of the High Court cited the above with approval as being in their opinion a correct statement of the law.

Venkata Reddi v. Rani Saheba of Wadhavan. (1920) I.L.R., 43 Mad. (P.O.), 541

HINDU LAW—Decree for maintenance to a widow of a joint family creating a charge on family properties—Subsequent purchaser of such properties under money decree binding on family—Priority of charge.] A charge on joint family properties created by a decree for maintenance payable to the widow of a member of a joint Hindu family takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family.

Somasundaram Chetty v. Unnamalai Ammal ... (1920) I.L.R., 43 Mad., 800

Co-widows—Relinquishment by one in favour of the other—Predecease of the latter before the former—Male reversioners—Right of inheritance, whether accelerated—Limitation Act (IX of 1908), art. 141—Suit by alienees from male reversioners, more than twelve years from death of latter widow, but within twelve years of the death of surviving widow—Limitation.] Where a Hindu widow gave up all her rights in her husband's estate in favour of her co-widow, and the latter predeceased the former, the right of succession of the male reversioners to the estate is not accelerated so as to entitle them to succeed to it immediately on the death of the widow in whose favour the relinquishment was made. A suit by the reversioners to set aside an alienation by the latter widow would be within time, under article 141 of the Limitation Act, if brought within twelve years from the death of the last surviving widow.

Changappa v. Buradagunta ... (1920) I.L.R., 43 Mad., 856

Endowment—Religious institution—Property of mutt, right to possession of—Custom and usage of mutt—Adverse possession—Limitation.] This appeal arose from a suit brought by the respondent "to declare that the defendants" (appellants) "have no right to the village of Patharakudi, and that the plaintiff as head of the mutt is entitled to the possession of the village, and to receive the income of the same from the hands of the receiver." The village was part of the property of the mutt, and had been for a long time in the possession of, and under administration by, the defendants, who were Nagara Chetties, as hukdars, trustees and managers, though the head of the mutt appointed in 1867 was the plaintiff, who made his claim by virtue of that office, and alleged that the defendants held the position of trustees as his agents. The defence was that the defendants and their predecessors, who had held the village for about 80 years, not for their own advantage but for the benefit of the mutt, were entitled to be continued in possession and management of it; and that the suit was barred by limitation. The respondent proved no management by the defendants as his agents. On the contrary, there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management. Held, that the plaintiff was not entitled to the village in suit. On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents; nor was his right to possession supported by the history of the land. The general state of the law with regard to religious institutions in India is that the nature of the ownership is an ownership in trust for the institution itself. The settled rule of administration is that it must be

not for personal use but entirely for and on behalf of the interests of the mutt; and that while the ownership is generally with the spiritual head of the institution, such property may be held by the usage and custom of the mutt by the trustees and managers, and that by the usage and custom in this case as disclosed by the evidence the ownership of the village was in the defendants. *Ram Parkash Das v. Anand Das* (1916) I.L.R., 43 Cal., 707 (P.C.); L.R., 43 I.A., 78; *Sethuramaswamiar v. Meruswamiar* (1918) I.L.R., 41 Mad., 298 (P.O.); L.R., 45 I.A., 1; and *Sammantha Pandara v. Selloppa Chetti* (1879) I.L.R., 2 Mad., 178, approved. Held, further, that the possession of the defendants therefore in their own right was adverse to the plaintiff, and the suit was consequently barred by limitation. *Baluwant Rao v. Puran Mal* (1883) I.L.R., 6 All., 1; L.R., 10 I.A., 20, referred to. As to the surplus income it is the duty of a trustee to refrain from personal enjoyment of it, and to add it to the capital of the estate administered; and this law applies also to the property of a mutt or aśhal, whether the title is in the gurutkal as spiritual head, or in the trustees according to the custom and usage of the institution.

Arunachellam Chetty v. Venkatachalapathi Guruswamiyal. (1920) I.L.R., 43 Mad. (P.C.), 258

HINDU LAW—Endowment—Trustees of Hindu Religious endowment—Right of Trustees to possession of endowed property—Madras Regulation VII of 1817, sec. 12—Religious Endowments Act (XX of 1863), ss. 3 and 4—Limitation Act (IX of 1908), schedule I, article 141—Possession adverse to Trustees.] The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his. The appellant in this case claimed to be hukdar or trustee of the Thanappa Mudali Kattalai, an endowment for the performance of certain ceremonies in a temple at Madura, and to be entitled to the possession of four villages forming part of the endowment. The villages came into the possession of the East India Company in 1801 and remained in their possession until 1849, when the general manager of the temple, was placed by the Company in possession. Since 1849 the villages were in the hands of the said manager and his successors, the respondents, the whole of the revenue had been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager, and the temple committee. Held, in a suit brought in 1908 by the appellant for possession of the villages, that the possession of those who had held the villages from 1849 was possession adverse to the appellant and his predecessors in title and that the suit was barred by limitation.

Ambalavana Pandara Sannidhi v. Meenakshi Sundareswaral Devasthanam of Madura ... (1920) I.L.R., 43 Mad. (P.C.), 665

Inheritance—Persons born blind—Exclusion from inheritance and joint ownership—Rule of exclusion whether obsolete—Texts—Competency of Courts to declare rule obsolete—Reversioners—Right of suit for declaration—Widow setting up absolute title to husband's properties under a will of another—Right of reversioner to sue for mere declaration—Specific Relief Act (I of 1877), sec. 42, (e) and (f), whether exhaustive.] The rule of Hindu Law which prevents a person born blind from claiming an interest along with his brothers as a co-owner in ancestral properties, has become obsolete. A reversioner under the Hindu Law is entitled to sue for a mere declaration as to the limited nature of the title of a widow to certain properties,

alleged by him to belong to her husband, but to which she sets up an absolute title under the will of another person. Illustrations (e) and (f) to section 42 of the Specific Relief Act are not exhaustive of the classes of cases in which a reversioner can sue for a declaration under the section.

Surayya v. Subbamma ... (1920) I.L.R., 43 Mad., 4

HINDU LAW—Inheritance—Stridhanam—Maiden's property—Fathers' sapindas, right of inheritance of—Father's sister—Father's paternal uncle's son—Preferential heir—Texts of Baudhayana and Brihaspati—Mitakshara and Smriti Chandrika.] Under the Mitakshara Law the heirs to the stridhanam property of a maiden, who died leaving neither uterine brothers, nor mother, nor father, are the sapindas of her father; and, as between her father's paternal uncle's son and her father's sister, the former is the preferential heir. Text of Brihaspati, held inapplicable; text of Baudhayana and commentaries of Mitakshara and Smriti Chandrika discussed. *Kamala v. Bhagirathi*, (1915) I.L.R., 38 Mad., 45, followed.

Sundaram Pillai v. Ramasamia Pillai ... (1920) I.L.R., 43 Mad., 32

Joint family—Will by a father bequeathing some family properties for maintenance of his wife, validity of.] A will made by a Hindu father who is joint with his infant son, bequeathing certain family properties to his widow for her maintenance, is invalid and inoperative as against the son, although it would have been a proper provision if made by the father during his lifetime. *Patra Chariar v. Srinivasa Chariar*, (1917) I.L.R., 40 Mad., 1122, and *Kudutamma v. Narasimha Charyulu*, (1908) 17 M.L.J., 528, distinguished.

Subbarami Reddi v. Ramamma ... (1920) I.L.R., 43 Mad., 824

Marriage between a Telugu Sudra and his wife's sister's daughter, legality of.] The marriage of a Hindu with his wife's sister's daughter is valid, as well among Sudras as among Brahmans, and among the Telugus of the north as among the Tamils of the south.

Ramakrishna Row v. Subbamma Row ... (1920) I.L.R., 43 Mad., 830

Mortgage by father, not for necessary purpose—Conditional decree—Personal decree against father and against ancestral properties of father and sons—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.] A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone. The Courts found that it was not for any purpose binding upon the sons; held, that the mortgage was entitled to a conditional decree, under Order XXXIV, rule 6, Civil Procedure Code, against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance, in case the sale-proceeds of the father's share of the mortgaged property was insufficient.

Kandasami Goundan v. Kuppu Mooppan ... (1920) I.L.R., 43 Mad., 421

Non-congenital insanity, whether a ground of deprivation of right of survivorship.] Insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital. *Deo Kishen v. Budh Prakash*, (1883) I.L.R., 5 All., 509 (F.B.), and *Murarji Gokuldas v. Parvatibai*, (1876) I.L.R., 1 Bom., 177, followed. *Sanku v. Puttamma*, (1891) I.L.R., 14 Mad., 289, dissented from. The right of a member of a Hindu joint family to share in ancestral property comes into existence at birth, and is not lost but is only in abeyance by reason of a disqualification. It subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification then exists. Hence, if on the death of all the other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship.

Muthuswami Gurukkal v. Meenammal ... (1920) I.L.R., 43 Mad., 464

Partition—Birth of natural son after adoption—Suit for partition by adoptive father and natural son against adopted son—Shares.] In a suit for partition during the lifetime of a Hindu father, the father and a natural

born son are entitled to eight shares of the property and the adopted son to one share. *Narasimhappa v. Chinna Kenchappa*, (1917) 88 I.C., 244 (Mad.) and *Subbarayudu v. Perarazu*, Appeal No. 104 of 1914 (unreported), followed.

Balakrishnayya v. Venkata Triambakam ... (1920) I.L.R., 43 Mad., 898

HINDU LAW—Widow—Will by widow bequeathing husband's estate absolutely to her three daughters—Oral partition by daughters—Share taken absolutely by each—Death of one of the daughters, leaving her daughter as heir—Suit by surviving daughters to recover deceased's share as heirs of their father—Estoppel—Oral partition whether valid—Survivorship, whether extinguished—Rights of reversioners.] A Hindu widow, inheriting her husband's estate, treated it as her absolute property and bequeathed it absolutely to her three daughters, who divided it into three equal shares by an oral partition and took each one share purporting to take it absolutely under their mother's will. One of the daughters died leaving a daughter as her heir who took possession of the deceased's share. The two surviving daughters sued, as heirs of their father, to recover the share of the deceased daughter from her daughter who was in possession: Held, that the plaintiffs were not estopped from claiming to recover the property as heirs of their father. *Dalton v. Fitzgerald* [1897] 2 Ch. 86, distinguished; that a partition of immoveable properties of whatever value can be effected orally and without a registered instrument; that the partition made between the daughters operated to extinguish the right of survivorship as between them, although it might not affect the rights of the ultimate reversioners to the estate; and that, consequently, the plaintiffs were not entitled to recover the properties from the deceased daughter's share. *Gyanessa v. Mobarakannessa* (1893) I.L.R., 25 Cal., 210, followed and *Latchumammal v. Rangammal* (1911) I.L.R., 34 Mad., 72, applied.

Alamelu Ammal v. Balu Ammal ... (1920) I.L.R., 43 Mad., 849

Right of residence—Unmarried sister's right—Decree against mother of last male owner on her personal debt—Sale of house in execution—Auction purchasers' right to oust unmarried sisters in possession—Right of residence of other females against purchasers.] An auction purchaser of an ancestral house, sold in execution of a money-decree passed on a personal debt of the mother who inherited the property as heir to her son, is not entitled to oust the unmarried sisters of the latter, who reside in the house.

P. Suriyanarayana Rao Naidu v. P. Balasubramania Mudali ... (1920) I.L.R., 43 Mad., 635

INCOME-TAX ACT (VII OF 1918), SS. 3 AND 9—Proprietor resident in British India—Business outside British India and not carried on from British India—Income not remitted to British India, whether taxable under the Act of—Reference under section 51—Right to begin.] A resident in British India owning a money-lending business carried on for him outside British India by agents resident there who merely keeps himself acquainted with the progress of the business and occasionally issues general instructions, is not liable to be taxed under the Act where the income from such business is not remitted to British India. On a reference by the Board of Revenue under section 51 of the Income-tax Act the assessee and not the Board has the right to begin.

Board of Revenue, Madras v. Ramanadhan Chetty ... (1920) I.L.R., 43 Mad. (Spl. B.), 75

SEC. 24, PROVISOS 2, 39 (d), 40 AND 41—Failure to produce accounts—Prosecution under section 39 (d)—Penal assessment—Levy of, whether a bar to prosecution—Bar under section 24, proviso 2, whether applicable.] Section 24, proviso 2, of the Indian Income-tax Act, does not bar the prosecution of an accused for an offence under section 39 (d) of the Act for failure to produce accounts, when penal assessment had been levied on him, under section 24, in consequence of his making a false return of his income.

King-Emperor v. Hoosanally & Co. ... (1920) I.L.R., 43 Mad., 498

INDIAN CONTRACT ACT (IX OF 1872), ss. 64 AND 65—Written contract—
 Material alteration by one party, effect of—Breach of contract—Damages—
 Repayment of advance.] If a written contract is materially altered by one
 party without the knowledge and consent of the other, the former is not
 entitled to damages for breach of contract, but is entitled to a repayment
 of the advance made by him.
Anantha Rao v. Surayya ... (1920) I.L.R., 43 Mad., 708

LAND ACQUISITION ACT (I OF 1894), ss. 9 (3) AND 45—Notice of award—
 Want of notice of acquisition proceedings.] The Collector's failure to
 serve notice of the intended acquisition on the occupier or owner, as
 required by sections 9 (3) and 45 of the Land Acquisition Act, does not
 make the subsequent proceedings, such as the award, void so as to entitle
 the owner or occupier to resist a suit in ejectment. *Janga Ram Marwari v.*
Secretary of State for India, (1903) I.L.R., 30 Cal., 576, followed.
Kasturi Pillai v. Municipal Council, Erode ... (1920) I.L.R., 43 Mad., 280

1908), ART. 156 ... SEC. 54:—See LIMITATION ACT (IX OF 51

LANDLORD AND TENANT—Denial of landlord's title—Forfeiture of tenancy—
 Denial that landlord's title was subsisting—Adverse possession—Kudima
 tenure, nature of—Part of future services—Resumption of lands—Right to
 eject on denial of title.] A denial by the tenant of his landlord's title must,
 in order to work a forfeiture of the tenancy, be brought home to the
 knowledge of the landlord and it must be unequivocal and clear. The
 receipt and retention by the tenant of a document of sub-lease in which he
 is spoken of as the jammī of the lands demised, cannot operate as a denial
 of the landlord's title so as to cause a forfeiture of the tenancy. If a
 tenant denies subsisting title in the landlord and claims that the property
 became vested in him by adverse possession, such conduct amounts to
 denial of landlord's title prior to suit. Lands granted on kudima tenure
 for past services are not resumable. But if granted for future services
 they are resumable on a refusal to perform service. A denial by such
 tenant of the landlord's title is tantamount to refusal to tender service.

Raman Nair v. Mariyomma ... (1920) I.L.R., 43 Mad., 480

LESSOR AND LESSEE—Agricultural lease—Flooding by sea-water—Land
 rendered unfit for cultivation—Right of lessee to abatement of rent—Duty to
 avoid lease in toto—Transfer of Property Act (IV of 1882), section 108, clause
 B (e)—Principle of the section, applicability of.] If by an inundation of
 sea-water a portion of lands leased for agricultural purposes becomes unfit
 for cultivation and the landlord brings a suit to recover the whole rent
 reserved in the lease, the tenant can plead as a defence that he is entitled
 to a proportionate abatement and is not bound to have avoided the lease
 in toto. The principle of proportionate abatement was recognized in
 India prior to the Transfer of Property Act, and is in accordance with
 natural justice. Neither section 108 B (e), Transfer of Property Act, nor
 its principle is applicable to cases of flooding by sea-water of lands leased
 for agricultural purposes. *Sheikh Enayutollah v. Sheikh Elahabuksh*,
 (1864) W.R. Gap. (Act X Rulings), 42, followed.

Subramania Pattar v. Kattamballi Rama ... (1920) I.L.R., 43 Mad., 132

LETTERS PATENT, CLAUSE (15):—See CRIMINAL PROCEDURE CODE (V OF
 1898), ss. 215 AND 478 ... 361

LICENCE TO SELL ARRACK—Prohibition to sell the privilege without per-
 mission—Taking partner without permission, legality of—Loan to such
 partnership with knowledge of prohibition—Onus on lender to prove legality
 of partnership—Right of lender to recover loan from licensee.] Where a
 licence to sell arrack contained the condition that "the privilege of supplying
 and vending shall not, without the permission of the Collector previously
 obtained, be sold, exchanged or sub-leased, nor, if the Collector has ordered,
 can an agent be appointed, without his permission previously obtained, for
 exercise of any such privilege," held that it was illegal for the licensee to

take a partner in the business, without first obtaining permission and that
 the plaintiff must be taken to have had notice of the illegality. But the
 illegality was not of such a nature as to debar the plaintiff altogether from
 suing, and he was entitled to recover one-half of the loan.

Brahmayya v. Ramiah ... (1920) I.L.R., 43 Mad., 141

LIFE INSURANCE COMPANY—Policy-holder—Alteration of rules—Effect on
 policy effected before alteration—Refund of premia paid.] A policy-holder
 in a Life Insurance Company is not bound by any alterations in the rules
 made after the contract between himself and the company had become
 concluded. If a policy-holder, who is permitted by the rules of an In-
 surance Company to discontinue payment of premia after a stipulated
 period, does so after that period, the policy does not lapse and the company
 is liable to refund the sums actually paid.

Tanjore Life Assurance Co. v. Kuppanna Rau ... (1920) I.L.R., 43 Mad., 333

LIMITATION—Accord and satisfaction—Annulment of satisfaction on the ground
 of coercion, effect of—Fresh cause of action for original claim, on annulment.]
 A debtor who satisfied, by payment, his creditor's claim for balance of money
 due, sued to annul the satisfaction on the ground of coercion and obtained
 a decree for refund. Held, that the annulment gave the creditor a fresh
 cause of action upon the original claim, and time began to run from the
 date of annulment. *Mussumat Ranees Burno Moyee v. Shoochee Mookhee*
Burmonia, (1868) 12 M.L.A., 244 and *Huro Pershad Roy v. Gopal Das Dutt*,
 (1883) I.L.R., 9 Cal., 255, at 259 (P.C.), followed.

Muthuveerappa Chetty v. Adaikappa Chetty ... (1920) I.L.R., 43 Mad., 845

—Adverse possession—Gift, invalidity of, as not following the
 requirements of sec. 123 of the Transfer of Property Act (IV of 1882)—
 Evidence as to possession only under it, not of the gift—Joint ownership follow-
 ing intended gift—Limitation Act (IX of 1908), sch. I, art. 144—Ouster.]
 The suit from which this appeal arose was brought to establish the title of
 the appellants to a moiety of a mitta or estate, consisting of two villages
 which belonged at one time to the ancestor of the parties, and eventually
 became vested in G and P, his two younger sons. On the death of G in
 1879 his share vested in his widow R and he left also a daughter D. P died
 in 1867 leaving a will which the High Court held gave an absolute interest
 in the moiety to his widow A and their Lordships of the Judicial Committee
 upheld that construction. On 16th October 1895, R and A who were then
 the registered owners of the two moieties of the mitta, presented to the
 Collector a petition, which after reciting that they had on 8th October
 given the two villages of which the mitta consisted to D, prayed that an
 order be made transferring the villages into her name. On the same date
 (10th October) D presented a similar petition to the Collector reciting the
 gift of the villages to her, and asked for the transfer of them to her on the
 register, and the Collector thereupon, on 8th May 1896 registered the two
 villages (being the whole mitta) in the name of D, "to hold and enjoy
 them with power to alienate them by way of gift, mortgage, sale, etc." and
 from that date D retained possession until her death in 1911, after which
 the mitta descended to the respondent as her successor. Held, that the
 gift was invalid as not being made by a registered deed as required by
 section 123 of the Transfer of Property Act (IV of 1882), that the recitals
 in the petitions could not be used as evidence of a gift, but might be
 referred to as explaining the nature and character of the possession thence-
 forth held by D, and that the evidence proved that she in fact took posses-
 sion of the mitta in her own right when it was transferred into her name,
 and retained such possession with receipt of the rents until her death, when
 the plaintiff's claim was barred by more than 12 years' adverse possession.
 Even if the rule of English Law, that the possession of one of several
 co-parceners, joint tenants, or tenants-in-common, is the possession of the
 others so as to prevent limitation affecting them, was applicable to sharers
 in an unpartitioned agricultural village in India not holding as members
 of a joint family, which is doubtful, it had on the facts of the case, no
 application. Held therefore that during the life of R the possession of D

- LIS PENDENS**—*Alienee made a party to the litigation—Compromise between original parties behind the back of the alienee, whether binding on the alienee.* [An alienee pendente lite who has been added as a party to the litigation is entitled to object to a decree being passed in terms of a compromise arrived at between his alienor and the opposite party.]
Veeraraghava Reddi v. Subba Reddi ... (1920) I.L.R., 43 Mad., 37
- LOCAL BOARDS ACT (V OF 1884)**, ss. 54, 144 TO 147:—*See* NEGOTIABLE INSTRUMENTS ACT (V OF 1881), ss. 5 AND 6 ... 816
- LOCAL FUND CODE**, RULE 549:—*See* NEGOTIABLE INSTRUMENTS ACT (V OF 1881), ss. 5 AND 6 ... 816
- MADRAS CITY MUNICIPAL ACT (III OF 1904)**, sec. 366—*Order by Health Officer to remove a patient to isolation hospital—Removal to isolated house—Disobedience of order—Charge under section 269, Indian Penal Code, whether sustainable—Duty of prosecution—Essentials of offence—'Illegally' and 'unlawfully,' distinction between.* [A person who was directed by the Health Officer acting under section 366 of the Madras City Municipal Act to remove his son to an isolation hospital, removed him to an isolated house. *Held*, that he was not guilty of an offence under section 269, Indian Penal Code. Although under section 366, clause (3) of the Madras City Municipal Act, a person disobeying an order under the section is to be deemed to have committed an offence under section 269, Indian Penal Code, the prosecution must prove not only that there has been disobedience to the order but also that he had unlawfully or negligently done an act which he knew, or had reason to believe, would spread infectious disease. *Cahoon v. Mathews* (1897) I.L.R., 24 Cal., 494, referred to.]
Kandiswamy Mudaliar v. King-Emperor ... (1920) I.L.R., 43 Mad., 344
- MADRAS CITY POLICE ACT (III OF 1888)**, sec. 76—*Breach of condition of licence by servants of licence-holder—Conviction not only of licence-holder but of servants also, propriety of.* [Under section 76 of the Madras City Police Act only a licensee under the Act is liable to punishment for a breach of the conditions of the licence, whether committed by himself or his servants. But the section does not contemplate proceedings against the servant or agent of the licensee.]
Velayudha Mudali v. King-Emperor ... (1920) I.L.R., 43 Mad., 438
- MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1884)**, ss. 216 TO 221—*Duty of municipality to carry night-soil from houses to Municipal depots—No rights in the municipality to levy fees from house-owners.* [A Municipality constituted under the Madras District Municipalities Act (V of 1884) has no power to levy fees from owners or occupiers of houses and buildings within the municipality, for carrying night-soil and other offensive matter accumulating on their premises from inside those premises to the municipal depots wherever situated, such duty being cast on the Municipality by the Act.]
South Indian Railway v. Municipal Council, Trichinopoly ... (1920) I.L.R., 43 Mad., 906
- MADRAS IRRIGATION CESS ACT (ACT VII OF 1865)**, ss. 1 AND 4 AS AMENDED BY MADRAS ACT V OF 1900—*Right to take water for irrigation through artificial channel, recognition of—Forfeiture of estate to Government—Easement—Engagement with Government—Non-liability for cess after period of 80 or 90 years.* [An artificial channel from a non-tidal river through which water for irrigation ran through an estate belonging to the respondent was constructed upwards of a century ago by the then zamindar of Palkonda, a neighbouring landholder, and the evidence showed that in 1814, the then zamindar recognized the right of the respondent's predecessor-in-title to irrigate his lands with water from the channel. In 1838, on forfeiture of the Palkonda zamindari for rebellion, it came into possession of the Government, but no attempt was made by the then Government to change the footing on which the irrigation rights were enjoyed by the

predecessors-in-title of the respondent, and by the respondent himself, or to lessen or interfere with the continued enjoyment of the easement as of right and without any exaction or charge. No claim in respect of the lands in suit was made until 1907 when a sum was levied on the respondent under the Madras Irrigation Cess Act (Madras Act VII of 1865, as amended by Madras Act V of 1900) which he paid under protest, and brought a suit for a refund of the amount, and for a declaration that he was not liable to pay any cess under that Act. The Act as amended enacts in a proviso "that where a zamindar . . . or any other description of landholder not holding under ryotwari settlements is by virtue of an engagement with the Government entitled to irrigation free of separate charge no cess shall under this Act be imposed for water supplied to the extent of this right and no more." *Held*, that "an engagement with the Government" had been created, within the meaning of the proviso to the Act, by the transaction of the zamindari having passed to the Government, and had been accepted by them as binding the parties for a period of between 80 and 90 years during which (including 40 years since the Act was passed) the respondent's zamindari had been enjoyed without any question or doubt that the respondent held under a tenure which gave him the benefit of the proviso in Act VII of 1865.

The Secretary of State for India in Council v. Maharajah of Bobbili. (1920) I.L.R., 43 Mad. (P.C.), 529

MADRAS RENT RECOVERY ACT (VIII OF 1865), ss. 3, 11—*Right of landlord to enhance rent on land which used to be dry, but was afterwards cultivated with garden crops by irrigation from wells dug at tenant's expense—Implied contract from paying increased rent for some years—Occupancy right with permanent tenure.* [Tenants with permanent rights of occupancy in a zamindari constructed wells at their own expense without permission of the zamindar, and cultivated dry lands which they had admittedly held at four fanams a kuli, for periods as far back as could be traced, with garden crops. The zamindar for the lands so cultivated claimed, and the tenants paid, for a number of years an enhanced rent of eight fanams a kuli. In suits by the tenants against the zamindar under section 8 of the Madras Rent Recovery Act to compel him to grant them proper pattas for fasli 1312 the defendant pleaded, *inter alia*, that he was entitled to the enhanced rate by virtue of a contract within section 11, clause (3) of the Act, to be implied from the continuous payments at that rate. *Held* (affirming the decision of the High Court), that a contract under section 11 must be one that is enforceable, and that the implied contract pleaded was not enforceable, inasmuch as no consideration for it had been proved; but as, prior to the construction of the wells, the tenants had for very long periods always been paying the dry rate of four fanams a kuli for the lands in suit, a contract to hold the lands at the lower rate might legitimately be implied which contract was enforceable and by the terms of section 11 had to be enforced. There was no estoppel on the tenants by their conduct in paying the enhanced rate for a series of years; such an estoppel rested on an implied representation of some existing fact on the faith of which the zamindar had changed his position and of that there was no evidence. The zamindar throughout contended for a new contract arising in each case when the eight fanam rate first began to be paid, but there was, in their Lordships' opinion, no consideration for any such new promise to pay at the rate of eight fanams a kuli for land which was already held on a binding contract of tenancy at the rate of four fanams a kuli.]

Raja Jagaveera Rama Venkateswara Eitappa v. Arumugam Chetty. (1920) I.L.R., 43 Mad. (P.C.), 174

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1886), sec. 19—*Compensation for tenants' improvements—Contracts made after Act, more favourable to tenant than the Act—Contract, or Act enforceable—Value whether at the time of eviction, or at date of contract, payable.* [Section 19 of the Malabar Compensation for Tenants' Improvements Act does not prevent the tenant from claiming compensation under a contract made after passing of the Act, if it is more favourable to him than the Act. The value of improvements payable to a tenant is their value at the time of

eviction. *Kerala Varmah Valla Raja v. Rahunni* (1898) 3 M.L.J., 51 (F.B.), followed.

Ammalu Amma v. Raman Nair ... (1920) I.L.R., 43 Mad., 722

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900), sec. 19:—See REGISTRATION ACT (INDIAN) (XVI OF 1908), sec. 80, OL. (1) (d) ... 66

MALABAR LAW—Karnavan—Junior members—Kanom—Redemption, suit for—Suit by junior members, whether sustainable—Transfer of Property Act (IV of 1882), sec. 61—Interest to redeem.] Only under very special circumstances can junior members of a Malabar tarwad, following the Marumakkattayam law, maintain a suit for the redemption of a kanom granted by their karnavan.

Sooji v. Mariyima ... (1920) I.L.R., 43 Mad., 893

—Karnavan—Lease four years before expiry of a prior lease—No necessity or justification for such lease—Expiry of prior lease when grantor was karnavan, effect of, on subsequent lease—Lease, whether valid or binding on succeeding karnavan.] Where a karnavan granted a lease to take effect on the expiry of a prior lease whose term was to expire four years later, and it was found that there was no necessity or justification for granting the subsequent lease four years prior to the expiry of the term of the prior lease, Held, that the subsequent lease was not valid or binding on the succeeding karnavan, even though the prior lease expired when the grantor continued to be the karnavan.

Kunhammad v. Kunhunni ... (1920) I.L.R. 43 Mad., 715

—Karnavan, removal of, from office—Senior anandravan—Exclusion from succession to office of karnavan—Power of Court to declare senior anandravan unfit to succeed to office—Grounds of exclusion.] A Court can for good cause remove a karnavan and declare the senior anandravan to be unfit to succeed to the vacant office. *Kunhan v. Sankara* (1891) I.L.R., 14 Mad., 78, followed; *Chindan Nambiar v. Kunhi Raman Nambiar* (1918) I.L.R., 41 Mad., 577 (F.B.), referred to; dictum of SADASIVA AYYAR, J., in *Cheria Pangil Achan v. Unnalachen* (1917) 32 M.L.J., 823, dissented from.

Nemanna Kudre v. Achmu Hengau ... (1920) I.L.R., 43 Mad., 819

MINOR—Guardian—Agent appointed by guardian—Liability of agent to account to minor—Settlement of accounts by arbitrator or mediator—Whether liable to be re-opened.] An agent appointed by the guardian of a minor is not liable to account to the minor for his acts even though he received properties belonging to the minor. A settlement of account by arbitrators or mediators cannot be re opened except on the ground of fraud.

Ramanathan Chettiar v. Muthiah Chetty ... (1920) I.L.R., 43 Mad., 429

MORTGAGE—Equity of redemption of moiety of mortgage property—Purchase by mortgagee—Extinction of mortgage.] In the absence of fraud, the purchase by the mortgagee in Court auction of the equity of redemption of some items of the mortgaged properties discharges that portion of the mortgage debt which was chargeable on those items, that is, it discharges a portion of the mortgage debt which bears the same ratio to the whole mortgage debt as the value of those items bears to the value of all the mortgaged properties. *Bisheshwar Dial v. Ram Sarup* (1910) I.L.R., 23 All., 284 (F.B.), followed. *Sami Rowappa v. Kuppusami Iyenjar* (1911) 2 M.W.N., 842, overruled.

Ponnamdula Pillai v. Annamalai Chettiar ... (1920) I.L.R., 43 Mad. (F.B.), 872

MORTGAGE-BOND—Transfer—Absence of notice to mortgagor—Payment to mortgagee by mortgagor after transfer without notice thereof—Payment in full settlement of debt—Effect of payment—Receipt by mortgagee, necessity for registration—Registration Act (XVI of 1908), sec. 17 (b)—Civil Procedure of Property Act (IV of 1882), sec. 130, principle of.] Payment by the mortgagor to the mortgagee after, but without notice of, a transfer of the mortgage, must, in the absence of collusion, be allowed to the mortgagor as

against the transferee. Where such payment was accepted by the mortgagee in full settlement of the debt due, the mortgagor is entitled to get credit, as against the transferee, not only for what he actually paid but for the whole mortgage-debt. Where a receipt by the mortgagee, in terms, only discharges a mortgage-debt, it does not fall under section 17 (b) of the Registration Act, and is admissible in evidence, though it was not registered. Where, in a suit for sale instituted by the transferee of a mortgage-bond against the mortgagee and mortgagor, a decree was passed against the latter, but on appeal by him, the decree against him was reversed, the Appellate Court had power, under Order XII, rule 38, Civil Procedure Code, to pass a decree against the mortgagee, who was a respondent in the appeal, even though the plaintiff had not filed an appeal or memorandum of objections.

Neelamant Patneik Mussadi v. Sukaduru Beharu ... (1920) I.L.R., 48 Mad., 808

MUHAMMADAN LAW—Dower—Widow in lawful possession of her husband's property—Right of widow to retain possession against husband's heirs till dower is satisfied—Necessity for consent of or agreement with her husband or his heirs—Sale by widow for payment of dower—Validity of sale—Right of vendee to retain possession until dower is satisfied.] A Muhammadan widow, whose dower remains unpaid, is entitled to remain possession of the properties of her husband which she obtained lawfully, without force or fraud but without the consent of, or any agreement with, the husband or his heirs as to the payment of her dower; nor can such properties be divided among the heirs until the dower debt has been satisfied. *Hamira Bibi v. Zubaida Bibi* (1916) I.L.R., 38 All., 541 (P.C.), discussed. Though the sale by such widow to satisfy the dower debt is not binding on the other heirs of her husband, the vendee is entitled to retain possession of the property sold to him against the other heirs until the dower debt is satisfied.

Beeju Bee v. Syed Moorthiya Sahab ... (1920) I.L.R., 43 Mad. (F.B.), 214

MULGENI LEASE—Covenant against alienation—Breach—Assignment, validity of.] In the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, an assignment of the lease by the lessee in breach of his covenant not to assign is perfectly valid. *Parameshwari v. Pittappa Shanbaud* (1903) I.L.R., 26 Mad., 157, explained. *Tamaya v. Timappa Ganpaya* (1888) I.L.R., 7 Bom., 284, *Basarat Ali Khan v. Manirulla* (1909) I.L.R., 36 Cal., 745 and *Promode Ranjan Ghose v. Aswini Kumar Nag* (1914) 18 C.W.N., 1188, followed. Per SESHAGIRI AYYAR, J.—The same principle would apply even in the case of a mulgeni lease executed subsequent to the Transfer of Property Act.

Udipi Seshagiri v. Seshamma ... (1920) I.L.R., 43 Mad., 508

MUTT, HEAD OF—Sanyasi—Simple money debts incurred by head for necessities of the mutt—Suit against successor—Liability of mutt properties—Personal liability of the debtor—Lay trustee, executor or administrator, analogy of.] In a suit to recover a simple money debt, incurred by the sanyasi head of a mutt for the necessary purposes of the mutt, the properties of the mutt can be made liable, whether the suit is brought during the lifetime of the incumbent who incurred the debt or his successor. Cases of debts incurred by lay trustees of religious or charitable institutions, executors or administrators, distinguished. *Shankar Bharati Swami v. Venkapa Naik* (1885) I.L.R., 9 Bom., 422, followed.

Lakshmindrathirthe Swamiar v. Raghavendra Rao. (1920) I.L.R., 43 Mad., 795

NEGOTIABLE INSTRUMENTS ACT (V OF 1881), ss. 5 AND 6—Cheque Bill of Exchange—Banker—Local Boards Act (V of 1884), ss. 54, 144 to 147—Government Treasury, whether a banker—Power of Local Board to make or issue negotiable instruments—Implied power—Rules and Forms under the Act—Local Fund Code, rule 649—Indorse of an order of District Board, whether holder in due course.] A Local Board is impliedly empowered, under the Local Boards Act (V of 1884) to make, endorse or accept negotiable instruments, as such a power can be inferred from the rules and forms made by the Governor in Council under section 144, clause (16) of the Act and contained in the Local Fund Code, which have the force of law under

section 147 of the Act. A Government Treasury, in which a District Board deposits its money under section 54 of the Act and issues orders for payment out which are respected by the former, is not a 'Bank.' *Foley v. Hill* (1848) 2 H.L. Cas., 28 at p. 43; and *Halifax Union v. Wheelwright* (1875) L.R., 10 Exch., 183, followed. An unconditional order in writing for payment of money to, or to the order of a person, issued by a District Board on the Government Treasury, is not a cheque under section 6 but is a bill of exchange under section 5 of the Negotiable Instruments Act; and a bona fide endorsee for value of such an order is entitled to payment as a holder in due course.

Rangaswami Pillai v. Sankaralingam Ayyar ... (1920) I.L.R., 43 Mad., 816

ONUS OF PROOF—*Suit by Government pattadar to eject tenants—Claim by tenants to right of occupancy—Facts establishing rights of occupancy—Title of plaintiff and service of notices to quit undisputed—Onus on defendants to prove claim, how satisfied—Second appeal—Jurisdiction of High Court on second appeal to deal with facts, Civil Procedure Code (1908) sec. 103.* In suits brought by the appellant as Government pattadar against the respondents after due service of notice to quit, to eject them from agricultural land in a ryotwari village, the respondents pleaded that they had a permanent tenancy or right of occupancy; and the appellant's title and the notices purporting to determine the tenancy were not disputed. *Held* that the onus was on the respondents to prove the existence of their right of permanent occupancy, but that it had been established by the evidence that they had been immemorably in possession of the lands, and that they had not been proved to have been ever let into occupation by the appellant; that they had been paying a uniform rate of rent; that the lands were reclaimed and brought under cultivation by them; that they had made great improvements and carried on the cultivation either of dry or garden crops of their own choice without any interference or objection; and that they had for a very long time been sometimes making alienations of wells and lands; and the onus of proof had been thereby satisfied. The District Judge had passed decrees in the appellant's favour for possession of all the lands in suit. The High Court was of opinion that the District Court had omitted to determine a question of fact which was essential to the right decision of the suit on the merits, and framed issues which it asked the District Judge to decide as to whether the respondents were yearly tenants or had a permanent right of occupancy. These the District Court returned without dealing with them in a satisfactory manner. The High Court on second appeal drew an inference of the respondents' occupancy rights, and decided the appeal (dealing with it under section 103 of the Civil Procedure Code, 1908) in favour of the respondents. *Held* that the inference not being contradictory to any finding of fact by the District Court, and there being materials from which such inference could be drawn, the High Court had jurisdiction, under the circumstances, to deal with the case under section 103 and make a decree as it had done.

Seturatnam Aiyar v. Venkatachela Goundan... (1920) I.L.R., 43 Mad. (P.O.), 567

PENAL CODE (INDIAN), SEC. 269:—*See MADRAS CITY MUNICIPAL ACT (III OF 1904)* ...

PENAL CODE, INDIAN (XIV OF 1860), SEC. 211—*Complaint, under section 1 of the Breach of Contract Act (XIII of 1859), withdrawn before passing of any order under section 2—Whether a 'criminal proceeding' within section 211, Indian Penal Code.* A complaint under section 1 of the Breach of Contract Act (XIII of 1859) which is withdrawn before any order is made by the Magistrate under section 2 of the Act, either for a refund of the advance paid or for specific performance of the contract, is not a 'criminal proceeding' within the meaning of section 211, Indian Penal Code. *In the matter of Anusoori Sanyasi* (1905) I.L.R., 28 Mad., 87, and *Derby Corporation v. Derbyshire County Council* [1897] A.C., 550, referred to.

Hussaina Beari v. King-Emperor ... (1920) I.L.R., 43 Mad., 448

PRACTICE—*Probate and Administration proceedings—Appeals—Rules of the High Court, 35, 36, 88—Fees payable to legal practitioners.* In appeals

from orders granting or refusing probate or letters of administration, the fee allowable to a legal practitioner is regulated by rule 38 and not by rules 35 and 36 of the Appellate Side Rules of the High Court.

Sidhia Chetty v. Venkataraya Chetty ... (1920) I.L.R., 43 Mad., 282

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC. 19 (g)—*Suit for stones of a well or their value—Title to the well questioned—Jurisdiction of the Small Cause Court.* Suit to recover stones forming part of a well and said to have been wrongfully removed by the defendant, or their value is cognizable by the Presidency Small Cause Court, in spite of the fact that it is necessary to determine the question of title to the well. *Puttangiowada v. Nilkanth Kalo Deshpande* (1913) I.L.R., 37 Bom., 875, followed. *Tirupati Raju v. Vissam Raju* (1897) I.L.R., 20 Mad., 155, considered and distinguished.

Krishnamachari v. Komalammal ... (1920) I.L.R., 43 Mad., 903

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), ss. 21, 28 to 30—*Private arrangement of insolvent with creditors for full discharge on part-payment, whether 'payment in full' or 'composition' under the Act.* A private arrangement of the insolvents to pay four annas in the rupee in full satisfaction of their claims even though made with all their creditors is neither a 'payment in full' nor a 'composition' within the meaning of the Act so as to entitle the insolvents to an annulment of an order of adjudication. An order of adjudication under the Presidency Towns Insolvency Act, made on an application of the insolvents who were unable to pay their debts, can be annulled by 'payment in full' to the creditors as provided for by section 21 of the Act or as the result of a composition with the creditors in the manner provided for by sections 28 to 30 of the Act.

Brij Kessoor Lal v. Official Assignee, Madras ... (1920) I.L.R., 43 Mad., 7

SEC. 55—Provincial Insolvency Act (III of 1907), sec. 36—*Mortgage within two years of insolvency of mortgagor—Good faith and consideration for mortgage—Onus of proof on mortgagee—Mortgagee admitted to proof by Official Assignee—Application by Official Assignee to expunge proof of mortgage—Onus of proof.* Under section 55 of the Presidency Towns Insolvency Act, as under section 36 of the Provincial Insolvency Act, a mortgagee setting up a mortgage executed within two years of the insolvency of the mortgagor, has the onus cast on him to show that the transaction was one executed in good faith and for consideration. The fact that the Official Assignee is moving to expunge a proof which he has admitted under section 26 of the former Act, does not shift the burden of proof from the mortgagee to the Official Assignee. *The Official Assignee v. Annapuranammal* (1913) 20 I.O., 901, followed. An admission of proof by the Official Assignee is in no sense an adjudication and it is open to him as well as to other creditors to have an adjudication by the Court on notice, and in such adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise.

Official Assignee of Madras v. Sumbanda Mudaliar ... (1920) I.L.R., 43 Mad., 739

SEC. 115—Immunity of Official Assignee from stamp duty, whether applicable to his attorney—*Nattukottai Chettis, whether bankers—Loans advanced on or without deposit of goods—Entry in same account—Banker's lien on goods for general balance of accounts—Indian Contract Act (IX of 1872), sec. 171.* An attorney representing the Official Assignee, is entitled to the same privileges as to stamp duty as the latter has under section 115 of the Presidency Towns Insolvency Act. Consequently, the attorney need not pay stamp duty for a copy of the order passed by a Judge of the High Court in the exercise of its insolvency jurisdiction. It is perfectly general knowledge, and it has been recognized in judicial decisions, that Nattukottai Chettis are the Indian bankers of this part of the country. *Vellayappa Chettiar v. Annamalai Achi* (1918) 6 L.W., 687, and *Annamalai Chetti v. Annamalai Chetti* (1919) 10 L.W., 67, referred to. The garnishee, a Nattukottai Chetti, had, in addition to money-lending business, customers who deposited money with him, kept pass books and went with them and drew money, and he paid

interest on the deposits and bought and sold hundies and lent money on securities. *Held*, the garnishee was a banker. It appeared that diamonds were deposited by a customer with the garnishee from time to time and advances made thereon and the diamonds were redeemed from time to time but also that loans were made by him without deposit of diamonds and entered in the same account. *Held*, on the insolvency of the customer, that under section 171, Indian Contract Act, the garnishee was entitled as a banker to retain the deposits as security for his general balance of account with the insolvent, and that no contract to the contrary had been proved in the case.

Official Assignee of Madras v. Ramaswamy Chetty ... (1920) I.L.R., 43 Mad., 747

PRINTING PRESSES AND NEWSPAPERS ACT (XXV OF 1867), sec. 4—
Indian Press Act (I of 1910), sec. 3, sub-sec. (1)—Control of press owners—Deposit of security, power of Magistrate to dispense with—Order for deposit made after dispensing with it—Declarations made by keeper of printing presses—Publishing objectionable matter in newspaper or other periodical—Order by Governor in Council forfeiting security, and newspaper with all copies wherever found and annulling declarations made—Petitions by owner of press to set aside or revise orders of Magistrate and Governor in Council.—Articles in newspaper bringing Government into hatred and contempt—Criminal Procedure Code, 1898, sec. 435—Writ of certiorari—Arrest in criminal case—Practice in Privy Council—Indian Press Act (I of 1910), ss. 3 sub-sec. (1), 4 sub-sec. (1), 17 and 22.] Under the Printing Presses and Newspapers Act (XXV of 1867), section 4, any person who keeps a printing press in his possession must make and subscribe a declaration before a Magistrate stating that he has a press for printing and where it is situated; and by section 5 no printed newspaper or other periodical shall be published without the printer or publisher making a declaration that he is the printer or publisher, the name of the periodical, and the place where the printing is conducted. Under the Indian Press Act (I of 1910 of the Government of India), section 3, sub-section (1) the person making such declaration is required to deposit before a Magistrate a sum of money or other security not less than Rs. 500 but not more than Rs. 2,000 as the Magistrate thinks fit to require. The Magistrate however may for special reasons dispense with the deposit, and has certain powers of cancelling or varying any order made under this sub-section. By section 4, sub-section (1), the Local Government, in case of anything objectionable appearing in the paper, may by notice in writing addressed to the owner of the press, declare the security deposit, the newspaper in which the objectionable matter appears and all copies of it wherever found, to be considered forfeited to the Crown, and the declaration made as above by the keeper of the press annulled. Sections 17 and 18 give power to any person interested in any property so forfeited to make an application to a Special Bench of the High Court to set aside such order, on the ground that the newspaper did not contain anything of an objectionable nature such as is described in section 4, sub-section (1). The appellant was the owner and keeper of a printing press, and printed and published a newspaper called "New India" and on 2nd December 1914 she had made all the declarations required and had duly observed all the proceedings (except making a deposit of security with which the Magistrate had dispensed) necessary under the above Acts to enable her to carry on and print and publish the newspaper. On 28th May 1916, however, she received a notice from the Magistrate, dated 22nd May 1916, in which he had, under sub-section (1) of section 3 of Act I of 1910, cancelled his order dispensing with the security and required her within fourteen days to deposit Rs. 2,000 as security; and in accordance with that order the appellant deposited the amount, but under protest. On 28th August 1916 she was served with an order, dated 25th August 1916, made by the Governor of Madras in Council reciting that twenty passages of the nature described in sub-section (1) of section 4 of Act I of 1910, and of the newspaper in which the passages had deposited and all copies of the newspaper in which the passages appeared were to be considered forfeited to the Crown. The appellant thereupon presented two petitions to a Special Bench of the High Court, one a Criminal Revision Petition under sections 103 and 107 of the Government of India Act (5 and 6

Geo. V, Sec. 61), and section 435 of the Code of Criminal Procedure, 1898, against the order of the Magistrate requiring security and praying that it might be set aside; and the other under section 17 of Act I of 1910 against the order of forfeiture made by the Governor in Council praying that it might be revised and set aside. The application against the order of the Magistrate was described in the course of the proceedings as an application for a writ of certiorari. Both applications were heard by a Special Bench and both were dismissed. In the petition under section 17 of Act I of 1910 the Special Bench unanimously held that three articles (2), (11) and (18) were within the terms of section 4, sub-section (1), clause (c): a majority, ABDUR RAHIM, Offg. C.J., and AYLING, J., thought articles (1), (6), (10) and (12) obnoxious to clause (c); AYLING, J., thought the same of articles (9) and (14); and SESHAGIRI AYYAR, J., of article (8); AYLING, J., was of opinion that article (7) was obnoxious to clause (e) and SESHAGIRI AYYAR, J., thought the same of article (11). Applications to the High Court for leave to appeal to His Majesty in Council were refused, but the appellant obtained special leave to do so. *Held*, with regard to the petition to set aside the order of the Magistrate that on the construction of section 3, sub-section (1) of Act I of 1910 the Magistrate had power to cancel his order dispensing with security; that the order cancelling the dispensation was not a judicial act, but one done in the exercise of administrative functions; that the omission to hear the appellant before making it was only an irregularity which could not be reviewed, at any rate by writ of certiorari, and not a case for revision under the Code of Criminal Procedure. The provisions of section 435 of the Code of Criminal Procedure, and of section 115 of the Code of Civil Procedure are not exhaustive and there may be rare cases which might not fall under either of those sections, and for those cases the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari cannot be said to have been taken away; though it is taken away in ordinary cases by the above sections of the Civil and Criminal Procedure Codes. And assuming the power to issue writs of certiorari remain notwithstanding the existence of later procedure by way of revision, in the present the procedure by certiorari would be precluded by section 22 of Act I of 1910. *Held*, with respect to the petition under section 17 to set aside the forfeiture the question was as to whether the passages cited from the articles published in the newspaper came within section 4, sub-section (1) of the Act, and the Judicial Committee found that due weight had been given by the Special Bench to the several portions of the section and that it had not been misconstrued on any matters of law. Their Lordships acting on their usual practice would not, with regard to appeals in Criminal cases, interfere on the merits with the conclusions of the Court below. *Dal Singh v. King-Emperor* (1917) I.L.R., 44 Cal., 876; L.R., 44 I.A., 137 and *Bal Gangadhar Tilak v. Queen-Empress* (1897) I.L.R., 23 Bom., 528; L.R., 25 I.A., 1, were referred to.

Besant v. Advocate-General of Madras ... (1920) I.L.R., 43 Mad. (P.O.), 146

PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 16 (2), 18 (2) AND 19 (2)—
*Adjudication of a person as insolvent—Necessity of an order appointing a person as Receiver of the insolvent's estate.] Section 18 (2) of the Provincial Insolvency Act (III of 1907) contemplates on every adjudication of insolvency an order by the Court appointing a Receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under section 19 (2). Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title. *Official Receiver of Trichinopoly v. Somasundaram Chetty* (1916) 30 M.L.J., 415, followed.*

Muthuswami Swamiar v. Somoo Kandiar ... (1920) I.L.R., 43 Mad., 869

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), sec. 17 (1) PRO-
VISO—Ex parte decree, application to set aside—Whether proviso mandatory or directory—Time within which deposit to be made or security given.] By the Full Bench (SESHAGIRI AYYAR, J., dissenting)—The provisions of section 17 (1), Provincial Small Cause Courts Act, are mandatory. By the Full Bench—But the deposit of the decretal amount may be made or the security given, within the period prescribed by the law of limitation for applications under the section, namely, thirty days from the date of the ex parte decree

although it did not accompany the application itself. *Jeun Muchi v. Budhiram Muchi* (1905) I.L.R., 32 Cal., 389, followed.

Assan Mohamed Sahib v. Rahim Sahib ... (1920) I.L.R., 43 Mad. (F.B.), 579

RAILWAYS ACT, INDIAN (IX OF 1890), ss. 8 AND 121—*Indian Railway Board Act (IV of 1905), Rules 241, 229 and 231—Stationmaster deputing signaller to collect tickets and excess fare—Assault on signaller by passenger.* Under rules 244, 229 and 231 framed under Railway Board Act (IV of 1905) a Stationmaster has power to depute a signaller subordinate to him to collect tickets and excess fares from passengers alighting at the station, and a signaller so deputed is a "Railway servant employed by a Railway administration" within the meaning of section 3, clause (7) of the Indian Railways Act (IX of 1890). An assault by a passenger on such signaller rightly demanding excess fare is an offence under section 121 of the Indian Railways Act.

Bheemanna v. Emperor ... (1920) I.L.R., 34 Mad., 348

SEC. 72—*Risk note—Consignment of goods—Loss, deterioration, or damage, meaning of—Liability of Railway Company—Insurers—Bailees—Competency of Company to contract for less liability than as bailees.* A consignor sent a bale of gunny bags through the defendant Railway Company. The risk note provided that the company should not be responsible for any loss, destruction or deterioration of or damage to the consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of a Railway administration or to theft by or to the wilful neglect of its servants, etc. The bale was damaged by the dropping of a package of acid by the negligent act of the Company's servant. On a claim against the Company for damages, the latter pleaded that they were not liable on the ground, *inter alia*, that there was no 'loss' of the article consigned within the meaning of the risk note. Held, that the plaintiff could recover, only if the bale of gunnies was lost, that is, entirely deprived of value. The distinction between 'loss' and 'destruction, deterioration, and damage' pointed out. It cannot be said that there is no loss if the outer cover which encloses a parcel is delivered, whatever may happen to the contents. *East Indian Railway Company v. Nilakanta Roy* (1914) I.L.R., 41 Cal., 578; *B.B. & C.I. Railway Company v. Ambalal Sewaklal Ind. Ry. Cas.* 48 and C.S. 309 of 1914, Madras High Court, (unreported), dissented from. *Per SESHAGIRI AYYAR, J.*—The term 'loss' would include cases where the article consigned is lost to the consignor as such article or has lost its identity as such. *Asfer & Co. v. Blundell* [1896] 1 Q.B., 123 and *Hearn v. The London and South Western Railway Company* (1855) 10 Exch., 793, referred to. Under the Indian Law, a Railway Company has not the liabilities of an insurer, but only those of a bailee, and, under section 72 of the Indian Railways Act, can enter into an agreement limiting its responsibility, provided it is in a form approved by the Governor-General in Council. *Sheikh Mahamad Ravuther v. The British India Steam Navigation Co.* (1909) I.L.R., 34 Mad., 95 (F.B.), commented on. Persons who undertake to do certain things and who employ servants to do those things must be held responsible for the carelessness or negligence of those servants in the course of their employment. *Joseph Rand v. Craig* [1919] 1 Ch., 1, referred to.

Madras and Southern Mahratta Railway Company v. Subba Rao. (1920) I.L.R., 43 Mad., 617

RECEIVER, SUIT AGAINST—*Sanction of Court for institution of the suit—Want of previous sanction—Effect of—Jurisdiction, whether affected—Sanction, subsequently obtained—Illegality, whether cured.* Where a suit is instituted against a Receiver appointed by a Court, without obtaining the previous sanction of that Court, the omission to obtain such sanction does not affect the jurisdiction of the Court in which the suit is laid but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation. *Banku Behari Dey v. Harendra Nath Mukerjee*, (1910) 15 C.W.N., 54 and *Jagat Tarini Dasi v. Naba Gopal Chaki*, (1907) I.L.R., 34 Cal., 805, followed.

Ammukutty v. Manavikraman ... (1920) I.L.R., 43 Mad., 798

REGISTRATION ACT (III OF 1877), ss. 17 AND 49—*Agreement between first and second mortgagees of the same property to share equally money realized from their mortgages—Suit by one of them to recover money realized by the other—Agreement also affecting the mortgaged property.* The appellants were the first mortgagees of certain immoveable property, and the respondents held a second mortgage of the same property and they came to an agreement "that both parties should as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realized on the date of realization." The agreement was found to be made for valuable consideration. The appellants having realized part of the estate, the respondents sued them in order to obtain their share of the proceeds to which they claimed to be entitled by virtue of the agreement. An objection was raised by the appellants that the agreement required registration, and not being registered could not be used as evidence. Held, on the construction of the agreement, that if the whole effect of the agreement was to provide merely that the realized money was to be divided in equal shares, there was nothing to require it to be registered and if on the other hand there were two distinct provisions, the one relating to rights of property, and the other with regard to the division of the money realized, then as the proceedings in the suit related merely to the question of the realized money, the agreement need not be registered for the purpose of being given in evidence in this suit, although it might require registration in a suit relating to the regulation of the rights against the estate itself.

Vyavan Chetti v. Subramanian Chetti ... (1920) I.L.R., 43 Mad. (P.C.), 660

ss. 17 AND 49—*Deed of authority to adopt, executed in Nizam's Dominions by a domiciled subject of that State, necessity for registration of—Adoption on such authority—Right of adopted son to succeed to his adoptive mother's father's properties situated in British India—Tenants-in-common—Adverse possession by the heir of one for more than twelve years—Article 144 of the Limitation Act (XV of 1877).* The Indian Registration Act (III of 1877) does not apply to authorities to adopt executed in Native States by domiciled subjects of those States; such documents are valid and are admissible in evidence in British India without registration. A person adopted in pursuance of such an authority acquires the status of an adopted son capable of inheriting the separate properties of his adoptive mother's father situated in British India. If on the death of A, a Hindu, who held an estate on behalf of himself and other tenants-in-common, the estate is held exclusively by his widow or daughter as his heir, claiming it as his separate property, adversely to the other tenants-in-common, for more than twelve years, the rights of the latter to recover the estate as tenants-in-common are barred under article 144, Limitation Act. Article 127 does not apply. On the death of the widow or daughter the estate will descend to the heirs of A as his separate property.

Venkatappayya v. Venkata Ranga Row ... (1920) I.L.R., 43 Mad., 288

REGISTRATION ACT (XVI OF 1908), SEC. 17 (b)—*See MORTGAGE* ... 803

Mortgage-bond—Interpolation by mortgagor—Adding another item belonging to mortgagor for convenience of registration—Registration Fraud on registration law—Document, whether properly executed, attested and registered. A document mortgaging only one item of property, was duly executed, and attested, and another item of his property was interpolated by the mortgagor with the knowledge and consent of the mortgagee in the presence of the same attesting witnesses. The mortgagor registered the deed in the Sub-Registrar's office within whose jurisdiction the latter item was situated. It appeared that the object of adding the second item was not so much to give an additional security to the mortgagee, as to enable the mortgagor to get the document registered near the place where he was living and thus prevent delay in registering the deed. Held, that there had been no fraud on the registration law and that the document was duly executed, attested and registered with regard to both items of property. *Harendra Lal Roy Chowdhuri v. Haridasi Debi* (1914) I.L.R., 41 Cal., 972 (P.C.), distinguished.

Kunhi Sankaran Nambiar v. Narayanan Tirumunpu. (1920) I.L.R., 43 Mad., 405

REGISTRATION ACT (XVI OF 1908), SEC. 17, SUB-SEC. (2)—*Certifying adjustment of decree—(Civil Procedure Code (V of 1908), Order XXI, rule 2—Whether exempted from registration.]* A compromise made after decree, affecting any immovable property of the value of over Rs. 100, and embodied in a petition presented under Order XXI, rule 2, Civil Procedure Code, which has been recorded by the Court, is exempt from registration. *Hemanta Kumari Debi v. Midnapur Zamindari Company* (1919), 46 I.A., 240, followed. *Chelamanna v. Rama Rao* (1913) I.L.R., 36 Mad., 46 and *Raja Venkatappa Nayanim Faru v. Raja Thimma Nayanim Varu* (1914) 27 M.L.J., 656, overruled.

Pooranayi Ayissa v. Kundron Choken ... (1920) I.L.R., 43 Mad. (F.B.), 689

..., SEC 90, CL. (1) (d)—*Consultation—Rule of ejusdem generis—Lease of lands by Government—Document executed by lessee but not registered, whether admissible in evidence—Prohibition in lease against erection of buildings—Power of Government to impose conditions—Crown Grants Act (XV of 1895), ss. 2 and 8—Power whether affected by Malabar Compensation for Tenants' Improvements Act (I of 1900), sec. 12.]* A lease of lands made by Government was evidenced by an unregistered document executed by the lessee; it contained an undertaking by the lessee not to erect buildings on the land; the latter, however, built on the lands contrary to the agreement. In a suit by the Secretary of State to eject the lessee. Held, that the document did not require registration as it fell under section 90, clause (1) (d) of the Registration Act, and was admissible in evidence. The expression "other document, etc." in section 90, Registration Act, should not be construed *ejusdem generis* with "sanads and inam title-deeds" in the previous part of the section; but, even if so construed, a lease is of the same character as a sanad; and the words "grants or assignments of interest" in the same section are comprehensive enough to include a lease. Under sections 2 and 3 of the Crown Grants Act the Government has power to impose restrictions in a lease made by it—a power which is not effected by the provisions of the Malabar Compensation for Tenants' Improvements Act. *Munshilal v. The Notified Area of Barant* (1914) I.L.R., 36 All., 176, dissented from.

Moosa Kutti v. The Secretary of State ... (1920) I.L.R., 43 Mad., 65

REGISTRATION LAW, FRAUD ON—*Sale-deed—Including a cent of land to enable a Sub-Registrar to register—Item of land, real and owned by vendor—No intention to pass title to vendee—Registration, whether valid.]* The inclusion of an item of property belonging to the vendor in a sale-deed without any intention of passing title in it and purely for the purpose of making the deed available for registration in a particular place is a fraud upon the registration law, and such sale-deed must be deemed not to have been properly registered.

Narasimha Rao v. Papunna ... (1920) I.L.R., 43 Mad., 436

RELIGIOUS ENDOWMENTS ACTS (XX OF 1863), ss. 3 AND 4—*See HINDU LAW* ... 666

SALE OF LAND—*Non-payment of price—Right of vendee to sue for possession—Decree for possession, whether can direct payment of price or be conditional on payment—Transfer of Property Act (IV of 1882) ss. 54 and 55.]* A vendee who has not paid the purchase money of the lands bought by him, is entitled to a decree against the vendor for possession of such lands. The Court cannot make the decree conditional on payment of the purchase money, nor can it decree payment of the price to defendant in the vendee's suit.

Krishnamma v. Mali ... (1920) I.L.R., 43 Mad., 712

SALE IN EXECUTION OF DECREE—*Benami purchase—Purchase on behalf of another person—Certified purchaser—Agreement to convey made after sale to carry out agreement made before sale—Civil Procedure Code, 1908, sec. 68, sub-sec. (1).]* Section 68 of the Code of Civil Procedure, 1908, sub-section (1) enacts that 'No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be

prescribed, on the ground that the purchase was made on behalf of the plaintiff, or on behalf of some one through whom the plaintiff claims.' The appellant purchased at an execution sale certain immovable property which he had before the sale agreed with the respondents to convey to them. After the sale agreements were made by which the appellant bound himself to carry out the original agreement with the respondents. In suits by the respondents against the appellant for specific performance the defence was that the suits were barred by section 68, sub-section (1). Held that the fresh agreements made after the sale, though carrying out those made before the sale, were not affected by section 68 and the suits were therefore not barred. *Venkatappa v. Jalayya* (1919) I.L.R., 42 Mad., 615, approved.

Vadivelu Mudaliyar v. Peria Manicka Mudaliyar ... (1920) I.L.R., 43 Mad. (P.C.), 648

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SPECIFIC PERFORMANCE—*Sale of land—Sale-deed not registered—Vendee in default in paying purchase money—Sale-deed, whether can be regarded as an agreement to sell—Suit by vendee for specific performance, whether maintainable.]* Where a sale-deed, purporting to be a conveyance of some lands, was executed and delivered to the vendee, but was not registered, and the omission was not due to act of God or fraud on the part of the executant, it is not open to the vendee to treat the unregistered document as an agreement to sell and to use for specific performance of such agreement. *Venkatasami v. Kristayya* (1893) I.L.R., 16 Mad., 341, followed. *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh* (1910) 12 C.L.J., 464, dissented from.

Thayarammal v. Lakshmiammal ... (1920) I.L.R., 43 Mad., 1

SPECIFIC RELIEF ACT (I OF 1877), SEC. 42, ILLS. (e) AND (f)—*See HINDU LAW* ... 4

..., SEC 42—*Temple property—Permanent lease—Invalidity of lease—Suit for declaration by worshippers—Maintainability of suit.]* Worshippers of a temple can maintain a suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid.

Veeramachaneni Ramaswamy v. Soma Pitchayya. (1920) I.L.R., 43 Mad., 410

STAMP ACT (II OF 1899), SEC. 2 (5), arts. 15 and 40 of Schedule I—*Court Fees Act (IV of 1870), Schedule II, art. 6—Security bond by receiver binding himself and his properties—Proper stamp—Whether liable under Stamp Act and Court Fees Act.]* A security bond, in favour of a Court, executed by a receiver binding himself and his properties for the due discharge of his duties, must be stamped both under the Court Fees Act and under article 40 of Schedule I of the Stamp Act. *Kulwanta v. Mahabir Prasad* (1889) I.L.R., 11 All., 16 (F.B.) and Referred Case No. 19 of 1911, followed.

Amirthammal v. Ramalinga Goundan ... (1920) I.L.R., 43 Mad. (F.B.), 268

..., SEC. 5—*Sale—Mortgage for due performance of covenants—Distinct matters, meaning of—Stamp Payable.]* A sale deed, in which the vendor mortgages lands not included in the sale as security for the due performance of his covenants, need not be stamped both as a sale and a mortgage. *Govindan Nambudiri v. Moidin* (1918) I.L.R., 41 Mad., 469 (F.B.), overruled.

Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras (Referring Officer) ... (1920) I.L.R., 43 Mad. (F.B.), 365

TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 52 AND 91, CLAUSE (f)—*See CIVIL PROCEDURE CODE ACT (V OF 1908), O. XXI, R. 103 and O. XXXIV, R. 1* ... 696

..., SEC. 53—*Fraudulent alienation to defeat and delay creditors—Attachment of alienated property—O. XXI, r. 63, suit under—Plea of attaching creditor as to fraudulent nature of*

alienation, validity of.] In a suit by an alienee, whose claim to property attached under a decree has been rejected, to set aside the order and establish his title, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors. *Subramania Ayyar v. Muthia Chettiar* (1918) I.L.R., 41 Mad., 612 (F.B.) and *Palaniandi Chetty v. Appavu Chettiar* (1916) 80 M.L.J., 565, overruled.

Ramaswami Chettiar v. Mallappa Reddiar ... (1920) I.L.R., 43 Mad. (F.B.), 760

TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 54 and 55 :—See SALE OF LAND ... 712

..., SEC. 91 :—See MALABAR LAW. 393

..., ss. 98 AND 60—*Anomalous mortgage—Mortgages defined in section 58 and combined mortgages under section 98—Clog on equity of redemption, validity of—Applicability of provisions of the Act to ordinary and anomalous mortgages—Terms of the deed and local usage, how far binding—Construction of document.* Where the mortgagee was put in possession of the lands mortgaged under a deed executed in 1900, which provided that the principal with interest at a specified rate should be repaid on a certain date, eleven years thereafter, and that, in default, the mortgagor should give up the lands as sold to the mortgagee and execute a proper sale-deed, and further that the latter should enjoy the property paying the revenue due to Government, and where the mortgagor sued in 1914 to redeem the mortgage and the mortgagee pleaded that the former could not redeem after the time limited under the deed, *Held* (by the Full Bench), that the transaction evidenced by the deed was not a mortgage by conditional sale or an anomalous mortgage under section 98, but a combination of a simple mortgage and a usufructuary mortgage, and that, consequently, the stipulation in the deed, which fetters the equity of redemption, was invalid as opposed to section 60 of the Act. *Held* (by WALLIS, C.J., and SESHAGIRI AYYAR, J.)—In the case of anomalous mortgages referred to in section 98 the provisions of section 60 as to the right of redemption do not apply when there is a contract or local usage to the contrary.

Kandula Venkiah v. Donga Palaya ... (1920) I.L.R., 43 Mad. (F.B.), 589

..., SEC. 123 :—See LIMITATION ... 244

..., SEC. 130 :—See MORTGAGE ... 803

TRUST LANDS.—*Permanent lease not void ab initio.* A permanent lease of trust lands is not void ab initio: it is only voidable.

Kadir Mastan Rowther v. Sengammal ... (1920) I.L.R., 43 Mad., 438

WILL.—*Fixed deposit—Direction to pay to another after death of depositor, whether a will.* A person depositing money with a fund filled in a form provided by the fund, whereby he nominated another as the person entitled to receive the money after his death. *Held* that this amounted to a will, and if made in the town of Madras, the nominee could not recover the deposit unless the nomination was duly executed and attested as a will and probate thereof obtained. *Per KRISHNAN, J.*—The direction created neither a charge nor a trust in favour of the nominee or a contract on which he could sue. *Towers v. Hogan* (1889) 23 L.R., Ir., 53 and *In re Williams* [1917] 1 Ch., 1, followed; *Florino Martices v. Pinto* (1917) 33 M.L.J., 476, distinguished.

Nana Tawker v. Bhawani Boyee ... (1920) I.L.R., 43 Mad., 728

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- and claimant whether a 'party'—Insolvency Court, sanction by, for offences under sections 193 and 465, Indian Penal Code, committed before Official Assignee.] A Court granting sanction under section 195, Criminal Procedure Code, ought to abstain from analysing the evidence or expressing any opinion as to the probability or otherwise of a conviction. All that the Court should feel is that the matter is one which on the face of it requires investigation by a Magistrate. The granting of sanction is in no way tantamount to an intimation that a *prima facie* case has been made out. If a claimant files a false affidavit and a forged document, in support of a claim, before the Official Assignee, and thereby commits offences under sections 193 and 465, Indian Penal Code. *Held*, that the offences are committed in a "proceeding in Court" and the claimant is a 'party' within the meaning of section 195, Criminal Procedure Code; and that the Insolvency Court can grant sanction. *Kristnamma v. Chitturi Chinna Perajay*, (1915) 17 M.L.T., 15, followed; dictum of SESHAGIRI AYYAR, J., in *Palaniappa Chettiar v. Ramaswami Chettiar*, (1916) 32 M.L.J., 54, dissented from. *Hajee Mahomed Habibulla Badsha Sahib*, in the matter of. (1920) I.L.R., 43 Mad., 1
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- ESTATES LAND (MADRAS) ACT (I OF 1908), ss. 155 AND 192 (e)—Set-off of money against claim for rent.] Except in the case provided for by section 155 a tenant has no right under the Madras Estates Land Act to set-off amounts due to him from the landholder against a demand for rent. *Raja of Ramnad v. Venkatarama Aiyar* ... (1920) I.L.R., 43 Mad., 69
- HINDU LAW—Inheritance—Persons born blind—Exclusion from inheritance and joint ownership—Rule of exclusion whether obsolete—Tests—Competency of Courts to declare rule obsolete—Reversioners—Right of suit for declaration—Widow setting up absolute title to husband's properties under a will of another—Right of reversioner to sue for mere declaration—Specific Relief Act (I of 1877), sec. 42, ill. (e) and (f), whether exhaustive.] The rule of Hindu Law which prevents a person born blind from claiming an interest along with his brothers as a co-owner in ancestral properties, has become obsolete. A reversioner under the Hindu Law is entitled to sue for a mere declaration as to the limited nature of the title of a widow to certain properties, alleged by him to belong to her husband, but to which she sets up an absolute title under the will of another person. Illustrations (e) and (f) to section 42 of the Specific Relief Act are not exhaustive of the classes of cases in which a reversioner can sue for a declaration under the section. *Surayya v. Subbamma* ... (1920) I.L.R., 43 Mad., 4
- HINDU LAW—Inheritance—Stridhanam—Maiden's property—Father's sapindas, right of inheritance of—Father's sister—Father's paternal uncle's son—Preferential heir—Tests of Baudhayana and Brihaspati—Mitakshara and Smriti Chandrika.] Under the Mitakshara law the heirs to the stridhanam property of a maiden, who died leaving neither uterine brothers, nor mother, nor father, are the sapindas of her father; and, as between her father's paternal uncle's son and her father's sister, the former is the preferential heir. Text of Brihaspati, held inapplicable; text of Baudhayana and commentaries of Mitakshara and Smriti Chandrika discussed. *Kamala v. Bhagirathi*, (1915) I.L.R., 38 Mad., 45, followed. *Sundaram Pillai v. Ramasamia Pillai* ... (1920) I.L.R., 43 Mad., 32
- LAND ACQUISITION ACT (I OF 1894), SEC. 54:—See. LIMITATION ACT (IX OF 1908) ART. 156 ... 51
- LIMITATION ACT (IX OF 1908), ART. 156—Applicability of, to appeals under Land Acquisition Act (I of 1894).] Article 156 of the Limitation Act (IX of 1908) applies to appeals filed under section 54 of the Land Acquisition Act (I of 1894). *Aga Muhammad Hamadhani v. Cohen*, (1896) I.L.R., 18 Cal., 321, referred to. *Ramasami Pillai v. Deputy Collector of Madura* ... (1920) I.L.R., 43 Mad., 51
- LITIGANDS—Alienor made a party to the litigation—Compromise between original parties behind the back of the alienee, whether binding on the alienee.] An alienee *pendente lite* who has been added as a party to the litigation is entitled to object to a decree being passed in terms of a compromise arrived at between his alienor and the opposite party. *Veeraraghava Reddi v. Subba Reddi* ... (1920) I.L.R., 43 Mad., 37
- MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900), SEC. 19:—See REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 90, CL. (1) (d) ... 65
- PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), ss. 21, 23 TO 30—Private arrangement of insolvent with creditors for full discharge on part-payment, whether "payment in full" or 'composition' under the Act.] A private arrangement of the insolvents to pay four annas in the rupee in full satisfaction of their claims even though made with all their creditors is neither a "payment in full" nor a 'composition' within the meaning of the Act so as to entitle the insolvents to an annulment of an order of adjudication. An order of adjudication under the Presidency Towns Insolvency Act, made on an application of the insolvents who were unable to pay their debts, can be annulled only by "payment in full" to the creditors as provided for by section 21 of the Act or as the result of a composition with the creditors in the manner provided for by sections 23 to 30 of the Act. *Brij Kessoor Lall v. Official Assignee, Madras* ... (1920) I.L.R., 43 Mad., 71
- REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 90, CL. (1) (d)—Consultation—Rule of ejusdem generis—Lease of lands by Government—Document executed by lessee but not registered, whether admissible in evidence—Prohibition in lease against erection of buildings—Power of Government to impose conditions—Crown Grants Act (XV of 1895), ss. 2 and 3—Power whether affected by Malabar Compensation for Tenants' Improvements Act (I of 1900), sec. 19.] A lease of lands made by Government was evidenced by an unregistered document executed by the lessee; it contained an undertaking by the lessee not to erect buildings on the land; the latter, however, built on the lands contrary to the agreement. In a suit by the Secretary of State to eject the lessee, *Held*, that the document did not require registration as it fell under section 90, clause (1) (d) of the Registration Act, and was admissible in

evidence. The expression "other document, etc." in section 90, Registration Act, should not be construed *ejusdem generis* with "sanads and inam title-deeds" in the previous part of the section; but, even if so construed, a lease is of the same character as a sanad; and the words "grants or assignments of interest" in the same section are comprehensive enough to include a lease. Under sections 2 and 3 of the Crown Grants Act the Government has power to impose restrictions in a lease made by it—a power which is not affected by the provisions of the Malabar Compensation for Tenants' Improvements Act. *Munshilal v. The Notified Area of Baraut*, (1914) I.L.R., 36 All., 176, dissented from.

Moam Kutti v. The Secretary of State ... (1920) I.L.R., 48 Mad., 65

SPECIFIC RELIEF ACT (I of 1877), SEC. 42, ILLS. (e) AND (f):—See HINDU LAW ... 4

THE INDIAN LAW REPORTS

MADRAS SERIES.

ORIGINAL CIVIL.

Before Mr. Justice Coutts Trotter.

IN THE MATTER OF HAJEE MAHOMED
HABIBULLA BADSHA SAHIB, AN INSOLVENT.*

1918,
September,
18.

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction, duty of Court granting—Claim before Official Assignee, whether a "proceeding in Court," and claimant whether a 'party'—Insolvency Court, sanction by, for offences under ss. 193 and 465, Indian Penal Code, committed before Official Assignee.

A Court granting sanction under section 195, Criminal Procedure Code, ought to abstain from analysing the evidence or expressing any opinion as to the probability or otherwise of a conviction. All that the Court should feel is that the matter is one which on the face of it requires investigation by a Magistrate. The granting of sanction is in no way tantamount to an intimation that a *prima facie* case has been made out.

If a claimant files a false affidavit and forged document, in support of a claim, before the Official Assignee, and thereby commits offences under sections 193 and 465, Indian Penal Code,

Held, that the offences are committed in a "proceeding in Court" and the claimant is 'a party' within the meaning of section 195, Criminal Procedure Code, and that the Insolvency Court can grant sanction. *Kristamma v. Chitturi Chinna Perraju*, (1915) 17 M.L.T., 15, followed; dictum of SESHAGIRI AYYAR, J., in *Palaniappa Chettiar v. Ramaswami Chettiar*, (1916) 32 M.L.J., 54, dissented from.

PETITION to sanction the prosecution of two persons for offences under sections 193 and 465, Indian Penal Code, in Insolvency Petition No. 112 of 1917.

One Hajee Mahomed Habibulla Badsha Sahib was adjudicated an insolvent on 10th July 1917 on a petition by a creditor. The insolvent filed his schedule giving the names of twenty-one persons as his unsecured creditors whose debts amounted to about Rs. 40,000. Subsequently the insolvent filed from time

* In Insolvency Petition No. 112 of 1917.

In re:
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to time supplemental lists of debts and creditors, most of which the Official Assignee impeached as fictitious. One Ambasunker Joshi, who was not mentioned by the insolvent in any of his lists, made a claim before the Official Assignee and filed an affidavit and a promissory note, dated 10th August 1916, purporting to show an advance of Rs. 2,500 to the insolvent.

The insolvent supported the claim. The Official Assignee found the promissory note to be a forgery perpetrated by the insolvent and the claimant in collusion; he thereupon moved the Insolvency Court for sanction to prosecute the insolvent and the claimant.

Sanction was granted to the Official Assignee to prosecute the claimant and the insolvent for offences under sections 467, 471 and 198.

Nugent Grant for petitioner.

M. D. Devadoss for respondent.

COURTS
TROTTER, J.

JUDGMENT.—This is an application for sanctioning the prosecution of two persons for offences under sections 198 and 465, Indian Penal Code. Agreeing, as I do, with the views expressed by NAHIB, J., in *Kristnamma v. Chitturi Chinna Perraju*(1), and disagreeing with those of SESHAGIRI AYYAR, J., in *Palaniappa Chettiar v. Ramaswami Chettiar*(2), which observations, in my opinion, are dicta which were quite unnecessary to the case decided by the Bench on that occasion, I feel myself in very great difficulty as to what I should do in this case. I am satisfied that the true interest of the accused requires that the Judge who gives sanction should abstain from giving anything like an analysis of the materials submitted to him for the purpose, or expressing any opinion as to the probability or otherwise of a conviction. I think that all that a Judge in giving sanction is called upon to do is to feel that the matter is one which, on the face of it, requires investigation by a Magisterial Court and perhaps ultimately by a competent tribunal. To my mind it would be fatal to the interest of the accused person that, because an order of sanction has gone, the committing Magistrate should feel that the sanctioning Court has made up its mind that there is made out against the accused a *prima facie* case in the sense that would demand committal. To arrive at that

(1) (1915) 17 M.L.T., 15.

(2) (1916) 32 M.L.J., 54.

conclusion is the duty, in my opinion, of the Magistrate before whom the case is brought up and not of the Judge from whom the sanction is obtained; and I think that it is well put by AYLING, J., in *Palaniappa Chettiar v. Ramaswami Chettiar*(1) where he says

"In effect, by according sanction, it does not say to the Court which tries the case, 'This is a case in which I think you will have to convict,' but 'This is a case which I think it is worth your while to inquire into'."

I strongly dissent from the view that a sanction given by this or any other Court is in any way tantamount to an intimation to the Magistrate that it is his duty to find that there is a *prima facie* case against the accused and commit him for trial. In my opinion his duty is simply to do what he would do in any other case; and sanction is only requisite to prevent a frivolous abuse of the powers of the Criminal Courts. I am satisfied that this prosecution is not that, and that is all I desire to say about it.

Various points were taken. The first one was that the affidavit and the promissory note filed along with it which is the foundation for these proceedings was not done in 'a proceeding in a Court', on the ground that it was filed not before me directly but before the Official Assignee. In my opinion, the heading of the affidavit alone is enough to show that this was filed in this Court in a proceeding in this Court, although, as a mere matter of machinery, certain claims may be adjudicated upon by the Official Assignee as a subordinate officer of this Court. In any view, that point is absolutely unarguable. Then it is said that the sanction under section 195 (1) (c), Criminal Procedure Code, is not for an offence committed by 'a party' and therefore it does not fall within the scope of this section. In my opinion, a claimant who files a claim in an insolvency petition in this Court is 'a party to the proceedings'. If his claim is disputed, he has to appear to support it and then a *lis* is constituted between himself on the one hand and the Official Assignee as representing the estate of the debtor on the other. If his claim is rejected, and he is not satisfied with it, he appeals to the Court just like any other party in other proceedings. But, in any event, it is of no moment, because if he is not a party my sanction is not required.

(1) (1916) 32 M.L.J., 54.

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MAHOMED
HARIBULLA
BADSHA
SAHIB.
—
COURT:
TROTTER, J.

In case it is required I give it and if it is not it does not matter.

I sanction the prosecution in terms of the notice of motion.

V. Varadaraja Mudaliyar, Attorney for the petitioner.

Short, Bewes & Co., Attorneys for the respondent.

[The claimant preferred an appeal* from the above judgment which was heard by WALLIS, C.J. and SADASIYA AYYAR, J. The following judgment was delivered on 10th April 1919:—

"We see no reason to differ from the learned Judge. The Appeal is dismissed. The Official Assignee's costs will be paid out of the estate."]

N.B.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

YELLAVAJHALA SURAYYA (PLAINTIFF), APPELLANT,

v.

YELLAVAJHALU SUBBAMMA AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.†

Hindu Law—Inheritance—Persons born blind—Exclusion from inheritance and joint ownership—Rule of exclusion whether obsolete—Tests—Competency of Courts to declare rule obsolete—Reversioners—Right of suit for declaration—Widow setting up absolute title to husband's properties under a will of another—Right of reversioner to sue for mere declaration—Specific Relief Act (I of 1877), sec. 42, ill. (e) and (f), whether exhaustive.

The rule of Hindu Law, which prevents a person born blind from claiming an interest along with his brothers as a co-owner in ancestral properties, has become obsolete.

A reversioner under the Hindu Law is entitled to sue for a mere declaration as to the limited nature of the title of a widow to certain properties, alleged by him to belong to her husband, but to which she sets up an absolute title under the will of another person.

Illustrations (e) and (f) to section 42 of the Specific Relief Act are not exhaustive of the classes of cases in which a reversioner can sue for a declaration under the section.

SECOND APPEAL against the decree of J. J. COTTON, the District Judge of Kistna, at Masulipatam, in Appeal Suit No. 21 of 1917, preferred against the decree of V. R. KUPPUSWAMI AYYAR, the

* Original Side Appeal No. 53 of 1918. † Second Appeal No. 826 of 1918.

Subordinate Judge of Kistna, at Ellore, in Original Suit No. 22 of 1915.

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v.
SUBBAMMA.

The material facts and contentions appear from the judgment of SADASIYA AYYAR, J.

P. R. Ganapali Ayyar for V. Ramadoss for the appellant.

V. Ramesam for the respondents.

JUDGMENT.—The plaintiff is the appellant. The material facts found are: The first defendant's husband, Chinna Sambayya, had two undivided brothers, namely, P. Sambayya and G. Sambayya. P. Sambayya was the eldest, G. Sambayya was the second brother, and the first defendant's husband, C. Sambayya, was the youngest. P. Sambayya died issueless about the year 1877. G. Sambayya who was born blind about 1847 had, however, been invested with the sacred thread (the parties being Brahmans by birth) as if he had no such disability and lived in commensality with his younger brother; C. Sambayya, in undivided family communion after the death of the eldest brother, P. Sambayya. G. Sambayya died in December 1911 when he was about 65 years old. His younger brother, C. Sambayya, the first defendant's husband, had predeceased him in November 1906, leaving his widow, the first defendant, as his heir. Soon after the first defendant's husband's death on the 19th January 1907, the blind Brahman G. Sambayya executed the will, exhibit VII, as follows:

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"I am now 60 years old. I am born blind. Your husband is my undivided brother. I am unmarried. My younger brother has no male issue. He left only two daughters . . . I execute this will in a sound and disposing state of mind so as to make my entire property devolve on you after my death with powers of alienation by gift and sale . . . For the continuation of the line you are authorized to adopt any boy whom you please whenever you desire. If you do not desire to adopt, you should have the right of alienation by gift and sale, as you please, in respect of the entire property mentioned herein. This will is to take effect after my death."

At the foot of the will, the particulars of the property bequeathed are given and they are said to be in the possession and enjoyment of the testator. One of the houses in Panduvva village is stated to have been purchased by the blind testator in November 1900 and to have remained in his possession.

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The testator was "an active and intelligent man taking part in all family transactions and contributing to the maintenance and improvement of the family." As a matter of fact "he seems to have been entirely managing the family affairs during his lifetime and the first defendant's husband was a mere figure-head." "As a Vaidic Brahman he would be officiating at ceremonies and going about for *Sambhavanas* and *Dhakshinas* on marriage and other occasions not only when they took place in his own village but also in adjoining villages. His blindness, far from being a disqualification, was a recommendation to his being paid double the usual *Dhakshinas* paid to other Brahmans. He appears to have been well versed in the Brahmanical, puranic and other religious literature, and appears to have been in the habit of expounding them to the villagers. He took part in the cultivation of the lands and he sold lands, purchased lands, incurred debts by mortgaging lands, executed simple debt bonds and discharged them all on behalf of the family." (See documents beginning in 1881, exhibit II, and ending with exhibit XIX, dated 1910.) The first defendant has been in possession of the properties after the death of her brother-in-law (G. Sambayya) in 1911.

The plaintiff is the divided agnate cousin of G. Sambayya and of C. Sambayya. He treated the blind man as the surviving full owner of the family properties after the death of the first defendant's husband. The plaintiff even got a decree against the blind man in 1910, the liability of the blind man being based on his ownership of his family lands.

The present suit was brought in July 1915 on the following averments:—

(a) The blind Sambayya had, according to Hindu Law, no ownership right in the plaint properties. His younger brother who died in November 1906 was sole owner at his death. His widow, the first defendant, in 1906 inherited the properties with a widow's interest.

(b) The will of blind Sambayya of January 1907 in respect of the properties, which did not, as above shown, belong to the blind man, giving the first defendant absolute powers for disposal by gift, sale, etc., cannot legally confer on her such powers, and she can only have a widow's interest as her husband's heir in those properties.

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(c) The authority to adopt given to her by such will could not lawfully be given to her by the blind man.

On those averments, the plaintiff prayed for a declaration that the first defendant, "save a widow's estate to be enjoyed for life, has acquired no absolute rights of sale, gift, etc., in respect of the schedule properties under the will alleged to have been executed" by the late G. Sambayya.

The plaintiff does *not* pray in the plaint for setting aside the will nor does he seek a declaration that the power to adopt given by the will is invalid. In paragraph 7 of the plaint, he says: "The first defendant not having as yet made any adoption in pursuance of the said authority, the plaintiff has no *relief* to seek for in this suit in that behalf."

Both the Lower Courts dismissed the plaintiff's suit.

The Subordinate Judge framed six issues. He begins the fifth paragraph of his judgment by referring to issues IV and VI alone. The sixth paragraph professes to consider the first issue alone, and the seventh paragraph the second issue alone. The fifth issue is, "whether the suit is barred"; and I take it that the issue was not pressed by the plaintiff. The second part of the second issue raises the question whether some of the plaint properties were the self-acquisitions of Guddi Sambayya. But there is no express finding on that part of the issue. The third issue states the question of estoppel and though the third issue as such is not referred to in paragraph 7 of the judgment of the Subordinate Judge, I find that paragraph which professes to consider only the second issue also gives a finding that the plaintiff is estopped by his conduct (in having brought the suit in which the plaint, exhibit XIX, was filed and the decree, exhibit XV, was passed) from asserting in the present suit that the blind Sambayya was not the sole owner of the properties by survivorship on the death of Chinna Sambayya. On the first issue, the Subordinate Judge held that the rule of exclusion of a born blind man, from inheritance along with his brothers and from co-parcenary with his brothers and from the right of survivorship, had become obsolete. On the first part of the second issue, the Subordinate Judge held that, by the assertion of joint ownership with his brother and by enjoyment accordingly as managing member, the blind Sambayya had acquired a prescriptive right as joint owner before Chinna Sambayya's death in 1906 (and

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hence had exclusive title by survivorship at Chinna Sambayya's death).

On the fourth and fifth issues, the Subordinate Judge held that the plaintiff being merely a contingent reversioner to Chinna Sambayya's estate and having a mere *spes successionis* had no right to sue for any declaration under section 42 of the Specific Relief Act unless waste or alienation by the widow is alleged and proved, and that as no such waste or alienation is alleged in this plaint the plaintiff was not entitled to maintain the present suit.

On appeal the learned District Judge agreed with the Subordinate Judge on all these points and dismissed the appeal.

The questions therefore for consideration in this second appeal are—

(1) Has the rule of Hindu Law which prevents a person born blind from claiming interest along with his brothers as a co-owner in ancestral properties become obsolete?

(2) Did Guddi Sambayya acquire by prescriptive enjoyment the right in the plaint properties as co-owner with his brother Chinna Sambayya and did he possess such co-ownership rights on the date of the death of Chinna Sambayya and could he legally acquire by long enjoyment as co-owner such a title?

(3) Is the plaintiff estopped by his conduct from denying Guddi Sambayya's title as co-owner and also his title as exclusive owner after Chinna Sambayya's death?

(4) Is the plaintiff, as a mere contingent reversioner to Chinna Sambayya's estates, not entitled to sue for a mere declaration as to the limited nature of the first defendant's title in the plaint properties?

As regards the rule of Hindu Law itself, the most important text is that in Manu-Smriti, ch. IX, § 201, Manu being recognized as the highest authority on Hindu Law next to the *Sruti* or *Veda*:

"Eunuchs and outcastes, persons born blind or deaf, mad men, idiots, the dumb and *nirindriya* are excluded from a share of the heritage."

(I have not translated the word '*nirindriyas*' in the quotation. The English translators following some commentators have translated the word as meaning "such as have lost the use of a limb." I shall later on show that the interpretation and

translation are wrong.) Yagnavalkya, ch. II, verse 140, excludes a blind man (*andha*) and not merely a man born blind (*Jaty-andha*). He also excludes a *pungu* (crippled in both legs) and a man incurably diseased (*avichikitsya roga*) and adds '*adyas*' and the like persons. Verse 141 shows that the personal disqualification of a blind man does not stand in the way of his son sharing the inheritance in his place, except in the case of the outcaste's son, who, in Yagnavalkya's days, would himself have been an outcaste. Not only is the son entitled to take his disqualified father's place but the disqualified man himself can re-open the partition (notwithstanding the rule that an estate once vested cannot be divested) if the ground of his disqualification is removed. The Mitakshara says:

"If the defect be removed by medicine or other means . . . the right of participation takes effect by analogy to the case of a son born after separation."

The Vyavahara Mayukha says:

"If after division, virility or the other absent qualification be regained by medicine or other means the person will receive his share like an after-born son."

[See Full Bench decision in *Kalidas Das v. Krishnan Chandra Das*(1)]

I need not consider whether the Mitakshara is right in saying that Yagnavalkya did not mean more than Manu and that he intended to exclude only persons born blind and not persons who were anyhow blind at the time of the partition. In *Murari Gokuldas v. Parvati bai*(2) that very learned Judge, WESTROFF, O.J., (who consulted his equally eminent colleague WEST, J., before delivering judgment) quotes the text of Manu, "the chief of the Rishis" and at page 185 he says: "The word '*nirindriyas*' in that text, which Sir William Jones has rendered 'such as have lost the use of a limb,' Mr. Colebrooke has in his translation of the Mitakshara rendered thus: 'those who have lost a sense [or a limb]' . . . Vachaspati Misra in his *Vivada Chintamani* commenting on the text of Manu, says: *Those who have lost the use of a limb* signifies those who have been deprived of a hand, a leg, or any other member of the body. Such persons are not competent to perform ceremonies relating to the *Vedas* and *Smriti*."

(1) (1869) 2 B.L.R., 103 (F.B.).

(2) (1876) I.L.R., 1 Bom., 177.

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They are consequently not entitled to inherit paternal property." Then WESTROPP, C.J., indicates his inclination on the matter thus :—

"Even assuming that Manu meant by 'nirindriya' to indicate deficiency in a sense, organ, limb, or member"

I take it that the learned Chief Justice was not prepared to agree with the commentators and translators that Manu used 'nirindriya' in that sense. This fortifies me in my opinion that 'nirindriya' does not convey that meaning but another meaning which I will mention later on. Then the learned Judge says :

"Nilakanta, in the Mayukha, ch. IV, s. XI, quotes, amongst other texts, that of Manu, with this remark : that, as to the words 'have lost a sense (nirindriya)' they mean 'deprived of the nose or the like.' The translator, Mr. Borrodaile (possibly following the Smriti Chandrika, ch. V, pl. 61) after the word 'nose,' adds in a parenthesis 'or smell,' but that is merely conjectural It is hardly probable that, if supervening deficiency in the more valuable senses of sight or hearing, or in the organ of speech, or in the reasoning faculty, were not permitted by Manu to work disherision, he regarded a deficiency in the minor senses of taste, touch, and smell as sufficient to produce that effect."

At page 189, the learned Judge refers to a text of Brihaspati :

"Manu holds the first rank among legislators, because he has expressed in his code the whole sense of the Veda; no code is approved which contradicts the sense of any law promulgated by Manu Upon a question as to which the Smritis vary so much as that of disqualification for inheritance, we think that the pre-eminence assigned by Brihaspati to Manu should not be forgotten."

The learned Chief Justice finally concludes that congenital blindness alone is a disqualification according to the highest authority (Manu) and as, in that case, the blindness was not congenital the blind testatrix did inherit her husband's estate and the legatees of the blind testatrix accordingly succeeded in the appeal. Of course, the direct point decided in that case was that a person not congenitally blind could inherit. The question whether a person congenitally blind could inherit according to the shastras, and, even if he could not, whether that rule of the shastras had become obsolete was not directly decided, though it was unhesitatingly assumed that the rule according to the

shastras was that a person born blind was incapable of sharing the inheritance.

Now comes the question whether that rule is obsolete. I need not say that a rule becomes obsolete when the reason of the rule disappears through change of circumstances and environments in the society which was governed by that rule. Now what is the reason for the exclusion by Manu and other Smriti writers of a born blind man? Manu refers to a man born blind and a man born deaf by the Dvandva Samasic phrase "*Jāthyandha Badhirau*." He classes them along with eunuchs, outcastes, mad men, idiots, dumb and nirindriyas but does not state that the latter should be such by 'birth'. In fact, mad men and outcastes need not at all be by birth. It is also impossible to give any plausible reason for giving a share to a man who was incurably idiotic or lunatic on date of partition while refusing it to one who was such from birth.

Before going further, I shall at once deal with the meaning of the expression 'nirindriyas.' The word is clearly taken from the vedic text which says that Soma should not be given pure to women as they are 'nirindriyas.' The text occurs in Taitt : Samhita VI Kanda, V Prapathaka, 8th Anuvaka :

"Soma when taken to women did not manifest himself. Then by means of clarified butter they attacked him. By this attack, Soma became destitute of indriya (virility, strength to breed) and they took this weak Soma for the Patnivat Agni. Hence women are unvirile (nirindriya) and destitute of inheritance."

It will be seen that the text itself was not intended to lay down any rule of inheritance but to lay down that women should not be given pure Soma but Soma weakened by ghee (just as the Kshatriya was given Nyagrodha juice instead of Soma and so on). The statement in the Veda is not an injunction about inheritance according to the Mimamsa rules of interpretation but is a Nityanuvada (the statement of a known fact or established convention) justifying the real injunction. Baudhayana quotes this text in his Sutra "*(Arhati Stree) Nadāyam Nirindriya Adāyāścha Striyo Mathāyiti Sruteh*." The meaning is that a woman is not entitled to inherit because a text of the revelation says "females are nirindriyas and are incompetent to inherit." Here the word 'nirindriyas' can never mean "devoid of sight, hearing, touch, smell, or taste, or mind" as women generally possess these.

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Every translator has translated it as meaning that females are devoid of sufficient *strength or prowess or capacity* in their senses. I shall in this connexion quote another text of the Sruti found in the Kathopanishad: "*Pesthodaka Jagadhatrāh Dugdha doha 'Nirindriya,' Anandanāmathe Lokah Tan Sa gachati Tā dadat*". Nachikethas finds fault, in this Upanishad text, with his father who made useless gifts, because the gifts were of '*nirindriya*' cows which had become too old (they were incapable of yielding milk or manure) and were too feeble to take food or drink. In this text '*nirindriya*' clearly means (as in the other vedio text), "wanting in the required vital strength to be indicated by vigour of activity of the five senses of perception and the five senses of action and the unifying eleventh sense of mind." It is also to be noted that if '*nirindriya*' in the text of Manu and Yagnavalkya means "devoid of any sense or organ of sense" (including 'sense' of action), it will be a tautology as pointed out by WESTROFF, C.J., because the deaf and the blind had been mentioned just previously. I am also very glad to have some support from Dr. Jolly in this matter. He says (Tagore Law Lectures for 1883, page 272):

"Another difference of opinion, besides the one resting on the varying number of texts quoted in each digest, has been called forth by the philological difficulties besetting the interpretation of some of the terms used in the old texts on exclusion from inheritance. *No other among those terms is so ambiguous as the phrase 'those who are nirindriya anyhow' in a text of Manu (IX, 201), which is quoted in all digests. Occurring as it does, at the close of a list of excluded persons, the word 'Nirindriya' may be supposed to be a general term denoting bodily infirmities or defects of every other kind than those specifically mentioned in the previous list. Thus, in another text of Manu (IX, 18) the same word 'nirindriya' is used with reference to women, and means 'destitute of strength.'*"

I feel therefore no hesitation in saying that '*nirindriya*' means "devoid of sufficient capacity and vital strength in the organs of sense." In fact, the exclusion of women from inheritance (except the wife, the daughter and the mother who were afterwards brought as favoured by special texts) has been expressly based on the above text of Veda which speaks of women being '*nirindriyas*' (and not because they cannot perform vedic rites as they are entitled, at least, to join their husbands in

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performing such rites). The very name of a woman in Sanskrit is '*abala*' or "one without strength." Barring exceptional amazons and geniuses, women were, till quite recently, known as the "weaker sex" and the "frailer sex" and just as the 'right hand' is the strong hand employed in useful activities (the left hand being merely used as supplemental), so women were to be protected and cherished but prohibited from being entrusted with any responsible work. "Women were regarded under the Teutonic Laws as necessarily dependent and the traces of this order of ideas still remain in the English Law. The proper guardian was the husband, father, brother or son, the nearest agnate or the king's Court." (The well-known text of the Smritis that a woman is unfit during her whole life period to be independent and that father, husband and sons control her till death may be recalled in this connexion). (So, under the early Roman Law: See Mommsen's History of Rome, Vol. 1).

Impotent persons, outcastes, mad men, idiots, and the born blind and deaf were persons generally incapable and even *unwilling* to transact business or to manage property and the exclusion of all these was based clearly on their presumed *incapacity*. There are many other grounds for exclusion from inheritance mentioned by Manu, Yagnavalkya, Brihaspati, Apasthamba, Narada and Devala. One ground was "affliction with an incurable disease." Two others were "irreligion and being guilty of degrading sins." Manu says in sloka 214, "All those brothers who are addicted to vice lose their title to the inheritance." Narada says: "An enemy to his father and one who is addicted to vice take no shares of the inheritance even though they be legitimate." Manu says in sloka 202:

"But it is just that the heir who knows his duty should give all of them food and raiment for life without stint according to the best of his power. He who gives them nothing sinks assuredly to a region of punishment."

Sloka 203 says:

"If the eunuch and the rest should at any time desire to marry, the issue of such as have children shall be capable of inheriting."

That the deaf and the dumb were assumed to be defective in mind also (owing to the best avenues of knowledge being closed to them) till very recent times is, if I may say so, notorious. That eunuchs were as a class content to be slaves obeying their

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masters' orders provided food and raiment were given to them is also well known, but according to Manu if a eunuch was desirous of marrying and married accordingly and then raised progeny on his wife by another (as was allowed in olden times), his son was entitled to share in the inheritance in his place. The Smrithi-Chandrika and the Sarasvathi Vilasa have attempted to base the disqualification of heirs on the ground of the disqualified person's incapacity to perform religious rites prescribed by Vedas and Smritis. Surely, Sudras were never entitled to perform vedic ceremonies nor Chandalas and other depressed classes. The laws of inheritance and exclusion from inheritance apply not only to the three castes or Dwijas (entitled to perform vedic ceremonies) but to all Hindus. It therefore seems impossible to base the exclusion on incapacity to perform vedic ceremonies.

As regards agamic religious practices, surely a blind man is not excluded by the sastras from singing devotional songs or weaving garlands for temple worship and so on. The man born blind is not necessarily or usually an idiot. Manu has no doubt said in chapter II, sloka 99, that even when one among the organs of a vedic student fails his divine knowledge passes away as water flows through one hole in a leathern bottle. But blind boys are studying and have studied the vedas and sastras (like Dirghatamas of old and the blind pandit of phenomenal learning and memory of very recent times who a few years ago dictated the *Pranava Veda* to the well-known Benares scholar Babu Bhagavan Doss) and in modern days there is no difficulty in teaching the blind to read. In this case itself, Guddi Sambayya was not excluded from vedic rites or social intercourse or from the management of affairs. Some orthodox commentators excluded persons suffering from elephantiasis, atrophy and marasmus from inheritance, but no Hindu would suggest in these days the exclusion from inheritance of a man suffering from elephantiasis, etc., nor would the Court uphold such a contention. In the same way Apasthamba and Gautama exclude from inheritance sons who acquire wealth by following irregular professions and Devala excludes a hypocrite and impostor. As Jolly says at page 281:

"In a primitive state of society, in which collective forms of property were generally prevalent, a natural reluctance would be

felt against recognizing a disabled family member out of whom no work could be got as an equal sharer with his capable co-parceners. A wide extension of the reasons for exclusion from inheritance is common to several archaic legislations. I will terminate this lecture with a summary of an interesting analogy to these archaic provisions in our law. In the rules of the *Sachsenspiegel* on this head, as in that old North German law book, the contents of which are closely analogous to the old laws of the Anglo-Saxons, an interesting analogy to these old archaic provisions in our law is to be found:—

- (1) Outcastes, illegitimate children, monks and nuns, one who has killed his father or other relative, whose presumptive heir he is, or who has forcibly dispossessed him, or robbed him of his property; these persons are entirely incapable of inheriting.
- (2) Dwarfs, helpless cripples, persons of neutral sex, and lepers are equally disqualified, but their next-of-kin have the duty of maintaining them.
- (3) The deaf, the dumb, the blind and the lame, as well as those who have no hands or feet, may inherit ordinary property, but they cannot succeed to any feudal estate.

The analogy of these rules with the corresponding provisions of the Indian Law is self-evident."

Further, even in old times the blind and lame men were not incompetent to perform religious works. Apararka, the well-known commentator on the *Mitakshara*, says at page 264:

"Though there is incompetence to perform religious works of the Patita, *there is no such incompetence* of the blind, the lame and others. They have no right to perform special rites, which include parts requiring seeing the sacrifice and the like, still there is no general incompetence to perform all religious works. They surely have the right mentioned in the *Grihya Sutras* to *Ishta* works (that is, works performed with fire consecrated according to Vedic or Smriti rules). They can be married.

"From this text (Manu's text) showing the marriage of the impotent, etc., *their investiture with the sacred thread is understood*" . . . "Supposing that the born blind, etc., have no right to perform *Ishta* ceremonies, because of want of marriage and Upanayanam, still they have right to *Poorta* or conservatory works (such as digging tanks) like the Sudras. *Therefore these persons are not disqualified because of their incompetence to perform religious works but because of special texts.*"

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Viswarupa says :

"Some say, the word 'pangu' and the rest are used as illustrative of all persons incompetent to perform *agnihotra* and the like sacrifices. *That is wrong* as wealth is the subject of human purpose and because we find the capacity of the unlearned who are incompetent (to perform the above sacrifices) declared. Therefore, these are disqualified to take shares because of express texts denying their rights. *Their disqualification to take a share is not because of their incompetence to perform sacrifice, etc.*"

I think this completely disposes of the theory of exclusion being based on incompetence to perform religious works.

Then, it was argued that because the blindness was due to sin in the former birth and it has not been expiated, therefore there is exclusion from inheritance. This again cannot be the true ground of exclusion as the adoption of a religious order (like *Naishtika Brahmachariya*, *Vanaprastha* or *Sanyasa*) also excludes from inheritance, according to *Devala*, who includes such a *Lingee* along with a mad man and a blind man. Viswarupa in his commentary on *Yagnavalkya* says :

"the disqualification to take a share is not . . . because they bear the sign of grave sin in a previous birth. According to tradition, the blind and the rest who are not *patita* may take grand-paternal property. The incompetency to give more than what is necessary for maintenance when one is able to do so should be understood to be a mere declaration of what is proper and *not a rule*. To that effect is the text of *Manu* : "if the eldest or youngest of several brothers is deprived of his share or if either of them dies, *his share is not lost*." This shows that because of the incompetency of a disqualified person to dispose of shares obtained by him, there is resumption of what is properly obtained by him. Therefore his share is not lost. Thus these persons are themselves alone disqualified. But if there are *Aurasa* and *Kshetrāja* sons, these are entitled to allotments if free from similar defects. Their daughters must be maintained likewise until they are made over to their husbands." (*Yajnavalkya* II, 142.)

I cannot conclude this subject better than by quoting from that very learned and very level-headed text-writer *Jagadis Chandra Ghose* (who is fortunately or unfortunately not a *Brahman* by birth). "The rule probably owed its origin to the difficulty of keeping the property from the attacks of the strong in those troublous times when might was right.

. . . But the old rule of exclusion on the ground of physical deformity was limited by these three ancient law-givers" (*Gautama*, *Vasishta* and *Apastamba*, the *Sutra* writers) "to the case of the insane and of the *Kliba* or one of a neutral gender according to the interpretation of *Vignaneswara*." (*These three did not mention the blind*.) "These persons were placed in the category of minors, and others incapable of transacting legal business . . . Now, it is quite possible that during the long centuries when *Buddha's* rational and merciful religion prevailed in India, all these theories" (incapacity to perform rites, former sins, etc.) "fell into disrepute except the doctrine that natural deformities were the consequences of grave sins in past existences. We find that during these times and in times following them, the rule was as is laid down by *Gautama*, *Vasishta* and *Apastamba* that *only* the insane, the *Kliba* and the *Patita* or outcaste for grave sins only were excluded." "The *Burmese Manu* also lays down that if one "shall have a severe disease shall be unable to walk, shall stutter or be dumb, let the share such child is entitled to be *set aside*, and let its relations support it. *If he be blind or deaf, but perfect in his intellect*, let him have his proper share. But as mad, dumb and lame people, and those who have disease of the eyes, may be relieved by medicine, let their portion be regularly set aside for them."

"Several commentators, such as *Medatithi* and *Vachaspati Misra*, have laid down that persons excluded from inheritance are those who are excluded from *vedic* as well as *Smarta* ceremonies, and *are thus incapable of marrying*. The *Saraswati-Vilasa* says in this connexion, 'the inner meaning is that deformed persons, if they are *eligible for marriage*, are share-takers'. . . . Therefore, the proper way to determine, whether a person is excluded from inheritance, is to ascertain whether he is debarred from marrying." As the prohibition of marriage of blind persons became obsolete long ages ago it would naturally follow that their exclusion from inheritance must have likewise become obsolete long ago. Now, this is the view of the Subordinate Judge (an experienced Hindu Judge).

As *Macnaghten* says in *Principles and Precedents of Hindu Law*, Vol. II, at page 138 :

"It will be seen from the above specimens that questions connected with loss of caste, and consequent privation of the right of

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inheritance, are not by any means frequently litigated. I do not recollect having met with any others. Were these disqualifying provisions indeed rigidly enforced, it may be apprehended that but very few individuals would be found competent to inherit property, as there is hardly an offence in jurisprudence, or a disease in nosology, that may not be comprehended in some one or other of the classes. A cursory inspection of the subjoined catalogue of disqualifications will suffice to verify this assertion."

And then he gives the disqualifications which include "a man destitute of virtue, a son who has no sacred knowledge, nor courage, nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, one who neglects his duties" and so on. It seems to me that the principle of exclusion is conclusively indicated by Viswarupa, "incompetency to dispose of his" proper share and especially by the text of Baudhayana which says "*persons incapable of transacting business*, blind men, idiots, those who were immersed in vice or afflicted by incurable diseases and those who neglect their duties, let the heirs supply with food and apparel." Further, Deepakalika (another commentator on Yagnavalkya) says that a *Jada* (one of the excluded heirs) means "one *without energy to perform the duties of his own station in life*." According to Apastamba, a son who "dissipates wealth by his vices should be debarred from participation even though he be the first born." I do not think it necessary to pursue this further. It is well known that commentators give all sorts of fanciful reasons as the reason of a rule of law while the real reason stares them, so to say, in the face. The strict injunction to maintain and protect disqualified heirs, and the rule that their sons become sharers, show that the exclusion was not intended as a punishment but as a protection to persons incapable of or unwilling to manage property and to deal in secular affairs with others (outcastes being incapable of dealing with their fellow beings) and also in order to prevent vicious persons from squandering wealth in *adharma*. Giving shares to such persons would only lead to the property given to them being soon lost to them through their incapacity and unwillingness to hold it or to its being used in the promotion of *Adharma*.

As I said before, whether having regard to the reason of the rule and the change of environments and circumstances, the rule in question was likely to have become obsolete would form an

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important consideration for arriving at the right conclusion in this matter. The days when large families (consisting of all the agnates and their wives) lived undivided under the protection of a kulapathi and patriarch passed away long ago. The text of Manu as now found was not as Manu pronounced it, but as Bhrigu (to whom he gave the general principles) expounded it to other rishis. Most of the slokas of even Bhrigu's dictation have been lost and many 'pious' forgeries have crept in through medieval priestcraft. These texts as to exclusion clearly date from the patriarchal days. That many blind men though born blind have become capable of managing affairs and were married with all vedic and other rites is shown by the life of the king Dhritrashtra and of the rishi Dhirghatamas. The duty of maintaining a disabled agnate (however remotely connected) must have gradually decreased in strength from the date when Manu gave his original injunctions. On this question of a rule becoming obsolete owing to change of time and circumstances, I shall only say that it has been acknowledged by numerous later writers that the strict rules in the older Smritis have to be relaxed in this Kaliyuga owing to such changes. Thus, though according to the older Smritis a man who hates his father is excluded from inheritance, nobody will dream of denying that that rule has become obsolete and later commentators have tried to explain away the rule as restricted to a man whose hatred extends to attempts on the life of his father. Manu says in Ch. II, sloka 103, that a Brahman who stands not repeating his gayatri in the morning twilight and sits not repeating in the evening twilight must be precluded like a Sudra from all sacred observances. That is of course obsolete. According to Manu Ch. III, slokas 17 and 19, a Brahman who takes a Sudra woman to his bed and begets a child by her loses his caste as a Brahman and "the law declares no expiation" for his sin. This is of course now obsolete, as concubinage with dancing girls and sambandams with Nayar ladies (the latter being, of course, not at all morally culpable if monogamous) cannot be said to be unknown or even uncommon and no Brahman loses caste thereby. Exclusion from inheritance on account of vice or extravagance is of course now obsolete. Outcastes, etc., and similar persons are now entitled to inherit by Act XXI of 1850 which shows that the British legislature moved with the times seventy years ago,

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the old days when outcastes from Hinduism were necessarily excluded from all secular activities having become obsolete after the numerous foreign invasions. Of course, nobody will now think that the loss of a limb or a sense by a soldier or a hero will have the effect of excluding him from inheritance even if that rule was ever in force. If all incurable diseases were really causes of exclusion from inheritance, chronic consumption and diabetes have been and are probably even now such diseases; but nobody would think of holding that exclusion for such causes is not obsolete. In *Venkata Subba Rao v. Purushottam*(1) it was argued by Mr. Ramesam (who unsuccessfully appeared for the respondent) that lameness which is subsequently acquired is a ground of exclusion, relying upon the Mitakshara and Yagnavalkya, who excluded a *Pangu* or 'cripple' without the qualification 'by birth' from inheritance. BHASHYAM AYYANGAR, J., interjected the following remarks in the course of his argument. "Have you found any case in which the point was raised?" and when he got the answer 'none' and that in *Futtick Chunder Chatterjee v. Juggut Mohinee Dabee*(2) the point was not raised but conceded, BHASHYAM AYYANGAR, J., again remarked, "that shows that it is obsolete as a ground of exclusion. What do you say as to one who is an enemy of his father?" Then in the judgment, the learned Judges (BHASHYAM AYYANGAR and MOORE, JJ.) say: "*Even assuming that under the Hindu Law texts in case the lameness was congenital there would be a bar, a matter regarding which we give no opinion, it is admitted in the present case that the lameness was not congenital.*" "No case has been quoted where any Court has held that lameness congenital or otherwise is a bar to inheritance"; and then the learned Judges reversed the decision of the lower Courts. The learned Judges while inclined to hold that even as regards a cripple from birth the rule was obsolete, got over the difficulty by following *Futtick Chunder Chatterjee v. Juggut Mohinee Dabee*(2), where lameness was held to be no bar unless it were proved that the person proposed to be excluded was a cripple from birth. In *Vedanayaga Mudaliar v. Vedammal*(3), SUBRAHMANYA AYYAR, J., says: "Acts or omissions which entailed

(1) (1908) I.L.R., 26 Mad., 133.

(2) (1874) 22 W.R., 248.

(3) (1904) I.L.R., 27 Mad., 591, at p. 594.

degradation under the Hindu system of life were indeed many. They included not only heinous sins and crimes but numerous other things which are looked upon as innocent or are tolerated in these times. It may well admit of doubt whether the injunctions connected with degradation (such as loss of the right of inheritance) were ever enforced otherwise than by expulsions from caste now relieved against by legislation. However this may be, it is quite certain that, even so far back as the days of the Dayabhaga commentator, Srikrishna Tarkalankara, loss of proprietary rights as an incident to degradation had begun to disappear (see Tagore Law Lectures for 1884-85, page 426). Since the establishment of British rule in this country, no one seems to have ventured to suggest in judicial proceedings that the sins attaching to the commission of even such serious crimes as robbery, murder, etc., entailed by itself forfeiture of civil rights as a matter of Hindu Law, for though innumerable persons have from time to time been convicted by the Courts of such offences, the reports contain no case recognizing any such doctrine." I must however state that there is one case *Choondoor Lutchmeedavee v. Narasimma*(1), decided in August 1858 where exclusion was not only suggested but was argued and where three Judges including T. L. STRANGE stated "(1) that mere conviction for theft, though it excluded from inheritance under the Hindu Law, would not carry that civil penalty in a British Court of Justice because the British Criminal Code sufficiently punished the offence with distinct penalties and (2) that theft by plaintiff of part of the ancestral property to be divided disentitled him to share." I am very doubtful if the decision will be followed now on the second point which the Judges decided, on the strength of the opinion of the junior pandit, ignoring that of the senior pandit. The North-West Provinces High Court in *Kalka Pershad v. Budree Sah*(2) refused to lay down that a man became disqualified because he wrongly misappropriated to his exclusive use part of the joint property or because he was addicted to vice or was hostile to his father. At page 270 occurs this significant passage: "the texts quoted by the Subordinate Judge which

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(1) (1858) S.A.R., 188.

(2) (1871) 3 N.W.P.H.C.R., 267.

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are understood to have become obsolete in practice," etc. To resume the quotation from *Vedanayaga Mudaliar v. Vedammal*(1), "Plaintiff's case, therefore, derives no support from the rules dealing with the matter of degradation which, even assuming that they were at one time more than mere moral injunctions, cannot now be treated as otherwise than obsolete." I might state in this connexion that there seems to have been no case in which the Courts have decided (as distinguished from assuming or opining or as having taken it as conceded in argument) that congenital blindness does exclude from inheritance in these days. In other words, there is no case in which a congenitally blind man has been made to lose his inheritance by the decision of a Court.

In *Kayarohana Pathan v. Subbaraya Thevan*(2) decided by BENSON and SUNDARA AYYAR, JJ., the following passages occur in the judgment: "It must be noted that the ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the *Mitakshara*." "How wide the reasons for exclusion were will appear from Colebrook's Digest, Vol. II, pages 424 to 435. *Many of the grounds of exclusion would not now be enforced by the Courts, and are practically obsolete.*" (Neglect of obsequies and duties towards ancestors were also grounds of exclusion.) "It is doubtful how far the injunctions contained in the books are now actually enforced in different parts of the country. In Steel's Law of Castes it is observed that the rules of exclusion are largely qualified by custom, and that in seventy-two castes at Poona it was found that insanity excluded only unmarried persons, and that in eighty-three castes blind persons married and having families might inherit." As regards the incurable disease of leprosy, the case in *Kayarohana Pathan v. Subbaraya Thevan*(2), following *Rangayya Chetti v. Thanikachalla Mudali*(3), *Ananta v. Ramabai*(4) and *Janardhan Pandurang v. Gopal Pandurang et al*(5), confined exclusion to the case of leprosy of the "agonizing, sanious or ulcerous type." This case was followed in *Raju v. Ramasami Naicken*(6), decided by the learned Chief Justice and SESHAGIRI AYYAR, J., based

(1) (1904) I.L.R., 27 Mad., 591, at p. 594.

(2) (1896) I.L.R., 19 Mad., 74.

(3) (1868) 5 Bom. H.C.R. (A.C.J.), 145.

(4) (1915) I.L.R., 38 Mad., 250.

(5) (1876) I.L.R., 1 Bom., 554.

(6) (1914) 16 M.L.T., 254.

the rule of exclusion on the ground of unfitness for social intercourse, which unfitness is not caused by the milder forms of leprosy.) I might add here that unfitness for social intercourse caused in former times unfitness for the proper management of property and this latter is, as I have already shown, the real reason (or rather one of the two reasons) for the ancient rule.

In the view therefore of very learned and orthodox Brahman Judges of the Madras High Court beginning from SUBRAHMANYA AYYAR, J., many grounds of exclusion have become obsolete owing to change of time, circumstances and environments.

Mr. Ganapati Ayyar quoted a passage from an old judgment of a very learned Hindu lawyer that a Judge ought not to alter the existing law on account of any inclinations towards social reform. I entirely agree. But if a rule of law has become obsolete, I do not think that a Judge is prevented from laying down the law as it exists, merely because the obsolete rule is socially unjust and his decision negating the old rule would also promote social reform and justice. I do not deny that Judges are human and may be unconsciously biassed in their decisions either by their conservatism in social and political matters or by their radicalism in such matters. Even the tendency of their particular religious, philosophical and cultural views might unconsciously affect their view of legal principles and questions. Owing to this, Judges of the nationality of the litigants and acquainted with the customs and social habits of the litigants are partly in a position of advantage and partly in a position of disadvantage as compared with Judges of a different nationality. When the English Common Law became a 'wooden' system in many respects, the introduction of the 'human' element by the Lord Chancellors in the Courts of Equity cannot be considered to have been an undesirable innovation. Even now, when equity and law have become combined, the ideas of "justice, equity and good conscience," which vary with individual Judges, do have an important part in the unconscious and gradual development of law. As regards questions of Hindu Law, I do not think that extreme conservatism is to be commended so long as the legislature is slow to move in the direction of recognizing that customs have become obsolete or do require alterations. It is well known that,

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while the Indian legislature was reasonably progressive in these matters till the days of the Age of Consent Act (passed during the time of Lord Lansdowne), it has since been afraid to move with the times and to suit itself "to the changing needs of society and custom in modern times."

Even Sir BHASHYAM AYYANGAR was unable to have a Sister's Inheritance Bill (long overdue) passed in the local legislature. While extreme conservatism may be a virtue in Judges where the legislature is capable of moving with the times, I do not think that it is going outside his functions for a Judge who finds that a rule or custom has become obsolete to declare and decide accordingly, especially where, as in this country, the legislature is for well-known reasons tardy in such matters. It cannot be denied that their Lordships of the Privy Council have by their decisions *gradually* developed the law as to alienations by a managing member or by a father in a Hindu family. They have recognized that the growth of the law by judicial decisions in the several High Courts on this question and allied questions has not been uniform owing to the Judges presiding over the respective High Courts having taken different views. (See, for example, the judgment of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh*(1). The rights of contingent reversioners to bring suits as regards adoptions and alienations by Hindu widows have also been gradually developed. It has not been a matter of strictly following precedents but of 'broadening' the law from precedent to precedent and it may even be (where the process of such broadening has gone on too far) of reacting occasionally. (The Malabar Law as to the rights of maintenance of junior members living apart from the tarwad house is still in a fluid state and is broadening from precedent to precedent.)

Coming back to the question now under consideration, most of (what I may call) the ante-diluvian rules of the Hindu Law of exclusion from inheritance jar not only on the minds of the persons educated in English but, so far as I know, on every ordinary Hindu mind and hence a large proportion of those rules dealing with extravagance, non-performance of religious or caste duties, etc., became obsolete long ago. Under these

(1) (1880) I.L.R., 5 Cal., 148 (P.O.).

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circumstances, the finding of the Subordinate Judge (accepted by the District Judge) in this case that the rule of exclusion through blindness, though congenital, is obsolete cannot be said to be due to an unconscious bias in the mind of the Subordinate Judge in favour of social reform. I would therefore decide the first question in favour of the respondent.

On the fourth question as to the right of the plaintiff to bring this suit as a person having a legal character or right against a person interested to deny it (see section 42 of the Specific Relief Act), I entirely agree with the opinion to be delivered just now by my learned brother and have nothing to add. It becomes unnecessary to consider the questions (2) and (3).

In the result, the Second Appeal is dismissed with costs.

NAPIER, J.—My learned brother has set out the facts in this case and also the questions that arise for decision. I will deal with the fourth question first, namely, "is the plaintiff as a mere contingent reversioner not entitled to sue for declaration as to the limited nature of the first defendant's title." It is contended for the respondents that as the widow is admittedly entitled to a widow's estate and as there is no allegation of waste or improper alienation, the suit does not lie. This difficult question has been the subject of several decisions both in the Privy Council and in this Court and it must be admitted that it is not easy to reconcile them all. It seems to me that there are two questions involved which it is best to keep separate for the purpose of arriving at a decision in any particular case. The first is whether a person in the position of this plaintiff is a person entitled to assert his right, and the second is whether any cause of action has arisen. In this case, the first question is, has a reversioner such a position that he can assert his status in any suit other than those specifically provided for in illustrations (e) and (f) of section 42 of the Specific Relief Act, namely, where a widow alienates property or adopts a son. The second is, whether the existence of a will conferring absolute title on a person otherwise only entitled as a widow gives a cause of action. In *Venkatanarayana Pillai v. Subbammal*(1), it was held by the Privy Council that the

(1) (1915) I.L.R., 38 Mad., 406 (P.O.).

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reversionary right is during a widow's lifetime a mere *spes successionis*, and that where the Indian law permits the institution of a suit the right to sue is based on the danger to the inheritance common to all the reversioners which arises from the nature of the right. It would follow from this view of their Lordships that no such person can bring a suit except under the provisions of the statute. In *Janaki Ammal v. Narayanasami Aiyer*(1) the Board uses slightly different language, for the judgment contains the following passage:—"It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis* is recognized by Court of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life." There is another decision of the Board in the same year, *Sheoprasan Singh v. Rammandan Prasad Singh*(2), where their Lordships consider section 42 of the Specific Relief Act with reference to the position of the alleged reversioner. But when that case is examined, it is clear that the decision of their Lordships against the reversioner's right turned on the fact that the will which they sought to avoid had been affirmed in a Court exercising appropriate jurisdiction and the propriety of that decision could not be impeached in those proceedings. The Court therefore held that there was in fact no intestacy and so the plaintiffs were not reversioners, and so could not sue. The next decision of the Privy Council is reported in *Saudagar Singh v. Pardip Narayan Singh*(3). That was a suit by a reversioner against a Hindu widow for a declaration that a deed executed by her under which she purported to convey the absolute interest in the property to another reversioner who ranked equally with the plaintiff was invalid. In holding that the suit lay, their Lordships use the following language: "In these circumstances it appears to their Lordships that this is an exact illustration of that which section 42 of the Specific Relief Act was meant to provide for." It appears to me that the head note to this case is wrong. The head note is that under section 42, illustration (e), the plaintiffs were entitled to the declaration.

(1) (1916) I.L.R., 39 Mad., 634 (P.C.). (2) (1916) I.L.R., 43 Cal., 694 (P.C.).
(3) (1918) I.L.R., 45 Cal., 510 (P.C.).

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Their Lordships of the Privy Council do not say so. Illustration (e) deals with alienations made without legal necessity and has reference to the ordinary class of alienations for the widow's own benefit and not to what was in that case a surrender to one of the nearest reversioners. Their Lordships say that the objection that it involves a finding that the plaintiffs in this case are reversionary heirs, will not prevent such a suit lying because such a declaration must be given in a case falling within illustration (e). But they do not say that this particular case is within illustration (e). The result of these decisions of the Board seems to me to be that a reversioner, although he only represents the whole body of possible reversioners and although their interest is possibly only a *spes successionis*, has on their behalf a legal character within the meaning of section 42 of the Specific Relief Act and is, in a proper case, entitled to sue.

This seems to be the view taken by this Court in the majority of cases. It was expressly so decided by a Bench in *Puttanna alias Keshava Bhatta v. Ramakrishna Sastri*(1), where the learned Judges say that the illustrations do not limit the scope of the section. This was followed in *Rama Aiyangar v. Gurusami Chetti*(2), the learned Judges assuming that the brother of a testator had the necessary legal character. We have been referred to a recent decision—*Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu v. Sri Raja Rao Venkata Kumara Mahipathi Surya Rao Bahadur Garu*(3)—in which SESHAGIRI AYYAR, J., has used language which seems to throw doubt on this proposition. If the learned Judge really intended to hold that a reversioner has not that character it seems to me to be at variance with the decisions of the Privy Council and of this Court which are binding on me.

The next question is in what circumstances is he entitled to sue. The first decision I would refer to is that of the Privy Council in *Sheo Singh Rai v. Dakho*(4). There the question considered by their Lordships was as to the effect of a nuncupative will giving power to adopt and a subsequent adoption by the widow as against the claim of the widow's husband's brother. This aspect of the case had not been presented to

(1) (1907) I.L.R., 30 Mad., 195.
(3) (1919) 36 M.L.J., 169.

(2) (1918) 35 M.L.J., 129.
(4) (1878) I.L.R., 1 All., 688 (P.C.).

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the Lower Courts and their Lordships therefore declined to give a definite judgment on that point. But they use the following language: "It would not probably be disputed that, if a fictitious will in writing be set up, the heir upon a proper case being made, might claim to have the document cancelled." For "a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred." This observation is *obiter* certainly, but it covers the present case exactly, for a title to the property purports to have been conferred and to be vested in the defendant in this suit by virtue of the will. In *Jaipal Kunwar v. Indar Bahadur Singh*(1), another decision of the Privy Council has been relied on as inconsistent with that view. There a widow executed and registered a will purporting to dispose of the absolute estate of her deceased husband. The Privy Council doubted whether this was a proper case for a declaration but declined to interfere. It seems to me that this case does not help the respondents, for a will is revocable and until the death of the testator it does not pass any property. No interest has vested or been divested.

Then as to the decisions of this Court. In *Sreepada Venkata Ramanna v. Sreepada Rama Lakshamma*(2), it was held that the mere fabrication of an authority to adopt will not entitle a reversioner to claim a declaration that the authority is not genuine, the reason given by the Bench being that 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. I think that this is in entire accord with the principle enunciated in *Jaipal Kunwar v. Indar Bahadur Singh*(1). It was however held by another Bench of this Court in *Bobba Padmanabhudu v. Bobba Buchamma*(3) that such a suit does lie. SESHAGIRI AYYAR, J., rests his decision on that of the Privy Council in *Saudagar Singh v. Pardip Narayan Singh*(4), but, with great respect, the learned Judge does not notice that in the Privy Council case the widow had actually surrendered the property to one of the reversioners so that there was, as in *Sheo Singh*

(1) (1904) I.L.R., 28 All., 238 (P.C.). (2) (1912) I.L.R., 35 Mad., 592.
(3) (1918) 85 M.L.J., 144. (4) (1918) I.L.R., 45 Cal., 510 (P.C.).

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Rai v. Dakho(1), complete vesting of title. *Venkata Narayana Pillai v. Subbammal*(2) was a suit to set aside an adoption which of course falls within the specific provision of illustration (f) of section 42. The case relied on by the respondent, *Sheoprasan Singh v. Ramnandan Prasad Singh*(3), as one in which relief against an actual will was refused, has already been explained as founded on the validity of the will having been established by a competent Court.

On these cases, it seems to me that a distinction may be drawn between cases where title is alleged to have vested and where there is only a power given or a right claimed, the actual exercise of which would divest the reversioners. It certainly may be that the setting up by the widow of an authority to adopt is not sufficient to found a cause of action in a reversioner, and I am inclined to that view myself. But whether that is so or not, where the testator has devised the whole interest of his property to a widow, the will operates at death to vest the property in her, with the result that though she may not be exercising powers higher than that of a widow, she has an absolute title. It seems to me that it is not necessary for her to set up actively her title. The language of the section is, "Any person denying or interested to deny," and it cannot be disputed that the widow in such circumstances is interested to deny. I am therefore of opinion that in the present case the suit lies, and that the appellant's contention on this point must prevail.

Coming now to the main question in the case, my learned brother has formulated it as follows: "Has the rule of Hindu Law which prevents a person born blind from claiming interest along with his brothers as co-owner in ancestral properties become obsolete"? My learned brother assumes that there was at one time a definite and well-established rule to that effect. The case was elaborately argued before us by Mr. Ganapati Ayyar and Mr. Ramesam and our attention has been invited to the doctrine laid down by all the sacred writers from Manu to Brihaspati and by the commentators from Viswarupa to the author of the *Smriti Chandrika*. I agree with my learned brother that the proposition has been established. There

(1) (1878) I.L.R., 1 All., 688 (P.C.). (2) (1915) I.L.R., 38 Mad., 406 (P.C.).
(3) (1916) I.L.R., 43 Cal., 694 (P.C.).

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remains therefore only the question whether the rule has become obsolete. Mr. Ganapati Ayyar suggested that the rule is founded on three propositions. The first is religious, namely, that such blindness is punishment for unexpiated sin; the second is ceremonial, that such persons are not fit for religious ceremonies; the third is social, that they are incapable of transacting affairs. I have had the advantage of reading my learned brother's exhaustive judgment on the points and, as I agree with it entirely, I will add only a few words.

He has dealt with all the three aspects and has applied these tests to other supposed disqualifications. He has shown that the religious basis has not been uniformly applied to all disqualifications, and has further demonstrated that such religious disqualifications can no longer be held necessarily to affect rights of property. With regard to the second, he has pointed out that in fact the various supposed disqualifications have not prevented the performance of religious ceremonies. There only remains therefore the theory that such persons are incapable of transacting affairs. As a basis for deprivation of property this supposed disqualification fails by not being comprehensive, and secondly, is contradicted by experience. It is not comprehensive because admittedly the disqualification does not cover the case of a child who loses its sight after birth, and is not true in fact because persons suffering from this as well as the other disqualifications to be found in the sacred writings are admittedly perfectly capable of looking after their own affairs. From a social point of view the rule was doubtless of sound application in a primitive state of society, and was as much for the benefit of the person who suffered as for the other members of the family. In archaic conditions of life a blind man could not take his share in cultivation and in protection of the family. It was therefore not unnatural that he should be excluded from a share in the property. It was essential, however, that he should not be allowed to starve and therefore the rule which required that he should be maintained by the family was a necessary and proper provision. In modern days, however, owing to improved methods of education there is nothing to prevent a person born blind from being taught how to transact business and to take his proper share in the responsibility of family affairs, and there is

therefore no reason why such a disqualification should still continue.

Our attention has been invited to a number of cases where the various disqualifications have been considered by the Courts in India and we have been pressed with *dicta* to be found in those cases. It is a most noticeable fact however that in very few cases has an alleged disqualification been upheld and those chiefly where disqualification is real in fact, such as the case of a deaf-mute from birth. The Courts have always been astute to distinguish. Further than that, we have *dicta* of learned Hindu Judges in cases that have been before this Court in late years. I refer especially to *Venkata Subba Rao v. Purushottam*(1), *Vedanayaga Mudaliar v. Vedammal*(2) and *Kayarohan Pathan v. Subbaroya Thevan*(3). The view uniformly expressed by these Judges has been that some ancient disqualifications can be held to be now obsolete. I entirely agree with my learned brother that it is open to this Court to enunciate this view. In so doing Judges are only following the example of eminent Judges in England who have from time to time declared some old rules of the Common Law to be now obsolete, and as my learned brother has pointed out there are observations in judgments of the Privy Council tending in the same direction. In my opinion, now that the question has been raised and argued before us at great length with full citation of all the texts and decisions, the time has come for this Court to declare the rule obsolete.

In this view it becomes unnecessary to consider the questions of estoppel and artificial co-ownership, though much might be urged on both those points. I agree therefore with my learned brother that the second appeal must be dismissed with costs.

K.R.

(1) (1908) I.L.R., 26 Mad., 183.

(2) (1904) I.L.R., 27 Mad., 591.

(3) (1915) I.L.R., 38 Mad., 250.

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APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Napier.

1919,
April,
8 and 22.

SUNDARAM PILLAI (PLAINTIFF'S LEGAL REPRESENTATIVE),
APPELLANT,

v.

RAMASAMIA PILLAI AND SEVEN OTHERS (DEFENDANTS NOS. 1, 7, 2
TO 4 AND 8 TO 10), RESPONDENTS.*

*Hindu Law—Inheritance—Stridhanam—Maiden's property—Father's sapindas,
right of inheritance of—Father's sister—Father's paternal uncle's son—
Preferential heir—Texts of Baudhayana and Brihaspati—Mitakshara and
Smriti Chandrika.*

Under the Mitakshara law the heirs to the stridhanam property of a maiden, who died leaving neither uterine brothers, nor mother, nor father, are the sapindas of her father; and, as between her father's paternal uncle's son and her father's sister, the former is the preferential heir.

Text of Brihaspati held inapplicable; text of Baudhayana and commentaries of Mitakshara and Smriti Chandrika disallowed.

Kamala v. Bhagirathi, (1915) I.L.R., 38 Mad., 45, followed.

SECOND APPEAL against the decree of A. EDGINGTON, the District Judge of Tinnevely, in Appeal No. 67 of 1917, preferred against the decree of MUHAMMAD FAZL-UD-DIN, the Subordinate Judge of Tinnevely, in Original Suit No. 54 of 1915.

One Muthia Pillai bequeathed the suit properties to his daughter, Gomati Ammal, who died a maiden after the death of her father. At the time of her death, she had neither brothers, nor father nor mother alive. The properties were claimed by the plaintiff as the nearest sapinda of Muthia Pillai, being the latter's paternal uncle's son, and as such the heir of the deceased maiden. The third defendant claimed to be the heir in preference to the plaintiff as being the sister of Muthia Pillai. The Subordinate Judge, who tried the suit, held that the plaintiff was the preferential heir and decreed the suit in his favour. On appeal, the learned District Judge held that the third defendant was the preferential heir under the Hindu Law and dismissed the suit. The plaintiff preferred this second appeal.

T. R. Venkatarama Sastri and A. Subbarama Ayyar for the appellants.

* Second Appeal No. 1001 of 1918.

A. Swaminatha Ayyar for the respondents Nos. 1 and 2.

P. R. Ganapati Ayyar for K. Srinivasa Ayyangar, S. Sundaram Pillai and S. Aravamuda Ayyangar for respondents Nos. 3, 4, 6 and 7.

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JUDGMENT—The sole question for determination in this appeal is whether plaintiff or third defendant is the heir to the property of one Gomati Ammal, a maiden. Plaintiff is the father's brother's son of Gomati's father, whereas third defendant is the sister of Gomati's father. In *Kamala v. Bhagirathi*(1) it was held that, when a maiden's mother and father are dead, her heirs are her father's sapindas and this case followed *Janghbai v. Jetha Appaji*(2), *Tukaram v. Narayan Ramachandra*(3) and *Dwarganath Rai v. Sarat Chandra Singh Roy*(4). In *Mitakshara* (chap. II, sec. 11, pl. 20) there is a text of Baudhayana which says:

"The wealth of a deceased damsel let the uterine brethren themselves take. On failure of them it shall belong to the mother, or, if she be dead, to the father."

But the *Mitakshara* is silent as to the succession in default of mother or father.

In the above-mentioned cases the rule of succession to the property of a woman married in an unapproved form, contained in placitum 11 of the same section, was applied by analogy and it would appear that this decision of three High Courts would be final, but it is contended for respondents that a text of Brihaspati contained in the *Smriti Chandrika* (chap. IX, sec. III, pl. 36) and the *Sarasvati Vilasa* (pl. 327) provides for the succession after the mother and father. This text no doubt immediately follows the text of Baudhayana in the *Smriti Chandrika*, but there does not appear to be any connexion between the two, for Brihaspati's text relates to what are called secondary mothers, and deals with the succession to their property. In the *Sarasvati Vilasa* the text follows a placitum relating to the property of a betrothed damsel. It is difficult to believe that the succession to a maiden is analogous to the succession to secondary mothers, for a maiden cannot by any stretch of language be treated as a secondary mother, whereas there is no such difficulty in the case of the persons cited, i.e.,

(1) (1915) I.L.R., 38 Mad., 45.

(2) (1908) I.L.R., 32 Bom., 409.

(3) (1912) I.L.R., 36 Bom., 339 (F.B.).

(4) (1912) I.L.R., 39 Cal., 319.

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mother's sister, uncle's wife, father's sister, etc. There is also another difficulty in the way of applying the text in the way contended for by respondent's vakil, which is that the persons enumerated are the heirs to a maiden's estate, for in the Smriti Chandrika the persons enumerated are said to be equal to a mother. If that be so they would take the succession after the mother to the exclusion of the father. This is directly opposed to Baudhayana's text in the Mitakshara, which in this Presidency must always be preferred to the Smriti Chandrika, when they are not in agreement. Respondent's contention must therefore be negatived for two reasons, firstly because Brihaspati's text does not at all refer to the succession to a maiden's property, and secondly, because, if it does refer to it, it is opposed to the Mitakshara. I therefore follow *Kamala v. Bhagirathi*(1) and hold that the heirs to Gomati's property are her father's sapindas. So far I agree with the District Judge, but he has followed the Bombay High Court in holding that a sister is a nearer heir than the father's brother's son. In Madras, however the law is that the father's brother's son is to be preferred, the sister only coming in after the male sapindas. I am unable to accept the contention based on the single sentence of the judgment in *Kamala v. Bhagirathi*(1) that the father's sapindas in a case when the property of a female is concerned are different to the sapindas in the case of a male's property. In the absence of any rule to the contrary the sapindas must always be the same. The appeal is accordingly allowed, and the Subordinate Judge's decree restored with costs both here and in the lower Appellate Court.

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NAPIER, J.—The question raised in this Second Appeal is as to the succession to the stridhanam property of one Gomati Ammal. The deceased Gomati Ammal inherited the property under a will from her father, one Muthia Pillai, and it is conceded that the mother is also dead. The contesting parties are the son of the paternal uncle of the deceased's father and the father's sister of the deceased, the uterine brothers who admittedly would have a preference to anyone else having failed. The point has been expressly decided in two cases in Bombay—*Janglibai v. Jetha Appaji*(2) and *Tukaram v. Nurayan*

(1) (1915) I.L.R., 88, Mad., 45.

(2) (1908) I.L.R., 32 Bom., 409.

Ramachandra(1)—and the view taken by that Court was followed by two learned Hindu Judges of this Court in *Kamala Bhagirathi*(2). It is suggested before us that this question requires reconsideration in view of the fact that the Mitakshara does not definitely decide the point and that the Bombay High Court relied on the *Veeramitrodaya*, a work which is not followed in Madras. It is further contended before us that the question is disposed of by a text in the Smriti Chandrika. The language of the Mitakshara is based on the authority of Baudhayana text: Baudhayana says:

"The wealth of a deceased damsel first uterine brothers themselves take. On failure of them, it shall belong to the mother, or, if she be dead, to the father" (chap. II, sec. II, pl. 30).

As the text stops there, this Court applied the analogy of the succession to the property of a childless married woman which is provided for in placitum 11 of the same section. There the succession is stated as being

"To the mother and to the father; on failure of them their nearest of kin takes the succession."

The translation is that of Borrodaile. The High Court, however, preferred "to their sapindas" as being a more correct translation. The judgment then proceeds as follows:—

"We see no reason for not accepting the view of the Bombay High Court that the sapindas both of the father and the mother must be understood to mean the same persons, as the mother becomes a member of the father's family on her marriage."

It is to be noted that the learned Judges do not expressly follow the language of *Veeramitrodaya* which is definite on the subject as did the High Court of Bombay, but proceeded by way of analogy arriving at the same result. It is not, therefore, correct to say that the decision of this Court is based on a text which is not an authority in this Presidency.

It remains to consider the text relied on by Mr. Ganapati Ayyar in his contention that this ruling is incorrect. I feel naturally considerable diffidence in construing a text which is translated, not being myself acquainted with the original Sanskrit. But in spite of that I am satisfied that the text has nothing whatever to do with the subject. In Smriti Chandrika,

(1) (1912) I.L.R., 36 Bom., 339 (F.B.). (2) (1915) I.L.R., 38 Mad., 45.

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chapter IX, section 3, placitum 36, Brihaspathi enumerates secondary mothers and points out who takes their property.

"The sister of a mother, the wife of a maternal or of a paternal uncle, the sister of a father; the mother of a wife and the wife of an elder brother are declared equal to a mother. If they leave no male issue of their body nor a son of a daughter nor a daughter, a sister's son and the like shall inherit their property."

Taken by itself, this text has on its face no application, because we are not construing here the succession to secondary or quasi-mothers. The only mother with whom we are concerned is the real mother, and the question is who, on the death of such real mother and father, is to succeed. The next objection is that, if this text is to apply, it contradicts the language of placitum 30 itself, for that is specific, the words being

"It shall belong to the mother or if she be dead to the father" not to the heirs of the secondary mother. The text is interesting as laying down that these quasi-mothers are to be treated as real mothers, but admittedly no such broad proposition is accepted in Hindu Law as applied in this Presidency. The only reason which Mr. Ganapati Ayyar could urge for applying this text is that it follows the placitum in the Smriti Chandrika which is identical with placitum 30 in the Mitakshara. Both of these texts are to be found in the Smriti Chandrika in section 3—Succession to a woman's property.

We were informed at the bar that the numbers given in the English translations are not in the original which is borne out by the fact that placitum 36 in Mr. Krishnaswami Ayyar's translation is No. 21 in Ghose's translation. The chapter contains a series of texts on succession to the property of woman generally and explanations of the terms used by the sacred writers, and the whole chapter is in the nature of a dissertation on conflicting views of the authorities. The only passage which deals with inheritance to the wealth of a damsel appears to be the one placitum of Baudhayana above referred to. The placitum relied on seems to be a note by the learned commentator to the effect that, where in the preceding paragraphs inheritance to a mother is dealt with, a specific line of succession is to be applied to these secondary mothers, and has no connexion whatsoever with the quotation from Baudhayana in the preceding passage. I am confirmed in this view that the passage relied on has nothing

whatever to do with the subject by the fact that although Smriti Chandrika is a recognized authority of secondary weight in Madras the learned vakils who appeared before our learned brothers in *Kamala v. Bhagirathi*(1) did not think that the passage was worth putting before their Lordships for consideration. In this respect I agree with the judgment of my learned brother.

K.R.

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APPELLATE CIVIL

*Before Mr. Justice Oldfield, Mr. Justice Seshagiri Ayyar and
Mr. Justice Kumaraswami Sastri.*

VEERARAGHAVA REDDI (FOURTH RESPONDENT IN C.M.P.
No. 2734 OF 1915 AND IN APPEAL No. 201 OF 1910), APPELLANT.

1919,
April, 7 and
28.

v.

SUBBA REDDI AND SEVEN OTHERS (PETITIONERS IN C.M.P.
No. 2734 OF 1915 AND APPELLANTS NOS. 1 TO 3 AND THEIR LEGAL
REPRESENTATIVES IN APPEAL No. 201 OF 1910), RESPONDENTS.*

*Lis pendens—Alienee made a party to the litigation—Compromise between
original parties behind the back of the alienor, whether binding on the alienee.*

An alienee *pendente lite* who has been added as a party to the litigation is entitled to object to a decree being passed in terms of a compromise arrived at between his alienor and the opposite party.

APPEAL under clause 15 of the Letters Patent against the decision of WALLIS, C.J., in *Veeraraghava Reddi v. Subba Reddi*.(2)

This was a suit to enforce a mortgage executed in favour of the plaintiff by the first defendant in 1895. Other defendants were added as persons interested in the mortgaged property. The plaintiff having failed in the First Court preferred an appeal to the High Court in 1910. During the pendency of the appeal

(1) (1915) I.L.R., 38 Mad., 45.

* Letters Patent Appeal No. 98 of 1917.

(2) Civil Miscellaneous Petition No. 2734 of 1915 filed in Appeal No. 201 of 1910 preferred to the High Court against the decree of the District Court of Nellore in Original Suit No. 6 of 1907.

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the first defendant executed in favour of the fourth respondent in the appeal two mortgages in June and November 1914, respectively. The fourth respondent applied to be made a party to the appeal and he was so added on 11th February 1915. The plaintiff and the first defendant carried on negotiations for a compromise even before the creation of the mortgages in favour of the fourth respondent; but the terms thereof were only definitely settled and embodied in a document on 22nd December 1914 by which the first defendant agreed to give the plaintiff the full relief asked for. On 16th September 1915 the plaintiff presented an application to the Court that the compromise should be accepted and a decree passed in terms of it. This was resisted by the fourth respondent on various grounds, one of which was that the mortgage sued on was sham and without consideration. Their Lordships (WALLIS, C.J., and K. SRINIVASA AYYANGAR, J.) made the following Order on 6th October 1915:—

“ Before delivering judgment, we have decided to call for findings on the following issues:—

(1) Whether the deed of compromise was executed by the first defendant?

(2) Whether the terms of the compromise were agreed to between the plaintiff and the first defendant prior to the alienation in favour of the fourth respondent.

(3) Whether the compromise, if any, between the plaintiff and first defendant was the result of fraud or collusion, intended to defeat the rights of the fourth respondent.

In the determination of this issue (sic), the lower Court should also consider the question whether the mortgages in favour of the fourth respondent were nominal or sham transactions.”

On the first issue sent, the District Judge returned a finding that the compromise was executed by the first defendant. On the second issue he found that negotiations for compromise were going on for a long time before the date of the mortgages in favour of the fourth respondent, but that the terms thereof were definitely settled and embodied in a document only after the dates of the mortgages, viz., on 22nd December 1914. On the third issue he found that the compromise was not entered into with any view to defeat the rights of the fourth respondent and on the fourth issue he found that the mortgages in favour of the fourth respondent were real and supported by

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consideration. Their Lordships (WALLIS, C.J., and K. SRINIVASA AYYANGAR, J.) accepted these findings. WALLIS, C.J., held that the compromise was binding on the fourth respondent also, and that a decree should be passed in terms thereof, while K. SRINIVASA AYYANGAR, J., held that the compromise was binding only on the first defendant and not on the fourth respondent. In the result a decree was passed according to the decision of WALLIS, C.J., whose decision prevailed under clause 86 of the Letters Patent. The fourth respondent thereupon preferred this appeal under clause 15 of the Letters Patent.

A. Krishnaswami Ayyar for the appellant.—The compromise is not binding on the fourth respondent, as he was no party to it. No compromise will be binding on a party to a suit or appeal unless he was a party to it, and the Court which is under Order XXIII, Civil Procedure Code, entitled to accept only a lawful compromise can pass only a decree which will be binding on the parties to the compromise. My client who was no party to the compromise is at liberty to prove that the mortgage sued on was sham and was void for want of consideration. A decree based on a compromise is no better than a contract. The alienee having been made a party he has all the rights of his alienor in the proper conduct and termination of the litigation, and he is entitled to see that no decree is passed prejudicial to him in any way. It has been held in this Court in *Sitaramaswami v. Lakshminarasimha*(1) that an alienee is entitled to prefer an appeal against a decree passed against his alienor. Under similar circumstances it has been held that a compromise was not binding on the alienee—*Tarakant Bannarjee v. Pudmoney Dossee*(2), *Rai Cheeran v. Biswa Nath*(3), *Harudhur Chuckerbuthy v. Protap Narain Choudhury*(4). The words “subject to any decree or order which may be passed” which occur in section 52 of the Transfer of Property Act mean only a decision of the Court and not a compromise. The section does not enact any new rule not contained in *Bellamy v. Sabine*(5) and it does not enable the alienor to defeat the rights of his alienee by entering into a compromise to his prejudice. Reference was made to *Annamalai Chettiar v. Malayandi Appaya*

(1) (1918) I.L.R., 41 Mad., 510.

(2) (1866) 10 M.I.A., 476.

(3) (1914) 20 C.L.J., 107.

(4) (1870) 14 W.R., 401, 402.

(5) (1857) 1 D. G. & J., 566.

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A. Viswanada Ayyar, amicus curiæ, for the respondents.—The compromise is binding on the fourth respondent, and he cannot object to its being made a decree of Court. All parties to a suit are entitled to compromise and obtain decrees based on the compromise. An alienee from one of the parties stands or falls with his alienor; he has no independent right whether he has been made a party or not. He was wrongly added as a party. All that he can plead is that there has been fraud or collusion between the parties entering into the compromise so as to defeat his rights—*Annamalai Chettiar v. Malayandi Appaya Naik*(1). Here it has been found that there was no fraud and that the compromise was entered into long before the mortgages in his favour and the compromise was mentioned to the Court when my clients opposed the fourth respondent's application to be made a party. The only thing that was not done then was that the compromise was not made a decree. Even according to the opinion of the learned Judges who differed it did not matter whether the compromise was before or after the alienation. The case of *Tarakant Bannarjee v. Pudumony Dossee*(6) is distinguishable as there was a separate suit therein to contest the compromise. It is not law after the enactment of section 52, Transfer of Property Act, according to which the alienee is bound by any decree or order that might be passed in the suit—see *Annamalai Chettiar v. Malayandi Appaya Naik*(1). Section 52 does not say that the decree or order cannot be the result of a compromise. If the compromise can be made a decree of Court so far as the first defendant is concerned, a similar decree will have to be made even as regards the fourth respondent so as to avoid inconsistency.

OLDFIELD, J. JUDGMENT.—The material facts, as they came before this Court at the hearing and as we accept them, are that plaintiff sued first defendant and others on a mortgage, and having failed in the Court of first instance appealed in 1910. Pending

(1) (1906) I.L.R., 29 Mad., 426.

(8) (1805) 11 Ves. 194; 82 E.R., 1062.

(5) (1801) I.L.R., 28 All., 331.

(2) (1907) I.L.R., 29, All., 389 (P.O.).

(4) (1884) I.L.R., 8 Bom., 328.

(6) (1866) 10 M.I.A., 476.

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disposal of the appeal, two mortgages on the property in suit were given by first defendant to fourth respondent, the present appellant in June and November 1914. Meanwhile, negotiations for a compromise had gone on between first defendant and plaintiff; but it is sufficient, without reference to the exact stage they had reached when the mortgages were given, to say that they resulted in a compromise on 22nd December 1914, which was reported to the Court on 16th September 1915, and which awarded to plaintiff as against first defendant the full relief asked for. Fourth respondent had, however, in consequence of his acquisition of an interest in the suit properties been made a party to the appeal on 11th February 1915. The question we have to decide is whether he is concluded by first defendant's action or is entitled to contest the appeal on its merits.

There are no English or Indian decisions, which can be applied to these facts directly, for in *Annamalai Chetty v. Malayandi Appaya Naik*(1), although a Full Bench of this Court held that the doctrine of *lis pendens* was not the less applicable, because the litigation ended, as it must do here between plaintiff and first defendant in a compromise, the present case differs, because in it the alienee has been made a party, whilst litigation is still pending; and *Manpal v. Sahib Ram*(2) was decided in favour of the alienee *pendente lite* on the ground that he was impleaded at the plaintiff's instance and an issue was raised between them at the trial, whereas here the joinder of fourth respondent was opposed by plaintiff and there have been no proceedings since it.

The case it resembles most closely in point is *Tarakant Bannarjee v. Pudumony Dossee*(3) in which it was held that a person, who acquired title pending the litigation and whose application to be impleaded was refused on the objection of a party, was not concluded by the decision reached before he could appeal against that refusal or institute a suit as supplemental to the one in which he sought to intervene. The learned Chief Justice has distinguished the principle then applied by the Judicial Committee on the grounds that the alienee claimed not, as fourth respondent here has done, to be added as a party but to be substituted for his alienors, and that section 52 of the Transfer

(1) (1906) I.L.R., 29 Mad., 426.

(2) (1905) I.L.R., 27 All., 544 (F.B.).

(3) (1866) 10 M.I.A., 476.

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of Property Act had not then been enacted. But with all respect, although fourth respondent no doubt in terms applied to be added as a party, his application was in substance to be substituted as one for first defendant in respect of the portion of the latter's interest, which had devolved upon him; and as regards section 52 the decision of the Judicial Committee is in point, not with direct reference to the general doctrine of *lis pendens* enunciated in it but as indicating the effect on the application of that doctrine, which an order such as fourth respondent has obtained in the present case and such as would have been passed in England even before the English Order XVII, rule 8, was enacted would have had. It is on the meaning and legal consequences of such an order that our decision must depend.

The order in fourth respondent's favour was passed by TYABJI, J., in the exercise of his discretion in the usual course under Order XXII, rule 10. It was not appealed against, or so far as appears, attacked before the Division Bench; and, although some objection to it has been mooted in argument before us, we have no reason in the absence of any ground of appeal relating to it for refusing to give it effect. As regards the effect, which it should receive, plaintiff's position is not clear. For his argument is, as I understand it, that fourth respondent, having been impleaded, is nevertheless not to be heard on the merits of the appeal. If so the order he has obtained will be deprived of meaning. For an order under Order XXII, rule 10, is statedly one permitting the continuance of the proceeding against the person in question, subject presumably to his enjoyment of the rights of procedure, ordinarily available to a person in his position. The doctrine of *lis pendens* is, as explained in *Bellamy v. Sabine*(1), founded not on any implied notice to the world of the pending litigation or other substantive consideration, but on the practical ground that in the absence of such a doctrine there would be no certainty that the litigation would ever come to an end; and there is therefore no objection to reading Order XXII, rule 10, as enabling the Court in the exercise of its discretion to exclude from the operation of the doctrine cases in which that mischief need not be apprehended. In *Chunni Lal v. Abdul Ali Khan* (2) BANNERJEE, J., no doubt said with reference to

(1) (1857) 1 DeG. & J., 588.

(2) (1901) I.L.R., 28 All., 381.

the position of a respondent impleaded under the provision formerly corresponding with Order XXII, rule 10, that

"as he took the assignment *pendentelite* the doctrine of *lis pendens* applied to his case."

But his meaning appears from the immediately succeeding sentence

"Section 372 was consequently applicable and appellant was not competent to raise any plea which his assignors could not have put forward"

to have been that he would be restricted to such pleas, not that he could not plead at all or that his right to plead was still to be determined. In *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*(1) the facts were similar to those before us except that a suit, not an appeal, was in question, and that in applying to be made a party the alienee relied not like the fourth respondent here, on his alienor's intention to compromise, but on facts indicating his intention to collude with the plaintiff; and the alienee was, after an exhaustive review of the English and Indian law, made a party, statedly in order that he might put forward the defences open to his alienor. No case consistent with plaintiff's contentions has been shown us; and in these circumstances I concur with SRINIVASA AYYANGAR, J., and direct that the appeal be posted for further hearing on the merits.

SESHAGIRI AYYAR, J.—Both the learned Judges who heard the appeal have agreed upon the facts and although it is open to us to go behind their judgments, I am satisfied that the findings come to by them are amply borne out by the evidence given in the case. Therefore the facts on which the question of law has to be decided may be stated as follows:—The first defendant executed to the fourth respondent two mortgages in June and November 1914. The plaintiff's mortgage was long anterior to the fourth respondent's mortgage. It was on the 28th of February 1895. The suit was brought upon this mortgage in February 1907. The judgment of the lower Court was given in March 1910. An appeal was preferred to this Court in August of the same year. During the pendency of the appeal the mortgages to the fourth respondent were executed. Thereupon he applied to the High Court to be made a party-respondent to the appeal—and

(1) (1884) I.L.R., 8 Bom., 323.

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this application was granted in February 1915. The plaintiff presented an application on the 16th of September 1915 that a compromise entered into between him and the first defendant in December 1914 should be accepted and that a decree should be passed in terms of it. This was resisted by the fourth respondent on various grounds. Issues were sent down by the learned Judges for finding whether the alleged deed of compromise was in fact executed, whether the terms were settled prior to the alienation in favour of the fourth respondent, and whether the compromise was the result of fraud or collusion intended to defeat the rights of the fourth respondent. The District Judge found that the razinama was executed on 22nd December 1914, that although there were negotiations for the compromise for some time the final terms were settled only on that date, and that there was no fraud or collusion between the first defendant and the fourth respondent. These findings were accepted by the learned Chief Justice and SRINIVASA AYYANGAR, J. But they differed on the question whether the fourth respondent was bound by the terms of the compromise.

In the arguments before us on behalf of the respondent there was unconsciously a confusion of ideas. The main contention was that, if the fourth respondent were not a party to the appeal he would have been bound by the result of the litigation; it followed that he must be deemed to have accepted the mortgages subject to the possibility of the first defendant and the plaintiff entering into a compromise, and that therefore although he may have been a party to the litigation he was bound by the terms of the compromise in the same way as if he had not been made a party at all. As I said before there are two ideas involved in this contention which should be kept distinct. In the first place there is the protection of law or the disability arising therefrom owing to the fact that a property which is the subject of litigation has been privately dealt with. That protection or disability is provided for by section 52 of the Transfer of Property Act. There is a distinct right which is independent of the theory of *lis pendens* which a party to a suit has. That right is that, where a party is before the Court and is interested in the subject-matter of the litigation, his rights should not be affected by any adjustment or compromise to which he is not a party. If these two distinct principles are

borne in mind the solution of the problem may not be difficult. I will first deal with section 52 of the Transfer of Property Act. I do not wish to embark upon any lengthy historical review of the principle of *lis pendens*. But I may be permitted to point out that the rule owes its origin to the maxim of Roman Law "*Rem de qua controversia prohibetur in acrum dedicare*," which I understand to mean that where the subject in dispute owing to contest passes into the custody of the judiciary, parties to it are under an obligation not to withdraw it from the protection of the Judge. From this initial principle, the law of *lis pendens* has been developed in the jurisprudence of the various countries.

In England by 28 Edw. I, Ch. II, a purchase *pendente lite* was declared champertous and was held void. Subsequently it was held mostly by the intervention of the Equity Courts that the transaction, however repugnant to law, was not void altogether, but was enforceable subject to the result of the litigation pending in the Court. The historical judgment in *Bellamy v. Sabine*(1) is now the basis of the principle of *lis pendens* in England. Lord CRANWORTH, the Lord Chancellor, said in that case:

"It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party . . . The necessities of mankind require that the decision of the Court shall be binding not only on the litigating parties but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of pending proceedings."

In order to avoid the possibility of fraud it was held that to attract the principle of *lis pendens* there must be active controversy in the litigation that is pending. This principle has been recognized in section 52 of the Transfer of Property Act. The meaning of the expression "contentious proceeding" has given rise to conflict of views. It was ultimately held in *Annamalai Chettiyar v. Malayandi Appaya Naik*(2) that, if the suit was contentious in its inception, this character of contentiousness was not taken away by the fact that the parties subsequently

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(1) (1857) 1 DeG. & J., 566.

(2) (1906) I.L.R., 29 Mad., 426.

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entered into a compromise. This must be treated as an exception to the general rule. The result of the legislation and of the authorities is that, if the purchaser is not a party to the suit, he will be bound by a litigation which was in its inception contentious whatever may be the process by which the ultimate conclusion is reached, whether by obtaining after active contest a decision by the Judge or by a compromise outside Court and its recognition by the Judge. That is all that is implied in or expressed by section 52 of the Transfer of Property Act and by *Annamalai Chettiar v. Malayandi Appaya Nair*(1).

Now comes the question how far this principle is to be modified where the purchaser is a party to the litigation. In Bennett on *Lis Pendens* all the authorities relating to the impleading of the purchaser as a party have been fully considered. He has come to the conclusion that a purchaser is not a necessary party. He goes further and says that Courts should not allow the purchaser to be made a party to the pending suit. This pronouncement appears to me to go too far. There are some cases in which it was held the suit will be defective for want of proper parties if after notice of a purchase *pendente lite* the plaintiff does not make the purchaser a party. However that may be, in this country the matter is set at rest by Order XXII, rule 10, of the Code of Civil Procedure. Under that rule

"in cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

It was held in *Muhammad Masihullah Khan v. Jurao Bai*(2) that a mortgage *pendente lite* is within this rule. It has also been held in this Court—vide *Sitaramaswami v. Lakshminarasimha*(3)—that the purchaser *pendente lite* has the right of preferring an appeal against a decision adverse to his assignor. No doubt Courts should exercise great caution in permitting a purchaser of this kind to become a party. Unless it is satisfied that the transferor is likely to act in violation of the rights of the transferee the records of the Court should not be burdened by the pleadings of the purchaser and the proceedings should not be lengthened by enabling such a purchaser to

intermeddle with the suit already pending. But when once the order has been made permitting the purchaser to come in, it seems to me that the subject-matter of the dispute in which he is interested should not be decided upon to his prejudice without hearing him. That is a right which as suitor he possesses by virtue of his being a party to the litigation. Order XXIII, rule 8, provides for the compromise of a suit. It presupposes that all the parties interested have entered into the compromise. If any one of them stands out it is a well recognized principle of jurisprudence that the compromise between the other parties should not in the least derogate from his rights. It follows from these provisions of the Code of Civil Procedure that although a purchaser *pendente lite* takes the transfer subject to the result of the litigation, and if he is not impleaded as a party he will be bound by any lawful compromise or adjustment which may be entered into between the plaintiff and his transferor, the moment that he becomes a defendant, the only detraction of right to which he subjects himself is the result of the litigation which has been openly and in his presence tried and decided upon. Once he is in the array of parties what could have been done by way of compromise or adjustment if he is not before the Court should not be allowed to interfere with his claim for a fair trial and a decision on the merits.

It was not seriously disputed that, if there was a private adjustment outside the Court which is not reported to it, that would not bind the purchaser *pendente lite*. Therefore what gives force to the adjustment is the sanction of the Court, and the question therefore resolves itself into this. Can a Court sanction a compromise so as to affect the rights of one of the parties before it although it may be a lawful agreement between the other parties? My answer is in the negative. It was said that the finding that there was no fraud or collusion is conclusive against the rights of the fourth respondent. I am unable to follow this reasoning. If there was fraud or collusion even though the purchaser is not a party he can impeach the compromise in a fresh suit, and how is his position bettered by intervening at an earlier stage to protect his rights. Further the prejudice to the purchaser would not necessarily be consequent upon fraud or collusion. The transferor and the plaintiff may honestly believe that a certain amount is due. They may

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(1) (1906) I.L.R., 29 Mad., 426.

(2) (1915) I.L.R., 37 All., 236.

(3) (1918) I.L.R., 41 Mad., 510.

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not embark upon a complicated inquiry into the question of limitation. They may not desire to go behind what is apparent on the face of the record and may agree honestly to fix the amount that is payable by one party to the other. But the purchaser *pendente lite* has a larger right. He can litigate the question whether the amount claimed in the suit was really due, whether it was barred by limitation and whether it is a binding debt. Therefore the mere fact that there has been no fraud or collusion does not settle the rights of the purchaser *pendente lite*. There are observations in *Rai Charan v. Biswa Nath*(1) to the effect that the purchaser would be affected only if he does not choose to make himself a party. *Haradjun Chuckerbutty v. Protap Narain Chowdhry*(2) is to the same effect. In *Tarakant Bannerjee v. Pudmony Dossee*(3) there are dicta at page 487 which very strongly support the view that the rights of a person who can and does intervene should not be affected by any adjustment or agreement between the other parties. I am therefore of opinion that the compromise, although it may be binding upon the first defendant, cannot affect the rights of the fourth respondent to claim a judicial decision on the question.

It was said that this would lead to inconsistent decrees being passed in respect of the same subject matter. I feel no difficulty on this point. Any decree to which the first defendant subjects himself will *prima facie* be personal and would affect property only in so far as the fourth respondent's interests are not prejudiced. I agree in the order proposed by my learned brother regarding rehearing.

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KUMARASWAMI SASTRI, J.—This appeal arises out of a difference of opinion between the Chief Justice and Mr. Justice SRINIVASA AYYANGAR as to the right of an alienee *pendente lite* who has been brought on record as a party under the provisions of Order XXII, rules 10 and 11, of the Civil Procedure Code to object to the recording of a compromise entered into between the original parties to the suit after the alienation in his favour and to the passing of a decree in terms thereof. The facts are fully set out in the judgment of SRINIVASA AYYANGAR, J., and the appeal has

(1) (1914) 20 C.L.J., 107.

(2) (1870) 14 W.R., 401.

(3) (1933) 110 M.L.A., 476.

been argued on the basis of the findings arrived at by the District Judge and accepted by the learned Judges who first heard the appeal.

A Full Bench of this Court in *Annamalai Chettiar v. Malayandi Appaya Naik*(1) has held that an alienee *pendente lite* who is not brought on record will be bound by a decree passed on a *bona fide* compromise arrived at between the parties but there is, so far as I am aware, no decision where the right of an alienee *pendente lite* who is a party to the suit to object to the compromise has been decided.

Section 52 of the Transfer of Property Act which codifies the law as to *lis pendens* enacts that immoveable property, the right to which is directly and specifically in question in a suit or proceeding, cannot during its active prosecution be transferred or otherwise dealt with by a party so as to affect the rights of any other party thereto under any decree or order which may be made therein except with the leave of the Court.

To bring into operation section 52 there should be a decree. A compromise arrived at between the parties to a suit is like any other contract or agreement only binding and enforceable as between the parties thereto or their privies. Ordinarily a person who has parted with his interest in property cannot by any contract or by any dealing with the interest he has parted with affect the rights of the alienee. If the compromise is not embodied in a decree it cannot be said that an alienee *pendente lite* is bound by it. Is he entitled if on record to object to the Court passing a decree which would confer validity on a transaction not otherwise binding on him? I think the answer to the question must be sought not with reference to the doctrine of *lis pendens* which assumes a decree to attract to itself the provisions of section 52 but to the provisions of the Civil Procedure Code as regards the right of parties to a suit.

There can be little doubt that a transferee *pendente lite* is entitled to come on record and to conduct all proceedings from the date he is added as a party though he would be bound by all orders passed up to that date and could not raise a defence not open to his transferor. Order XXII, rules 10 and 11, are based on the principle that a person having an interest in the suit

(1) (1906) L.L.R., 29 Mad., 426 (F.B.).

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should be a party so that he may have an opportunity of proving his case and supporting his title and also to prevent any chances of fraud or collusion between his transferor who often after the alienation in his favour retains little or no interest in the subject-matter of the litigation. As observed by their Lordships of the Privy Council in *Tarakant Banerjee v. Puddomoney Dossee*(1)

"The law allows a party interested to intervene in the suit; that right should not be rigorously dealt with."

The danger of secret collusion referred to by their Lordships is as real to-day as it was when the case was decided in 1866. *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*(2) is also authority in point. It is no answer to the request of the alienee to be added to say that the alienation was pending suit as Order XXII, rule 10, expressly refers to acquisition of interest *pendente lite*. Except under special circumstances I do not think the Court ought to refuse to join an alienee as a party under Order XXII, rule 10.

When an alienee has been so added he gets all the rights of a party to a suit. I can see nothing in the Code which reduces him to a mere figurehead bound by all the acts of the original parties because his alienation was pending the suit. If for example his transferee remains *ex parte* can it be said that he cannot let in evidence or prosecute or defend the suit because it has been held that an alienee *pendente lite* is bound by an *ex-parte* decree passed in the suit. Order XXIII, rule 3, contemplates a compromise or adjustment between all the parties to the suit and it is difficult to see how the Court can pass a decree on a compromise to which a party to the suit was not a party without such person's consent unless it can be held that a compromise as a compromise between the original parties is binding on an alienee pending suit. To do so would be to extend the doctrine of *lis pendens* to agreements between the original parties to a suit which may at some future date enable them to get a decree in terms thereof. I can find no authority for doing so.

There may be cases where the other party has had no notice of the alienation *pendente lite* and has *bona fide* compromised the suit and put himself in a disadvantageous position owing to the

(1) (1866) 10 M.I.A., 476.

(2) (1884) I.L.R., 8 Bom., 323.

alienee not having taken steps either to give him notice of his alienation or to bring himself on record with due diligence. In such cases the alienee may be estopped or prevented from objecting to a decree being passed. These cases are outside any of the provisions of the Civil Procedure Code as Order XXIII, rule 2, does not prevent a Court from passing a decree in terms of a compromise to which one of the parties to the suit is not a party if such compromise will be otherwise binding or if the party objecting has estopped himself from disputing its binding nature on him. No such pleas have been raised by the respondent. There is therefore no apparent hardship in his being required to prove his case.

I agree with the conclusion arrived at by my learned brothers OLDFIELD and SESHAGIRI AYYAR, JJ., and concur in the order passed by them.

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Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

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v.

THE DEPUTY COLLECTOR OF MADURA AND
ANOTHER, RESPONDENTS (PETITIONERS).*

Limitation Act (IX of 1908), art. 156, applicability of, to appeals under *Land Acquisition Act* (I of 1894).

Article 156 of the *Limitation Act* (IX of 1908) applies to appeals filed under section 54 of the *Land Acquisition Act* (I of 1894).

Aga Muhammad Hamadhani v. Cohen, (1886) I.L.R., 13 Cal., 221, referred to.

APPEAL from the decree of F. A. COLERIDGE, District Judge of Madura, in Original Petition No. 211 of 1911, dated 31st day of December 1915.

This is an appeal from an award of the District Court of Madura in a proceeding to acquire certain land of the appellant, initiated by the Deputy Collector of Madura, for the purpose of

* Appeal No. 160 of 1918.

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extending the town of Madura. Dissatisfied with the amount allowed to him by the award the appellant preferred this appeal. The appeal was filed ten days out of time with a court-fee of two rupees, and about a year and a half after it was returned to the appellant by the Registrar it was re-presented with the proper court-fee. The question raised by the respondent in this appeal was whether the appeal was in time.

The Hon. the Advocate-General, for the respondent, took a preliminary objection that the appeal was out of time not having been filed within the ninety days allowed by article 156 of the Limitation Act. That has been the practice.

A. Krishnaswami Ayyar and K. S. Jayaram Ayyar (with M. S. Muhi-ud-din) for the appellant.—Article 156 applies only to appeals filed “under the Civil Procedure Code,” i.e., to appeals the right to file which is given by that Code. The right to file this appeal is given by section 54 of the Land Acquisition Act, though the other rules relating to procedure governing appeals, as enacted in Order XLI, Civil Procedure Code, are applicable to such appeals also. To apply the limitation prescribed by article 156 for appeals under special Acts two things are necessary: (1) either there must be express provision in the special Act applying that article (e.g.) as in section 6 of the Calcutta Improvements Act (XIX of 1911) and section 3 of the City of Bombay Improvements Act, or (2) the language of the special Acts giving the right of appeal must be wide enough to include the provision as to limitation (e.g.) as in section 55 of the Divorce Act, sections 191 and 192 of the Madras Estates Land Act and section 8 of the Presidency Towns Insolvency Act (III of 1909). See also page 261 of Donogh’s Land Acquisition Act. There is no such wide language in section 54. Moreover article 156 speaks of appeals from a decree or order. An award under the Land Acquisition Act has been held to be not a decree or order—*The Special Officer, Salsette Building Sites v. Dasabhai Bezanji*(1); *Manavikraman Tirumalpad v. The Collector of the Nilgiris*(2); *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(3); *Mulambath Kunhammad v. Parakat*

(1) (1913) 17 C.W.N., 421 (P.O.). (2) (1918) I.L.R., 41 Mad., 943.
(3) (1918) I.L.R., 40 Cal., 21 (P.O.).

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Kathirikutti(1). Section 3 of the Limitation Act speaks of limitation ‘prescribed’ by the first schedule. There is no period ‘prescribed’ for this case. The case of *Dropadi v. Hira Lal*(2) is opposed to the Full Bench ruling of our High Court in *Lingayya v. Chinna Narayana*(3). If no period is ‘prescribed,’ then article 181, which prescribes three years, applies. The first and the third columns of the article must be read together—*Batul Begam v. Mansur Ali Khan*(4), *Ranjit Singh Bahadur v. Maharaj Bahadur Singh*(5).

The Hon. the Advocate-General for the respondent.—The words “appeal under the Civil Procedure Code” do not indicate that the right of appeal must be one given by that Code; they mean only appeals governed by the provisions of that Code so far as procedure is concerned; see *Aga Mahomed Hamadani v. Cohen*(6). The Civil Procedure Code uses only the terms “decrees or orders”. When we have to apply these words to other Acts, we must understand them to mean what corresponds therein to “decrees or orders”. An award is a “decree or order” for this purpose; see *Manavikraman Tirumalpad v. The Collector of Nilgiris*(7). The words “subject to the provisions of the Civil Procedure Code” in section 54 mean that the procedure prescribed by that Code as to filing an appeal, etc., should be followed. Section 54 gives only the bare right of appeal, which if it fructifies into a memorandum can be preferred only under and in accordance with the rules of Order XLI. As a matter of practice appeals under section 263 of the Indian Succession Act and under 86 of the Probate and Administration Act have been treated as governed by the Civil Procedure Code and the Limitation Act. Section 29(b) of the Limitation Act also supports this view; and section 3 of the Limitation Act speaks of any appeal ‘preferred’. As regards the two special Acts quoted, the particular tribunals therein concerned were not ‘Courts’ and as pointed out by JENKINS, C.J., in *Hari v. Secretary of State for India*(8), the special explanation in those Acts had to be enacted to meet the necessity.

(1) (1916) 31, M.L.J., 827, 832. (2) (1912) I.L.R., 34 All., 408 (F.B.).
(3) (1902) I.L.R., 24 All., 17 (P.C.). (4) (1918) I.L.R., 41 Mad., 169 (F.B.).
(5) (1919) I.L.R., 46 Cal., 178 (P.C.). (6) (1886) I.L.R., 13 Cal., 231.
(7) (1918) I.L.R., 41 Mad., 943, at p. 943.
(8) (1903) I.L.R., 27 Bom., 424.

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The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.—This is an appeal from an award of the District Judge of Madura in certain land acquisition proceedings and the preliminary question is whether article 156 of the Limitation Act applies. The court-fees were paid on the memorandum of appeal 1 year and 149 days out of time, and if article 156 applies the appeal would be barred. The question is of first impression and cannot be said to be quite free from difficulty. The Land Acquisition Act gives a right of appeal by section 54, which lays down:

"Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act."

There is no special period of limitation provided for in the Land Acquisition Act, nor is there any allusion, unless it be by implication of this very section, to the Limitation Act. Article 156 of the Limitation Act provides a period of 90 days for "appeal under the Code of Civil Procedure, 1908, to a High Court, except in the cases provided for by article 151 and article 153," the time to run from "the date of decree or order appealed from." The argument on behalf of the appellant is that you must read the first column of the article as meaning that the appeals provided for here are those the right to which is conferred by the Code of Civil Procedure, and it is contended that this interpretation is strengthened by the language of column 3. There is no direct authority on the point. There is however a ruling of the Calcutta High Court, *Aga Muhammad Hamadani v. Cohen*(1), the reasoning of the decision in which seems to apply to the present question. There the objection was raised with reference to an appeal provided for under the Burma Courts Act, XVII of 1875. Section 49 of that Act provided for an appeal to the High Court of Calcutta in cases where the amount of value of the subject-matter exceeded Rs. 3,000 and was less than Rs. 10,000. WILSON and PORTER, JJ., interpreted the words "Appeals under the Code of Civil Procedure" in article 156 of the Limitation Act as meaning appeals, the procedure in

(1) (1896) I.L.R., 18 Cal., 221.

respect of which is governed by the Civil Procedure Code. They say:

"The Limitation Act, schedule II, article 156, when it speaks of the Civil Procedure Code, is, on the face of it, speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned."

It seems to us that this is the correct interpretation of article 156. There seems to be no good reason for saying that an appeal under the Civil Procedure Code means only an appeal the right to prefer which is conferred by the Code itself. On the other hand it would not be straining the language of the article too much to hold that an appeal, the procedure with respect to which, from its inception to its disposal, is governed by the Civil Procedure Code, may rightly be spoken of as an appeal under the Code; this interpretation seems to us to be strengthened by the reference in article 156 itself to article 151 of the same schedule. Article 151 provides for appeals from a decree or order of the High Court in the exercise of its original jurisdiction. Now though the right to appeal from such decrees or orders is not given by the Code of Civil Procedure but by the Letters Patent Appeal yet article 156 speaks of such appeals as appeals under the Civil Procedure Code. That also tends to show that what is meant by the legislature is appeals, the hearing and disposal of which is governed by the rules of procedure laid down in the Civil Procedure Code.

As regards column 3 there can be no doubt after the decision of the Privy Council in *Rangoon Botatoung Company, Ltd. v. The Collector, Rangoon*(1), that an award under the Land Acquisition Act is not a decree passed in the ordinary jurisdiction of a Civil Court. But their Lordships themselves point out in that case that appeals from awards as provided for in section 54 of the Land Acquisition Act are governed as to their procedure from the date of the filing of the appeal to its disposal by the rules provided for in the Civil Procedure Code: and in the Letters Patent Appeal in this Court in *Manavikraman Tirumalpad v. The Collector of the Nilgiris*(2) it has been held that section 98 of the Civil Procedure Code applies. Though the award of the

(1) (1918) I.L.R., 40 Cal., 21.

(2) (1918) I.L.R., 41 Mad., 948.

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Land Acquisition Judge is not a decree or order for purposes of further appeal from the decision of the High Court in appeal, nevertheless the procedure laid down in the Civil Procedure Code with reference to appeals from original decrees which are also made applicable to appeals from orders by rule 2 of Order XLIII, Civil Procedure Code, governs appeals under section 54 of the Land Acquisition Act although in the rules the word 'decree' is used. It is to be pointed out that the provisions of the Civil Procedure Code regarding procedure to be followed in appeals from original decrees are incorporated in the Land Acquisition Act by virtue of section 54. If the first column of article 156 includes, as we hold, appeals provided for by section 54 of the Land Acquisition Act there is really no difficulty created by the use of the words "decree or order" in the third column. Then we think it rightly pointed out in *Dropadi v. Hira Lal*(1) that there are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed, probably rightly, that such appeals are under the Code of Civil Procedure governed by what is now article 156 of schedule 1 to the Limitation Act and by the general provisions of the Act also.

Attention has been drawn by Mr. A. Krishnaswami Ayyar to certain special Acts, such as the Calcutta Improvement Act and the Bombay Improvement Act, in which special rules of limitation are provided for. That, to our mind, does not affect the question. It might have been perhaps better if the legislature enacting the Land Acquisition Act had also provided some special provision or made an express and direct reference to the provisions of the Limitation Act. But that is another question.

We hold upon a proper construction of article 156 that it applies to appeals provided for by section 54 of the Land Acquisition Act.

This appeal must be dismissed with costs.

N.B.

(1) (1912) I.L.R., 34 All., 496, at p. 50.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

SITARAMAYYA, APPELLANT (SECOND DEFENDANT),

v.

GOPALAKRISHNAMMA AND AN OTHER, RESPONDENTS
(PLAINTIFFS).*

1919,
April, 28, 29.

Civil Procedure Code (XIV of 1882), sec. 248, clause (a)—Attachment under decree known to judgment-debtor—Application for sale more than a year after previous application—Sale without notice to judgment-debtor, validity of.

A sale of a judgment-debtor's property is not void for want of notice to him of the application for sale made more than a year after a prior application for execution, if the sale is held in pursuance of a subsisting attachment known to the judgment-debtor. *Raghunatha Das v. Sundar Das Khetri*, (1915) I.L.R., 42 Cal., 72 (P.C.), and *Shyam Mandal v. Satinath Banerjee*, (1917) I.L.R., 44 Cal., 954, distinguished.

APPEAL against the order of remand made by T. S. TYAGABAJA AYYAR, the Subordinate Judge of Coacanada, in Appeal Suit No. 92 of 1917, preferred against the decree of C. RANGANAYAKULU NAYUDU, the District Munsif of Coacanada, in Original Suit No. 106 of 1916.

This was a suit brought in 1916 by the plaintiffs (1) for a declaration that a Court auction concluded in favour of the defendants of certain family lands belonging to the plaintiffs and their deceased father, held in 1899 in execution of a decree of 1893 against the father, was null and void on the ground that no notice of the application for sale as required by section 248, clause (1), Civil Procedure Code of 1882, was served on the plaintiff's father, (2) for redemption of a mortgage executed by the plaintiff's father in favour of the defendants, and (3) for accounts. The first plaintiff attained majority within three years of the suit. The second plaintiff, his brother, was still a minor. The defendants pleaded, *inter alia*, that the proceedings in execution were regular, that the plaintiff's father was aware of the attachment under which the sale was held, that even if the notice under section 248 was not served, it did not vitiate the sale and that the suit was barred by limitation. The District Munsif

* Appeal Against Order No. 819 of 1918.

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dismissed the suit holding that want of notice did not vitiate the sale. On appeal the Subordinate Judge held that, though the plaintiff's father was given notice of the execution application for attachment of his property and was aware of the attachment under which the sale was eventually held, the sale was null and void, as no notice of the last application for sale (which was made more than a year after the previous application for sale) was given to the plaintiff's father. He accordingly reversed the decree of the first Court and remanded the suit for fresh disposal. The defendants appealed.

V. Ramesam and C. Rama Rao for appellant.

P. Somasundaram for first respondent.

ABDUR
RAHIM, J.

JUDGMENT.—The whole question in this appeal is whether the suit to set aside the sale held on 29th April 1899 is barred by limitation. The suit was instituted about fifteen years from the date of the sale, and at the date of the sale the father of the plaintiff was living. Therefore the suit will be barred unless the case be treated as a case where the sale is to be regarded as null and void. The learned Subordinate Judge held that the sale was void, inasmuch as no notice had been issued under section 248 of the old Civil Procedure Code. That section says that the Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him (a) if more than one year has elapsed between the date of the decree and the application for its execution, or (b) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made. The second clause has no application and the question is whether under the circumstances notice had to be issued under clause (a) and, if so, whether the non-issue of notice made the entire proceedings null and void. It is somewhat strange that there is no authority bearing directly upon the point which arises in this connexion. Here it appears that attachment was ordered on 1st December 1894 on an application made within one year of the date of the decree. But then this application which apparently asked not merely for attachment but also for sale was dismissed on 18th January 1895 for want of further prosecution. But it cannot be doubted that the dismissal of the application

did not in any way affect the continuance of the attachment, and SITARAMAYYA v. GOPALA-KRISHNAMMA. we must take it that the attachment subsisted until the date of the sale. After the first petition, exhibit H, several other applications were made—exhibits H series. The next two applications after exhibit H were made within one year of the decree, and admittedly no notice is required to be given of those applications under section 248. But the fourth application, exhibit H-3, was made more than a year after the decree and no notice was issued or served upon the judgment-debtor. It would appear from the finding of the Subordinate Judge that the judgment-debtor had left his village at Samalkot and was living at Vizianagram and as often happens in such cases notice was not properly served. So we may take it that the judgment-debtor did not receive any notice of the application for execution made subsequent to the attachment; but the attachment subsisted and the property was sold under the provisions of section 284 of the old Civil Procedure Code which says that any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same. It may be observed that this section does not speak of any notice being given to the judgment-debtor before the property is actually sold. But if an application comes within the purview of section 248 notice has undoubtedly to be given to the judgment-debtor in the terms of that section, that is requiring him to show cause why the decree should not be executed against him. Much reliance has been placed on behalf of the respondent on a ruling of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (1), but in that case the property of the judgment-debtor had become vested in the Official Assignee after the attachment but before the sale. Their Lordships found upon the facts that the Official Assignee had not been properly brought before the Court and no order binding on him had been obtained, and it was upon that ground that they held that the Court had no jurisdiction to sell the property so as to bind the Official Assignee. The property having vested in the

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(1) (1915) I.L.R., 42 Cal., 72 (F.C.).

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Official Assignee it was necessary that he should be properly brought before the Court, otherwise an order for sale would not bind him so as to affect the rights of other creditors. That comes clearly under clause (b) of section 248. Their Lordships do not lay down that the absence of notice in any other case coming under section 248 would make the proceedings in execution null and void, being held without jurisdiction. The ruling of the Calcutta High Court in *Shyam Mandal v. Satinath Banerjee*(1), by MUKHJEE and CUMING, JJ., has also been relied on before us. The learned Judges however do not appear to have noticed that in the Privy Council case the Official Assignee in whom the insolvent judgment-debtor's property had vested was not properly before the Court, while in the case they had to deal with the proper parties were apparently represented in the proceedings. Further it was not a case where there was a subsisting attachment. It has been repeatedly pointed out that there is a distinction in law between an application for execution and an application for taking a step in aid of execution; vide *Venkataramanamma v. Purushotham*(2) and *Subbachariar v. Muthuveeran Pillai*(3). Here the object of the application made after the attachment was to take a step in furtherance of an execution already initiated, and even if we assume that such an application should comply with the provision of section 235 of the old Civil Procedure Code the further question remains whether failure to give notice of an application made in order to bring the property to sale after attachment goes to the root of the jurisdiction of the executing Court or is merely an irregularity making the sale liable to be set aside under section 311 of the old Civil Procedure Code. It seems to us difficult to hold when there is a subsisting attachment that a Court proceeding to sell the property in pursuance of that attachment would be acting without jurisdiction if no notice was given of the application for an order for sale when the property has been attached in accordance with law. It is not contended that the property in dispute was not so attached in this case. It may be presumed that the judgment-debtor knew of the attachment, and as he was properly before the Court in the execution proceedings the absence of

(1) (1917) I.L.R., 44 Calo., 954.

(2) (1901) I.L.R., 24 Mad., 168.

(3) (1918) I.L.R., 38 Mad., 552.

notice of any further application can at the worst amount only to an irregularity. It seems to us therefore that the sale in this case cannot be said to be null and void.

Then the learned pleader for the judgment-debtor further argued that this is a case of fraud and therefore the suit would be in time as the plaintiff came within three years of the date, when the fraud came to his knowledge. No such case was really sought to be made in the Court of trial. Issue does not raise any question of fraud and the plaint, so far as we can judge from the summary of it, does not contain any specific allegations of fraud. The Subordinate Judge no doubt in one or two places in his judgment says that the judgment-creditor acted fraudulently in not serving the judgment-debtor with notice. But in this he seems to have gone further than the issues properly raised in the case. As the sale was not void and as there was no case of fraud, the suit is clearly barred as it was instituted 15 years after the date of the sale which, as already mentioned, took place in the lifetime of the plaintiffs' father.

The result is that the appeal must be allowed, the judgment of the Subordinate Judge reversed, and that of the District Munsif restored with costs here and in the lower Appellate Court.

BAKEWELL, J.—I agree.

BAKEWELL, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

RAMASAMI NAIKEN AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

VENKATASAMI NAIKEN AND THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (V of 1909), sec. 35—Costs—Change in law, effect of, on award of costs.

It is a good cause for depriving the successful respondent of his costs of the appeal that the law has been altered since the filing of the appeal.

* Second Appeal No. 1147 of 1918.

1919,
July, 21.

RAMASAMI
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SECOND APPEAL against the decree of D. G. WALLER, the District Judge of Coimbatore, in Appeal No. 232 of 1917, preferred against the decree of S. VARADA ACHARYA, the First Additional District Munsif of Coimbatore, in Original Suit No. 14 of 1915.

This was a suit (1) for a declaration that certain sales of family lands made by the plaintiff's father (the first defendant) in favour of defendants two to four were void and not binding on the plaintiffs, in that the sales were for fictitious debts and for illegal and immoral purposes, and (2) for recovery of possession of the properties sold. The first defendant remained *ex parte*. The other defendants contended, *inter alia*, that the debts (most of which were mortgage-debts) were real, that they were not incurred for any illegal or immoral purpose, and that the sales having been for antecedent debts were binding on the sons (the plaintiffs). Both the lower Courts found the pleas of the defendants established and dismissed the suit. The plaintiffs preferred this appeal.

The Hon. the Advocate-General, with R. Ganapati Ayyar, for the appellants.—At the time this appeal was filed there was a decision of a Bench of this Court in my favour, viz., *Badagala Jogi Naidu v. Bendalam Papiiah Naidu*(1), that a previous mortgage debt was not an antecedent debt in respect of a subsequent alienation so as to bind the sons' shares also in the property subsequently alienated. This ruling was afterwards set aside by a Full Bench of this Court in *Armugam Chetty v. Muthu Koundan*(2). Hence I do not press this appeal, but for the above reason I am not liable for the costs of the respondent.

K. Srinivasa Ayyangar with T. M. Krishnaswami Ayyar for respondents.—The appellants are liable to pay the costs of the appeal. Costs generally follow the event and must be allowed unless there has been misconduct on the part of the successful party or unless his case has been found to be manifestly unjust; see Order 65, rule 1, of the rules of the Supreme Court—*Cooper v. Whittingham*(3), *Kuppuswamy Chetty v. Zamindar of Kalahasti*(4). Section 85 of the Civil Procedure Code is also to the same effect. The fact that there was a change in the law does not matter.

(1) (1918) 35 M.L.J., 382.

(3) (1880) 15 Ch. D., 501.

(2) (1919) 37 M.L.J., 166.

(4) (1904) 1 L.R., 27 Mad., 241.

The Hon. the Advocate-General in reply. Award of costs is entirely in the discretion of the Court. That is the English as well as the Indian rule. Section 35, Civil Procedure Code, is much wider than the English rule. The cases quoted by the other side are no longer law. It is not necessary to show misconduct to deprive the successful party of his costs—*Forster v. Farquhar*(1). The case of *Walter v. Steinkoof*(2) shows that the fact that a Judge has to decide a bare question of law does not deprive the Court of its discretion as to costs. A change of law whether effected by Parliament or by decisions of superior tribunals has been held to be good cause for depriving the successful party of his costs—*Robinson v. Rosher*(3), *Sultan Harbour Improvement Company v. Hitchens*(4). The language of section 35 is wide enough to cover such cases.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—Following the Full Bench decision in *Armugam Chetty v. Muthu Koundan*(5), we hold that this Second Appeal fails and dismiss it. The learned Advocate-General who appeared for the appellant did not argue the Second Appeal, but contended that as it was filed after the Privy Council decision—*Sakhu Ram (handra v. Bhup Singh)*(6) and on the strength of *Badagala Jogi Nayudu v. Bandalam Papiiah Nayudu*(7)—in which SPENCER and KRISHNAN, JJ., interpreted the Privy Council ruling to mean that a deed of mortgage cannot be relied on as an antecedent debt, this Court should not direct the appellant to pay the respondents' costs. Mr. K. Srinivasa Ayyangar, on the other hand, contended that unless there was misconduct on the part of the successful party or unless it would be manifestly unjust on the merits of the case to visit the defeated party with costs, costs should follow the event. There can be no doubt that the rule enunciated in section 35 of the Code of Civil Procedure as to costs is wider than the English rule (Order LXV, rule 1) as to actions tried by a jury which enables the Judge to withhold costs for the successful party only for good cause shown. Even under the English rule, BOWEN, L.J., pointed out that in order to deprive the successful

(1) (1899) 1 Q.B., 564.

(2) (1892) 3 Ch., 489.

(3) (1841) 1 Y. & C. Ch. Cas., 7; s.c., 62 E.B., 767.

(4) (1882) 15 Beav., 161.

(5) (1919) 37 M.L.J., 166.

(6) (1917) 1 L.R., 39 All., 437 (P.C.).

(7) (1918) 35 M.L.J., 282.

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party of his costs it is not necessary to prove that the opposite party has been guilty of misconduct—see *Forster v. Farquhar*(1). Mr. Justice NORTH in *Walter v. Steinkoof*(2) said that the discretion of the presiding Judge is not taken away because he has to decide a bare legal question. The strict rule which was enunciated by JESSEL, M.R., in *Cooper v. Whittingham*(3), has been practically abandoned in these two cases. Mr. Justice SUBRAHMANYA AYYAR in *Kuppusami Chetty v. Raja of Kalahasti*(4) has based his judgment on the dictum of the Master of the Rolls which is no longer law in England. Further, for the present case, there is the direct authority of *Robinson v. Rosher*(5) and *Sultan Harbour Improvement Company v. Hitchens*(6), wherein it has been pointed out that it would be a sound exercise of discretion to refuse costs where a suit was based on a state of law, which has since been overruled either by an Act of Parliament or by a superior tribunal. In our opinion, the above principles are deducible *a fortiori* from the language of section 35 of the Civil Procedure Code.

Under the Indian Law, it can safely be stated that the discretion of the Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case and upon its presentation by the party and upon circumstances and authorities which were pre-existing before the suit was launched. In the present case, the first defendant has been responsible for the whole of the litigation; neither the plaintiffs nor the other defendants have been guilty of any act of commission or omission which can be charged against them. If the judgment of the Divisional Bench had stood, the appellants might have succeeded. That is a consideration which cannot altogether be ignored in apportioning costs. Taking all these circumstances into consideration, we think the appellant should not be made to pay the costs of defendants. We further think the first defendant who is the *fons et origo* of all the trouble should be directed to pay the costs of the other defendants in this Court.

N.R.

(1) (1898) 1 Q.B., 564.

(3) (1893) 15 Ch. D., 511.

(5) (1841) 1 T. & C. Ch. Cas., 7.

(2) (1892) 8 Ch., 489.

(4) (1904) I.L.R., 27 Mad., 341.

(6) (1852) 15 Beav., 161.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

KALLINGAL MOOSA KUTTI (FIRST DEFENDANT), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(PLAINTIFF), RESPONDENT.*

Registration Act (Indian) (XVI of 1908), sec. 90, cl. (1) (d)—Construction—Rule of ejusdem generis—Lease of lands by Government—Document executed by lessee but not registered, whether admissible in evidence—Prohibition in lease against erection of buildings—Power of Government to impose conditions—Crown Grants Act (XV of 1895), ss. 2 and 3—Power whether affected by Malabar Compensation for Tenants' Improvements Act (I of 1900), sec. 19.

A lease of lands made by Government was evidenced by an unregistered document executed by the lessee; it contained an undertaking by the lessee not to erect buildings on the land; the latter, however, built on the lands contrary to the agreement. In a suit by the Secretary of State to eject the lessee,

Held, that the document did not require registration as it fell under section 90, clause (1) (d), of the Registration Act, and was admissible in evidence.

The expression "other documents, etc." in section 90, Registration Act, should not be construed *ejusdem generis* with "sanads and inam title-deeds" in the previous part of the section; but, even if so construed, a lease is of the same character as a sanad, and the words "grants or assignments of interest" in the same section are comprehensive enough to include a lease.

Under sections 2 and 3 of the Crown Grants Act the Government has power to impose restrictions in a lease made by it—a power which is not affected by the provisions of the Malabar Compensation for Tenants' Improvements Act.

Munshilal v. The Notified Area of Baraut, (1914) I.L.R., 36 All., 176, dissented from.

SECOND APPEAL against the decree of G. H. B. JACKSON, the District Judge of South Malabar, in Appeal Suit No. 324 of 1918, preferred against the decree of R. NAGESWARA AYYAR, the Principal District Munsif of Calicut, in Original Suit No. 118 of 1916.

The suit was one to recover possession of a paramba held by the first defendant under a kaichit (rent deed), dated 13th February 1902, for three years, executed by him to the plaintiff (the Secretary of State for India in Council), with arrears of rent and cost of removing the buildings upon the site in case

* Second Appeal No. 1954 of 1918.

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the defendants did not remove them and for other reliefs. The suit lands were Government janmam lands relinquished by the South Indian Railway Company and the first defendant was put in possession of them by the Government. The material portion of the document ran as follows:—

"I shall not erect any buildings other than those which are now existing. I shall not extend the dimensions of the building now existing or change them. At the expiry of the term of this kaichit I shall at my own expense pull down and remove all the buildings without demanding consideration of any kind and surrender to Government."

This document was not registered. The first defendant contrary to his undertaking in the agreement erected certain buildings on the site. The Government, after giving six months' notice to quit, sued to eject the first defendant and the other defendants who were sub-tenants under him. The defendant pleaded that the suit based on the unregistered document was not sustainable as the document was not admissible in evidence, and that the provisions in the agreement for removal of buildings were penal and invalid. Both the lower Courts held that the plaintiff was entitled to a decree in ejectment without payment of compensation for the value of the buildings and directed the defendant to remove the buildings and that, in default, the plaintiff was to be at liberty to remove them and recover the costs from the defendant. The first defendant preferred this second appeal.

K. P. M. Menon for the appellant.

The Government Pleader for the respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—Two questions of some importance have been argued before us in this case. By exhibit A the first defendant took a lease of certain lands near a railway station from the Government. The lease was for three years and provided for a rent of Rs. 150 per annum. It contained a clause that the defendant should not erect buildings on the land. Notwithstanding this undertaking he put up buildings on it. The suit is by the Secretary of State for ejectment. The defendant pleaded that as exhibit A was not registered it was not admissible in evidence; and secondly that the provision restraining the defendant from erecting buildings is obnoxious to section 19 of Act I of 1900, the Malabar Compensation for

Tenants' Improvements Act; both these contentions were overruled by the Courts below. We think they were right.

It was argued for the appellant that the first question, relating to registration, is covered by *Munshi Lal v. The Notified Area of Baraut*(1). With all respect to the learned Judges we are unable to follow that decision. The learned Judges say that the words

"other documents purporting to be or to evidence grants or assignment by Government of land or of any interest in land" in section 90, clause (1) (d), of the Indian Registration Act, should be read *ejusdem generis* with the preceding words "*sanads* and *inam* title-deeds." We see no ground for applying this principle of construction to the section. As was pointed out in *Angus v. Dalton*(2), we have first to ascertain from the language of the section the class of cases which were intended to be affected. If the intention is clear, the occasion for the introduction of the *ejusdem generis* rule of interpretation would not arise (see also the other cases collected at page 546 of Maxwell on the Interpretation of Statutes). In the present case the object of the legislature in enacting section 90 of the Registration Act seems to be to enumerate the class of documents executed by or on behalf of the Government which should not be affected by the previous sections relating to registration. In this view there is no ground for imputing to the legislature a restrictive scope of the operation of clause (1) (d) of section 90. Further, even applying the principle, we are not satisfied that a lease of land is not of the same character as a *sanad*. As the learned Government Pleader pointed out there are *sanads* by Government and zamindars which grant property on favourable terms. Therefore the idea implied in a *sanad* is not invariably that of a gift without reservation. For these reasons, we are unable to agree with the Allahabad High Court that a lease is not within the sub-clause. A further argument of the learned counsel for the appellant requires a little more consideration. He contended, and in this also he is supported by *Munshi Lal v. The Notified Area of Baraut*(3), that the words

"grants or assignments by Government of land or of any interest in land"

(1) (1914) I.L.R., 36 All., 176.

(2) (1878) L.R., 4 Q.B.D., 166.

(3) (1914) I.L.R., 36 All., 176, at p. 179.

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would exclude a lease. We are unable to accept this contention either. Turning to section 17 of the Registration Act we find in sub-clause (2) (vii) the use of the word grant; and that word is used with reference to transfers and receipts enumerated in clause (1) (b) and (1) (c) of section 17. In that connexion the word has the meaning of transfer and does not denote a gift. We are therefore of opinion that the words "grants or assignments of interest" in section 90 (1) (d) are comprehensive enough to include a lease. The document therefore is admissible in evidence.

The learned Judges of the Allahabad High Court got over the difficulty connected with the Crown Grants Act (XV of 1895) in a manner which we are unable to accept as sound. Section 2 of the Act refers to

"grant or other transfer of land or of any interest therein."

This language shows in the first place that the word 'grant' can be employed to denote a transfer of land. In the second place it is clear that all transfers of land of every description are within the operation of the section. Mr. Menon's suggestion that the Act is confined to the transfer of prerogative rights possessed by the Crown and not to ordinary incidents of a mercantile transaction in which the Crown may be engaged is opposed to the plain language of the Statute. We find nothing in *Dost Mahomed Khan v. The Bank of Upper India*(1) to support this view.

On the second point, we feel no doubt that the wide language of section 3 of the Crown Grants Act is conclusive. The Government have specially armed themselves with powers which they have withheld from private parties, presumably on the ground that they are not likely to misuse them. It is clear to us that these contracts are not within the mischief of section 19 of the Malabar Compensation for Tenants' Improvements Act.

We must for the above reasons confirm the decrees of the Courts below and dismiss the second appeal with costs. The appellant will have two months to remove the buildings erected by him.

K.B.

(1) (1906) 3 A.L.J., 129.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Burn.

RAJA OF RAMNAD, APPELLANT (DEFENDANT),

1918,
July, 30.

v.

VENKATARAMA AIYAR AND ANOTHER, RESPONDENTS
(PLAINTIFFS).*

Estates Land (Madras) Act (I of 1908), ss. 155 and 192 (e)—Set-off of money allowances against claim for rent.

Except in the case provided for by section 155 a tenant has no right under the Madras Estates Land Act to set off amounts due to him from the landholder against a demand for rent.

SECOND APPEAL against the decree of T. SRINIVASA AYYANGAR, Subordinate Judge of Rāmnād at Madura, in Appeal No. 17 of 1918, filed against the decree of T. K. SUBBA AYYAR, District Munsif of Sattur, in Original Suit No. 334 of 1914.

This was a suit for a declaration by the plaintiffs (tenants of the defendant) that there were no arrears of rent due from them, for fasli 1321 (i.e., 1911), that the distraint and sale of their holding, as if there were arrears, was irregular, illegal and invalid and for an injunction restraining the defendant from ejecting them from the holding. The defendant pleaded, *inter alia*, the existence of the arrears and the validity and regularity of the distraint and sale. The plaintiffs met this by alleging that it was customary for several years past to deduct from the rent due certain cash allowances of rupees ten, due to the plaintiffs from the defendants, and that they rightly remitted to the defendant only the balance. The defendants denied the right to the cash allowance and pleaded that, even if it was due, the plaintiffs had no right under the Madras Estates Land Act to set it off against the rent. Both the lower Courts found that the allowance was due, that it was customary to set it off against the rent and that the distraint and sale were consequently null and void.

* Second Appeal No. 2025 of 1918.

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AIYAR.

The defendant preferred this appeal.
S. Soundararaja Ayyangar, and C. Sitaramayya for R. Krish-
nama Achariyar for appellant.

S. Subrahmanya Ayyar for K. Jagannatha Ayyar for second
respondent.

SESHAGIRI
AIYAR, J.

The JUDGMENT of the Court was delivered by
SESHAGIRI AIYAR, J.—We are constrained to differ from the
Subordinate Judge on the question of set-off; admittedly arrears
were due on the holding: admittedly also a certain sum of
money was due from the landlord to the tenant for manibham.
The tenant deducted the manibham from the rent and paid the
balance. The landlord appropriated the payment towards the
rent and distrained for the arrears. The property was sold.
This suit is to set aside the sale on the ground, among various
others, that the sale was illegal.

The Subordinate Judge has held that the tenants were by
custom entitled to set-off the manibham due to them against the
rent and that therefore there were no arrears; we are unable to
agree with him. There are two sections in the Estates Land
Act which relate to set-off: section 155 and section 192 (a).
In the first section a right of set-off outside Court is given when
there is eviction. That has no application to the present case.
In the second section, the legislature distinctly negatives the
right of the tenant to plead any set-off as a defence to a claim
for rent. It is contended for the respondent that, as the
set off was made outside the Court, this prohibition does not
affect the tenants. But it must be remembered that prima facie
each of the two claims referred to by us are mutual and inde-
pendent. Unless one party chooses to recognize the claim of
the other and agrees to arrive at an amicable settlement, it
cannot be said that the action of one of them in deducting what is
due to him from what is due from him is binding on the other.
Nor can it be said that, by the action of the tenants, the right
of the landlord to the arrears of rent was put an end to. We
must therefore hold that there were arrears when the distraint
proceedings commenced. The further question is whether the
attachment and sale were regular. This question has not been
considered by the lower Court, as it was unnecessary to decide
it and the other questions, in the view it took. We must
reverse the decree of the Subordinate Judge and remand the

appeal for disposal on the other points raised in the issues.
Costs will abide the result.

N.R.

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APPELLATE CIVIL.

Before Sir Abdur Rahim, Kt., Officiating Chief Justice,
and Mr. Justice Moore.

BRIJI KESSOOR LAUL AND ANOTHER (APPELLANTS), PETITIONERS,

1919,
July, 31.

v.

OFFICIAL ASSIGNEE, MADRAS (RESPONDENT), RESPONDENT.*

*Presidency Towns Insolvency Act (LII of 1909), ss. 21, 28 to 30—Private arrange-
ment of insolvent with creditors for full discharge on part payment, whether
'payment in full' or 'composition' under the Act.*

A private arrangement of the insolvents to pay four annas in the rupee in
full satisfaction of their claims even though made with all their creditors is
neither a 'payment in full' nor a 'composition' within the meaning of the Act
so as to entitle the insolvents to an annulment of an order of adjudication.

An order of adjudication under the Presidency Towns Insolvency Act, made
on an application of the insolvents who were unable to pay their debts, can be
annulled by a 'payment in full' to the creditors as provided for by section 21
of the Act or as the result of a composition with the creditors in the manner
provided for by sections 28 to 30 of the Act.

APPEAL against the Order of Courts Trotter, J., in Original
Insolvency Petition No. 235 of 1917.

The two appellants in this case (father and son), who were
unable to pay their debts, applied to the High Court of Madras
to be adjudicated insolvents in December 1917 and they were
so adjudicated. Their unsecured debts amounted to Rs. 1,720
and a debt of Rs. 2,800 was secured by a house in Muttra,
Northern India. In the middle of 1918 they arranged with all
their unsecured creditors, except one, to pay four annas in the
rupee and the creditors agreed to release them from all their

* Original Side Appeal No. 2 of 1919.

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claims. The creditors informed the Official Assignee of this arrangement. The insolvents represented to the Official Assignee that the house at Muttra was not worth anything beyond the mortgage amount and that the secured creditor was willing to accept the house in satisfaction of his debt. On these facts the insolvents filed the present petition to the Court of Insolvency praying that (1) the impending sale of the house, advertised for sale at the instance of the Official Assignee be stopped, and (2) that they may be allowed to withdraw their petition for adjudication. An order *nisi* having been issued, the Official Assignee ascertained from the Official Receiver at Muttra, to whom he had entrusted the conduct of the sale of the house, that the house was worth Rs. 6,000 and opposed the application on the grounds that the creditors who were all residents of Madras were misled and were induced to consent to give a full discharge on a misrepresentation as to the value of the house and that all the creditors could be paid in full. Thereupon, the Court dismissed the petition.

The insolvents preferred this appeal.

K. Ramanatha Shenai for the appellants.—The Judge should have annulled the order of adjudication. All the creditors, except one, have reported to the Official Assignee that they have given full discharge and that no further steps need be taken against the insolvents. There is no opposition from the remaining creditor and the insolvents will meet his claims. Thus in effect there is 'a payment in full' or a 'composition with the creditors' either of which entitles the insolvent to an order of annulment of adjudication under sections 21 and 30 of the Act. Even if this arrangement does not strictly come within the terms of the sections, there is an inherent power in the Court to annul the adjudication when the creditors are satisfied and when no fraud has been found.

N. Rajagopalan for the Official Assignee.—The insolvents have been guilty of fraudulent conduct in suppressing the real value of the house. There is no inherent power in the Court to annul an order of adjudication. What has been done cannot be considered either as a 'payment in full' under section 21 or as a 'composition with the creditors' under sections 28 to 30. There has been no payment in full; see *In re Flatan, ex parte*

Official Receiver(1); *In re Izod, ex parte the Official Receiver*(2); *In re Hester, ex parte Hester*(3); *In re Keet*(4); *In re Subrati Jan Mahomed*(5) and *In re Shivalal Rathi*(6); section 35 of the English Bankruptcy Act (46 and 47 Vict., Ch. 52). How a composition with the creditors should take place after an order of adjudication is laid down in sections 28 and 29 of the Act. The procedure therein laid down has not been followed. There has been no proposal to the creditors to have a composition; there has been no summoning of the creditors, no meeting, no agreement of theirs and no report to the Court of any composition.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, Offg. C.J.—The insolvents arranged with their creditors, by paying them four annas in the rupee, that they should give them a receipt in full discharge of their debts. It has been ruled both in England and India that such a payment is not a 'payment in full' within the meaning of section 21 of the Presidency Towns Insolvency Act, corresponding to section 35 of the English Bankruptcy Act; see *In re Subrati Jan Mahomed*(5); *In re Shivalal Rathi*(6); *In re Flatan, ex parte Official Receiver*(1); *In re Izod, ex parte the Official Receiver*(2); *In re Hester, ex parte Hester*(3) and *In re Keet*(4). This cannot be said to be a case in which the debtor ought not to have been adjudged insolvent, for the adjudication was made on his own application and clearly he was unable to pay his debts. But then it is urged that we must treat it as a composition under section 28 and pass an order annulling the adjudication under section 30. Clearly, however, it is not a case of composition within the meaning of the Act. There was no proposal, so far as we can gather from the materials placed before us, for a composition to be submitted to the Court and we do not find that the Court, proceeding as directed by sections 28 and 29, approved of any such proposal. It is only when the Court has approved of a proposal for composition properly submitted to it that it may annul the adjudication. Then it is said that we have

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(1) (1893) 2 Q.B., 219.

(3) (1889) 22 Q.B.D., 632.

(5) (1912) 15 Bom. L.R., 748.

(2) (1898) 1 Q.B., 241.

(4) (1905) 2 K.B., 686.

(6) (1917) 19 Bom. L.R., 805.

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a sort of general discretion to annul an order of adjudication if we are satisfied that the conduct of the insolvent has not been in any way fraudulent or dishonest. But even supposing there was such a general discretion, on which question we have not been referred to any decision, the Court had no opportunity of examining the insolvent in this connexion so as to form a proper conclusion as to his conduct. The petitioner seems to have misconceived his remedy, for he proceeded to present an application for withdrawal of the petition and he also seems to have been under the impression that it was enough for his purpose if he could get his creditors to give him a discharge for their debts. That is not sufficient in law, as has been pointed out in all the cases referred to.

We must, therefore, dismiss the insolvents' appeal. It will be open to him to make a proper application before the Insolvency Court.

The Official Assignee will be entitled to the costs of the appeal out of the estate.

C. Virarayhavalu Nayudu, Solicitor, for appellants.

A. Kandaswami Mudaliyar, Solicitor, for respondent.

N.B.

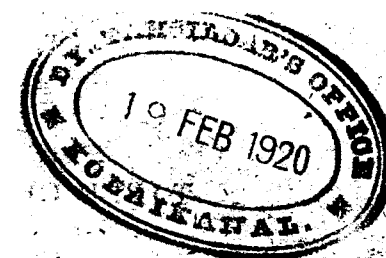


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CIVIL PROCEDURE CODE (ACT V OF 1908); SEC. 47—Decree—Sale in execution—Auction purchaser in execution of money decree whether representative of decree-holder—Stranger purchaser in execution of decree—Applicability of section 47, Civil Procedure Code.] A stranger purchaser at Court-auction is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree under execution decided under section 47, Civil Procedure Code. <i>Per</i> ABDUR RAHIM, OFFG. C.J.—A stranger purchaser by private contract is also so bound and entitled. Whether a purchaser either by private contract or at Court-auction in execution of a money decree is to be considered the representative of the decree-holder or judgment-debtor depends upon the nature of the question raised and on who the contesting party is. <i>Per</i> OLDFIELD and SESHAGIRI AYYAR, JJ.—The inclusion in the proceedings of a stranger purchaser at Court-auction is justifiable on the ground of his interest in their result and without reference to his possession of any representative character. <i>Prosunno Kumar Sanyal v. Kali Das Sanyal</i> , (1892) I.L.R., 19 Calo., 688 (P.C.), considered and applied. An auction purchaser of property in execution of a money decree is not a representative of the decree-holder for the purpose of these execution proceedings. <i>Per</i> OLDFIELD, J.—Such an auction purchaser is the representative of the judgment-debtor for the purpose of inquiring into a question relating to the subsequent execution of a distinct decree against the same judgment-debtor affecting the same property. <i>Per</i> SESHAGIRI AYYAR, J.—	

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, s. 13— <i>Ex parte</i> decree, power of Court to set aside.] A Court has no power, apart from the provisions of Order IX, rule 13, Civil Procedure Code, to set aside an ex parte decree passed by itself. <i>Somayya v. Subbamma</i> , (1903) I.L.R., 26 Mad., 599, overruled.	
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does not operate against a subsequent purchaser of the same property in a sale held by a Court having jurisdiction in execution of another decree against the same judgment-debtor. *Mahomed Mozuffer Hossein v. Kishori Mohun Roy*, (1895) I.L.R., 22 Cal., 909, explained; *Prayag Roy v. Sidhu Prasad Tewari*, (1908) 35 Cal., 877 and *Parsidh Narain Singh v. Janaki Singh*, (1907) 7 O.L.J., 644, dissented from.

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INCOME-TAX ACT (VII OF 1918), ss. 3, 9—*Proprietor resident in British India—Business outside British India and not carried on from British India—Income not remitted to British India, whether taxable under the Act or—Reference under sec. 51—Right to begin.* A resident in British India owning a money-lending business carried on for him outside British India by agents resident there who merely keeps himself acquainted with the progress of the business and occasionally issues general instructions, is not liable to be taxed under the Act where the income from such business is not remitted to British India. On a reference by the Board of Revenue under section 51 of the Income-tax Act the assesse and not the Board has the right to begin.

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LESSOR AND LESSEE—Agricultural lease—Flooding by sea-water—Land rendered unfit for cultivation—Right of lessee to abatement of rent—Duty to avoid lease in toto—Transfer of Property Act (IV of 1882), sec. 108, cl. B (e)—Principle of the section, applicability of. If by an inundation of sea-water a portion of lands leased for agricultural purposes becomes unfit for cultivation and the landlord brings a suit to recover the whole rent reserved in the lease, the tenant can plead as a defence that he is entitled to a proportionate abatement and is not bound to have avoided the lease in toto. The principle of proportionate abatement was recognized in India prior to the Transfer of Property Act, and is in accordance with natural justice. Neither section 108 B (e), Transfer of Property Act, nor its principle is applicable to cases of flooding by sea-water of lands leased for agricultural purposes. *Sheikh Enaytullah v. Sheikh Elahesbakh* (1864) W.B. Gap. (Act X Rulings), 42, followed.

Subramania Pattar v. Kattamballi Rama ... (1920) I.L.R., 48 Mad., 182

LICENCE TO SELL ARRACK—Prohibition to sell the privilege without permission—Taking partner without permission, legality of—Loan to such partnership with knowledge of prohibition—Onus on lender to prove legality of partnership—Right of lender to recover loan from licensee. Where a licence to sell arrack contained the condition that "the privilege of supplying and vending shall not, without the permission of the Collector previously obtained, be sold, exchanged or sub-leased, nor, if the Collector has ordered, can an agent be appointed, without his permission previously obtained, for exercise of any such privilege," held that it was illegal for the licensee to take another as his partner in the business, without first obtaining permission and that the plaintiff must be taken to have had notice of the illegality. But the illegality was not of such a nature as to debar the plaintiff altogether from suing, and he was entitled to recover one half of the loan.

Brahmayya v. Ramiah ...

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PRINTING PRESSES AND NEWSPAPERS ACT (XXV OF 1867), SEC. 4—Indian Press Act (I of 1910), sec. 3, sub-sec. (1)—Control of press, owners—Deposit of security, power of Magistrate to dispense with—Order for deposit made after dispensing with it—Declarations made by keeper of printing presses—Publishing objectionable matter in newspaper or other periodical—Order by Governor in Council forfeiting security, and newspaper with all copies wherever found and annulling declarations made—Petitions by owner of press to set aside or revise orders of Magistrate and Governor, in Council—Articles in newspaper bringing Government into hatred and contempt—Criminal Procedure Code, 1898, sec. 435—Writ of certiorari—Appeal in criminal cases—Practice in Privy Council—Indian Press Act (I of 1910), ss. 3, sub-sec. (1), 4 sub-sec. (1), 17 and 22.] Under the Printing Presses and Newspapers Act (XXV of 1867), section 4, any person who keeps a printing press in his possession must make and subscribe a declaration before a Magistrate stating that he has a press for printing and where it is situated; and by section 5 no printed newspaper or other periodical shall be published without the printer or publisher making a declaration that he is the printer or publisher, the name of the periodical, and the place where the printing is conducted. Under the Indian Press Act (I of 1910 of the Government of India), section 3, sub-section (1), the person making such declaration is required to deposit before a Magistrate a sum of money or other security not less than Rs. 500 but not more than Rs. 2,000 as the Magistrate thinks fit to require. The Magistrate however may for special reasons dispense with the deposit, and has certain powers of cancelling or varying any order made under this sub-section. By section 4, sub-section (1), the Local Government, in case of anything objectionable appearing in the paper, may by notice in writing addressed to the owner of the press, declare the security deposit, the newspaper in which the objectionable matter appears and all copies of it wherever found, to be considered forfeited to the Crown, and the declaration made as above by the keeper of the press annulled. Sections 17 and 18 give power to any person interested in any property so forfeited to make an application to a Special Bench of the High Court to set aside such order, on the ground that the newspaper did not contain anything of an objectionable nature such as is described in section 4, sub-section (1). The appellant was the owner and keeper of a printing press, and printed and published a newspaper called "New India" and on 2nd December 1914 she had made all the declarations required and had duly observed all the proceedings (except making a deposit of security with which the Magistrate had dispensed) necessary under the above Acts to enable her to carry on and print and publish the newspaper. On 23rd May 1916, however, she received a notice from the Magistrate, dated 22nd May 1916, in which he had, under sub-section (1) of section 3 of Act I of 1910, cancelled his order dispensing with the security and required her within fourteen days to deposit Rs. 2,000 as security; and in accordance with that order the appellant deposited the amount, but under protest. On 26th August 1916 she was served with an order dated 25th August 1916 made by the Governor of Madras in Council reciting that twenty passages published in the newspaper "New India" and identified in the order were of the nature described in sub-section (1) of section 4 of Act I of 1910, and declaring that the security which the appellant had deposited and

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all copies of the newspaper in which the passages appeared were to be considered forfeited to the Crown. The appellant thereupon presented two petitions to a Special Bench of the High Court, one a Criminal Revision Petition under sections 106 and 107 of the Government of India Act (5 and 6 Geo. V, No. 61), and section 435 of the Code of Criminal Procedure, 1898, against the order of the Magistrate requiring security and praying that it might be set aside; and the other under section 17 of Act I of 1910 against the order of forfeiture made by the Governor in Council praying that it might be revised and set aside. The application against the order of the Magistrate was described in the course of the proceedings as an application for a writ of certiorari. Both applications were heard by a Special Bench and both were dismissed. In the petition under section 17 of Act I of 1910 the Special Bench unanimously held that three articles (2), (11) and (18) were within the terms of section 4, sub-section (1), clause (c); a majority, ABDUR RAHIM, Offg. C.J., and AYLING, J., thought articles (1), (6), (10) and (12) obnoxious to clause (c); AYLING, J., thought the same of articles (9) and (14); and SESHAGIRI AYYAR, J., of article (8); AYLING, J., was of opinion that article (7) was obnoxious to clause (c) and SESHAGIRI AYYAR, J., thought the same of article (11). Applications to the High Court for leave to appeal to His Majesty in Council were refused, but the appellant obtained special leave to do so. Held, with regard to the petition to set aside the order of the Magistrate that on the construction of section 3, sub-section (1) of Act I of 1910 the Magistrate had power to cancel his order dispensing with security; that the order cancelling the dispensation was not a judicial act, but one done in the exercise of administrative functions; that the omission to hear the appellant before making it was only an irregularity which could not be reviewed, at any rate by writ of certiorari, and not a case for revision under the Code of Criminal Procedure. The provisions of section 435 of the Code of Criminal Procedure, and of section 115 of the Code of Civil Procedure are not exhaustive and there may be rare cases which might not fall under either of those sections, and for those cases the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari cannot be said to have been taken away; though it is taken away in ordinary cases by the above sections of the Civil and Criminal Procedure Codes. And assuming the power to issue writs of certiorari remain notwithstanding the existence of later procedure by way of revision, in the present case the procedure by certiorari would be precluded by section 22 of Act I of 1910. Held, with respect to the petition under section 17 to set aside the forfeiture the question was as to whether the passages cited from the articles published in the newspaper came within section 4, sub-section (1) of the Act, and the Judicial Committee found that due weight had been given by the Special Bench to the several portions of the section and that it had not been misconstrued on any matters of law. Their Lordships acting on their usual practice would not, with regard to appeals in Criminal cases, interfere on the merits with the conclusions of the Court below. *Dal Singh v. King-Emperor*, (1917) I.L.R., 44 Cal., 378; L.R., 44 I.A., 137 and *Bal Gangadhar Tilak v. Queen-Empress*, (1897) I.L.R., 23 Bom., 528; L.R., 25 I.A., 1, were referred to.

Bevan v. Advocate-General of Madras ... (1920) I.L.R., 48 Mad. (P.O.), 146

APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir Abdur Rahim, Kt., Offg. Chief Justice,
Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.*

BOARD OF REVENUE, MADRAS, PETITIONER,

v.

RAMANADHAN CHETTY, MINOR BY
GUARDIAN, VELLIAMMA ACHI, RESPONDENT.*

1919,
September,
2 and 3,
October,
1.

*Income-tax Act (VII of 1918), ss. 3, 9—Proprietor resident in British India—
Business outside British India and not carried on from British India—Income
not remitted to British India, whether taxable under the Act—Reference under
sec. 51—Right to begin.*

A resident in British India owning a money-lending business carried on for him outside British India by agents resident there, who merely keeps himself acquainted with the progress of the business and occasionally issues general instructions, is not liable to be taxed under the Act where the income from such business is not remitted to British India.

On a reference by the Board of Revenue under section 51 of the Income-tax Act the assessor and not the Board has the right to begin.

CASE stated and referred to the High Court under section 51 of the Income-tax Act (VII of 1918) by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Board of Revenue, Madras.

Ramanadhan Chetty, a minor, a resident of Kanadakathan in Ramanad district, was taxed by the Revenue authorities for income derived in his money-lending business which was carried on in Saigon (French territory) and other places outside British India, by his agents resident there. No part of the income of the business was remitted to British India. The assessee through his guardian was keeping himself acquainted with the progress of the business and was occasionally issuing general instructions from British India for the conduct of the business. The assessee appealed to the Board of Revenue that on these facts he was not liable to be assessed and asked that, if the Board was of a different opinion, the matter might be referred under section 51 of the Income-tax Act (VII of 1918) to the High Court for a decision. The Board accordingly made this reference to the High Court.

* Referred case No. 4 of 1919.

BOARD OF
REVENUE,
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CHETTY.

A. Krishnaswami Ayyar for the assessee. I have the right to begin as I am the aggrieved appellant before the Board and as it is at my instance that the Board has referred this matter to this Court.

The Hon. the Advocate-General for the Revenue Board. I have the right to begin as it is the Crown that wants this Court's assistance, and has made this reference.

ORDER.

We think that on this reference made under section 51 of the Indian Income-tax Act, VII of 1918, the assessee, on whose application reference was made by the Board of Revenue, is entitled to be heard first. The Board of Revenue under the section is bound to refer the question on an application made for the purpose by the assessee, and when the question is referred to the High Court, the High Court after hearing the case is to deliver judgment and the judgment so delivered will be sent to the revenue authorities. There is no ruling on the point and we have not been able to ascertain whether there has been any uniform practice on any similar reference, but having regard to the nature of the reference in this case and how it originated, that is, on the motion of the assessee who is aggrieved by the order of the revenue authorities, we are of opinion that the assessee's pleader ought to be heard first.

A. Krishnaswami Ayyar for the assessee. My client is not liable to be assessed. There are various classes of incomes that are liable to be assessed and there are various reasons for taxation under the Act. This class of income, viz., the income from business, is taxable for any one or all of the following reasons:— (1) if the business is situate in British India, (2) if the income from such business accrues or arises in British India or is deemed to so accrue or arise, (3) even if the business is situate outside British India, if the income is received in British India, (4) if the foreign business is carried on from British India, i.e., if it is controlled from here. Not one of these reasons exists in the present case. The income from this business is interest on moneys, but such interest is payable in this case only outside British India, for the place where the contracts of loan are made is outside British India and the place of payment of interest either by express or implied contract is outside British

BOARD OF
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India.—*Commissioner of Stamps v. Hope*(1), *Res v. Lovitt*(2) —compare section 17, explanation III, Civil Procedure Code (XIV of 1882). The facts alleged in this case, viz., that the principal keeps himself acquainted with the progress of the business and occasionally issues general instructions, do not amount either to carrying on the business from British India or effectively controlling the business from here. This business is done outside British India at the sole discretion of the local agents. The words 'accrue' or 'arise' in section 8 show that the income must actually or constructively be received in British India. Mere right to demand from here, the interest or the remittance of the income, without its actual remittance, into British India does not make the income accrue or arise in India. Reference was made to Stroud's Judicial Dictionary, Murray's Oxford Dictionary, Century Dictionary, Bouvier's Legal Dictionary and Webster's Dictionary for the meaning of the words 'accrue' and 'arise'. Reference was made to *Colquhoun v. Brooks*(3), *Colquhoun v. Brooks*(4) and *Lovell and Christmas, Limited, v. Commissioner of Taxes*(5) and *Commissioner of Taxes for New Zealand v. Eastern Extension Australasia and China Telegraph Company*(6). Under the English Income-tax Act and the Finance Act mere residence of a proprietor within the United Kingdom makes him liable to the tax even in respect of income earned elsewhere. The Indian Income-tax Act bases liability to taxation on receipt of income and not on residence. The words "deemed to arise or accrue" refer to cases such as those mentioned in sections 6 (2) and 8. Reference was made to sections 31 to 33, 3 (5), and 11 of the Act and to Chitty's statutes, Vol. 10, page 152.

The wording of the Indian Income-tax Act VI of 1886 is not different from that of the present Act. The revenue authorities for the last thirty years have interpreted it in the way I contend and income such as the one now in question was not taxed; practice under the repealed Act is a good guide for interpreting the new Act; see *Oriental Bank Corporation v. Wright*(7) and *Muthura Mohan Saha v. Ram Kumar Saha, Chittagong District Board*(8).

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| (1) [1891] A.O., 476 at p. 481. | (2) [1912] A.C., 212 at p. 218. |
| (3) (1888) 21 Q.B.D., 52. | (4) (1889) 14 App. Cas., 493. |
| (5) [1908] A.O., 46. | (6) [1906] A.C., 526 530, 533. |
| (7) (1880) 5 App. Cas., 842 at p. 856. | (8) (1916) 1 L.R., 48 Cal., 790 at p. 810. |

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The Hon. the Advocate-General for the Revenue Board. The assessee is liable to be taxed. Section 3 is only a general section as to what incomes are taxable; but section 9 supplements and enlarges the class of taxable businesses. Section 9 speaks of "any business," i.e., wherever situate. This income, though not actually remitted into British India is one that 'accrues' or 'arises' in British India within section 3 or it is at least one that must be deemed to accrue or arise within that section, as the proprietor has a *present right to demand remittance to him* of the same. Anything that is *payable at present or receivable* is something that accrues or arises and actual receipt is not necessary to constitute the income *accruing or arising*. That is the meaning of the word 'accrue'; see Century Dictionary, Bouvier's Law Lexicon, *Colquhoun v. Brooks*(1) and *Colquhoun v. Brooks*(2). After the words 'accrues' or 'arises' in section 3 (1) we must understand the words 'to a person.' As what is charged is the income, i.e., excess of receipts over expenses, place of payment by debtors is immaterial. Reference was made to sections 7, 10 (3), 31 to 33 and 14. The business though situate outside British India is carried on in British India, as it is from here that the business is controlled. A business is carried on at a place from which the business is controlled, whether the control is general or special, permanent or occasional.—*San Paulo Railway Company v. Carter*(3), *De Beers Consolidated Mines, Limited v. Howe*(4), *Cesena Sulphur Company v. Nicholson*(5), *Mitchell v. Egyptian Hotels, Limited*(6), and *Commissioner of Taxes for New Zealand v. Eastern Extension Australasia and China Telegraph Company*(7). The Indian Income-tax Act is in *pari materia* with the New Zealand Act dealt with in the last case; see also *Reo v. Lavitt*(8); Sanders' Income-tax Act, page 206. Practice under old Acts is relevant; but practice under modern Acts is not; see Craies' Statute Law, pages 81, 83 and *Trustees of Clyde Navigation v. Laird*(9). If any further facts are necessary for determining whether the business is one carried on from British India, they can be ascertained under section 51 from the Revenue Board.

(1) (1883) 21 Q.B.D., 52 at 59.

(3) [1896] A.C., 31 at 41.

(5) (1870) 1 Ex.D., 428.

(7) [1906] A.C., 526.

(9) (1888) 8 A.C., 658, 673.

(2) (1889) 14 App. Cas., 498 at 511.

(4) [1906] A.C., 435, 458.

(6) [1915] A.C., 1022 at 1037, 1032.

(8) [1912] A.C., 212.

A. Krishnaswami Ayyar in reply. Practice is relevant even as regards a re-enacting statute; see *Commissioner for Special Purposes of Income-tax v. Pemsel*(1) and *Yewens v. Noakes*(2) and Beale's Interpretation of Statutes, 2nd Edition, page 369. English decisions on 'carrying on business' are useless as they do not relate to profits; *San Paulo Railway Company v. Carter*(3). Control is no test.

JUDGMENT.—This is a case stated by the Board of Revenue, under section 51 of the Income-tax Act, VII of 1918, in which the question involved is whether the assessee, a Nattukkottai Chetti, who is the proprietor of a money-lending business, carried on by his agents on his behalf in various places including Saigon, Sodac and Khando situated in French Cochin-China, is liable to be taxed, under the provisions of this Act, in respect of the income of the business, though that income is not received in British India.

The learned Advocate-General on behalf of the Crown has based his contention on two grounds; firstly, that the income in question accrued or arose to the assessee in British India, inasmuch as he was entitled to call upon his agents to pay the income to him in British India, and, secondly, that, upon the case stated by the Board, the business the income of which is sought to be taxed must be held to have been carried on in British India and, therefore, the income of that business is taxable.

It will be convenient to dispose of the last contention first. The facts in this connexion as submitted are as follows:—The entire business operations producing the income are conducted at the places abovementioned outside British India by agents appointed for fixed periods, who use their own discretion in lending money to customers. The only part taken by the proprietor in connexion with the business is to acquaint himself with the state of the business abroad and occasionally to issue general instructions. It is impossible for us, on these facts, to hold that the business is one carried on in British India. The learned Advocate-General cited several English rulings in

(1) [1891] A.C., 531 at 591.

(2) (1880) 6 Q.B.D., 530 at 535.

(3) [1896] A.C., 42.

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support of his arguments, but, as pointed out by Lord HALSBURY in *San Paulo Railway Company v. Carter*(1) [see also per Lord LOREBURN in *De Beers Consolidated Mines, Limited v. Howe*(2)] it is a question of fact where the trade is carried on; at all events, it is an inference to be drawn from the facts and circumstances of each case. In that case the railway in Brazil, the earnings of which were sought to be assessed, was owned by a company whose registered office was in England; the business of the company was managed by the directors in England; the directors purchased in England and sent out to Brazil the materials and plant necessary for the purposes of the railway; and the accounts were kept and the balance sheets and reports were made out in London, where also the meetings were held, and all dividends were declared and paid. On those facts, the learned Lords held that the trade was carried on in England and was, therefore, assessable, under the first clause of schedule D of 5 and 6 Vict., Cap. 85, section 100. The business here is that of money-lending and the mode of carrying it on is left entirely to the discretion of the agents in the places where the lending operations are conducted. The mere issuing of general instructions occasionally by the proprietor in British India and the fact of his being supplied with information from time to time as to the state of the business would not at all bring the case within the purview of the ruling referred to. As in no sense, in my opinion, could the business in this case be said to be managed and controlled by the proprietor in British India, the statement of Lord LOREBURN in *De Beers Consolidated Mines, Limited v. Howe*(2), "that the real business is carried on where the central management and control actually abides" has no application. On the other hand, the observations of the Privy Council in *Lovell and Christmas, Limited v. Commissioner of Taxes*(3), apply rather closely to the facts of this case. Their Lordships observe

"One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where

(1) [1896] A.C., 31.

(2) [1906] A.C., 455.

(3) [1908] A.C., 46 at p. 51.

such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income-tax Acts, so as to render the profits liable to income-tax."

It is, therefore, unnecessary to express an opinion on the question whether the income of a business controlled and managed by a person residing in British India, although the actual operations giving rise to the income are carried on, as in this case, outside British India, would be assessable to income-tax.

At one time the Advocate-General seemed even to argue that it is section 9 (1) by which the tax payable on account of income derived from business is to be determined. All that it says is

"that the tax shall be payable by the assessee under the head 'Income derived from business' in respect of the profits of any business carried on by him,"

and the rest of the section deals with the mode in which such profits shall be computed. If section 9 (1) be taken to furnish the whole test, then section 3 (1) would have to be excluded from consideration in dealing with the income derived from business. But the Advocate-General was not really prepared to go so far; at any rate, there can be no doubt that section 9 (1) must be read along with section 3 (1) and that it is the latter that lays down the test to be applied in determining all incomes assessable to the tax including income derived from business. If a certain income derived from business cannot be said to accrue or arise or to be received in British India, that income would not be assessable by virtue of anything contained in section 9. In fact, the main argument in this connexion has been that the income of a business, which is managed and controlled by the proprietor in British India, accrues or arises in British India within the intendment of law and, because it so accrues or arises, it is taxable.

The first part of the argument does not really present any difficulty, for the language of section 3 seems to be unambiguous. The tax is leviable with reference to the place where the income accrues or arises or is received and not, with reference to the residence of the person who is entitled to the income. This seems to be the entire scheme of the Act and sections 31 and 33 would appear to be illustrations of that principle. Whatever meaning be attached to the words 'accrue' or 'arise' such as,

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'grows' or 'becomes due or payable,' it is impossible to hold that the income in this case could be said to have accrued or arisen in British India. If loans are made and the borrowers reside outside British India, and if accounts are adjusted, the moneys lent are realized with profit or are capable of being realized, and the profits are periodically ascertained and dealt with outside British India, it is impossible to hold that the income of such business accrued or arose in British India.

A number of English decisions were discussed before us but it is unnecessary to deal with them in any detail, because the English Statute under consideration in those cases differs in many material respects from the Indian Act. In the English Statute the place of residence of a person is a basis of assessment but is not so, as pointed out above, in Act VII of 1918. The case of *Colquhoun v. Brooks*(1) does not lay down any principle of construction which can be of use in this case.

Then the learned Advocate-General at one stage of his argument seemed to contend that the income sought to be assessed should be deemed 'to accrue or arise or to be received in British India under the provisions of this Act,' but this argument is clearly untenable. In the first place, this phrase refers to cases set out in the Act itself (see for instance section 6 (2), section 8) and none of them have any application to the case under consideration; and in the second place, as I have shown, there is no general rule of law by virtue of which the income sought to be assessed could be said to accrue or arise in British India.

If we look at the history of this enactment, the case sought to be made on behalf of the Crown appears to be still more untenable. The provision of Act VII of 1918, so far as the present question is concerned, is practically in the same words as that of the Income-tax Act of 1886. There the word 'income' used in the Act is defined as "income and profits accruing and arising or received in British India" and the present Act says that it shall apply to "all income if it accrues or arises or is received in British India." Whether there is any difference intended at all between the phrase "accrues and arises" and the phrase "accrues or arises," it could not reasonably be said that there has been any such change as to affect the question we are dealing with. Act VI of 1886 was in force for more than

(1) (1888) 21 Q.B.D., 52, and (1889) 14 App. Cas., 493.

thirty years before the present Income-tax Act was enacted, and the Advocate-General himself has informed us that, at least before 1915 or 1916 when he was consulted with respect to certain cases of a nature similar to this, the general practice of the Revenue Department was not to assess income of businesses carried on outside British India but the proprietor or proprietors of which resided in British India. We are justified in assuming that the legislature was aware of this practice, and if with that knowledge they repeated in the new enactment the same words on which the practice of the Government was founded, it gives rise to the presumption that they did not want to assess such incomes. If the legislature intended to tax these incomes and it would have been a very substantial source of public revenue, they could have easily said, as in the English Statute, that income accruing to a person in British India from any business wherever carried on is liable to be assessed.

I would hold, therefore, that the income of the business under reference is not liable to be assessed under the provisions of Act VII of 1918.

OLDFIELD, J.—The question referred is of considerable importance. But the considerations, which are really material, can be stated shortly.

Respondent has in the French Territory of Saigon a money-lending business conducted by an agent, and (according to the statement in his petition, which is adopted in the case submitted to us) keeps himself acquainted with its progress and occasionally issues general instructions. He however resides in this Presidency and receives no income from Saigon. On these facts is he liable for tax on the profits of this business or, as he contends, will he be so liable, only if and when the profits are remitted to him here?

I agree with the learned Chief Justice that the answer to the first of these questions must be in the negative; and to justify that conclusion I refer to the scheme of the Income-tax Act of 1918, under which the case has to be decided. Section 3 (1) of that Act runs:

"save as hereinafter provided this Act shall apply to all income from whatever source it is derived; if it accrues or arises or is received in British India or is under the provisions of the Act deemed to accrue or arise or to be received in British India".

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After sections 3 (2) and 4 which specify certain general exclusions not at present material, there is the charging section, section 5, in which six classes of income are enumerated with the statement that, save as thereafter provided, they shall be chargeable in the manner thereafter appearing; and the ensuing sections 6 to 11 specify the manner, in which each class is to be assessed, each beginning "The tax shall be payable by an assessee under the head":—and then one of the six classes in section 5 is specified and the manner of assessment appropriate to it is described. Of the remaining provisions only sections 7, 10 (3), 31 and 33 have been relied on and to them I return. The point is at present that section 3 (1) affords a comprehensive definition of income for the purpose of the Act and that this definition is to be regarded as controlling, not as enlarged by, the language subsequently used in classifying the different descriptions of such income and prescribing the method of assessment for each.

This is important, because the main argument for the Crown is that the description of one such class in section 9 "Income derived from business" and the direction to assess such income on "the profits of any business carried on by" the assessee are either supplementary to or can be substituted for the definition of income in section 3 (1); and that the carrying on of the business in British India, which, for the purpose of argument, may be regarded as established, is sufficient to render respondent chargeable. For the reasons given I am unable to accept that construction, and I therefore turn to the distinct line of argument also attempted, that the income accrued to respondent here with direct and exclusive reference to the wording of section 33 (2), because in the alternative he has carried on here the business in which the income originated, or he was here when his right to the income in his agent's hands elsewhere became enforceable. That argument is not in my opinion tenable in either of these forms with reference to any legitimate interpretation of the word "accrue" or to the provisions of the Act, which have also been relied on.

The primary meaning given for the word in the Oxford Dictionary is "to arise or spring as a natural growth or result"; in Webster's Dictionary, "to come by way of increase"; and in Wharton's Law Lexicon "to grow to or arise." These, the

only authorities referred to, show that the origin of the thing which accrues, in the exertions of some person or otherwise, is not an essential element in the definition of the word "accrue" and cannot affect its application. This is fatal to the attempt made in the first form of the argument to identify the place of accrual referred to in section 3 (1) with the place in which such exertions, in the present case by carrying on business, have taken place. I, however, refer at once to sections 10 (3), 31 and 33 of the Act, in the light of which it is contended that section 3 (1) should be construed. It might be sufficient to say that the first, in which a very definite exception is specified, and the others, occurring in a chapter headed "Liability in special cases," cannot be invoked as exemplifying any general principle or controlling a general definition. But in fact the sole similarity between the cases dealt with in these provisions and the case before us is that all relate to profits earned where they are not enjoyed. The special provision in section 10 (3) for liability to assessment in British India of professional fees, which a resident there has received elsewhere, can be referred to no general foundation and is merely the recognition of a presumption of law that the earnings of a resident in British India will be brought there for enjoyment, whilst sections 31 and 33 (of which the former statedly deals only with income chargeable under the Act) are easily intelligible provisions for the liability to the tax, of the person through whose hands in one capacity or another the profits in question will pass in British India and whom therefore the Crown can reach in order to collect it. It may, on the other hand, be observed that the existence of a special and explicit provision in section 10 (3) for the taxation of one kind of income not received in British India is strong reason for refusing to hold others liable by implication. The argument of the learned Advocate-General in its first form is accordingly unsustainable with reference either to the significance of the word "accrue" or to any construction of section 3 (1) with reference to other parts of the Act; and it must be rejected.

His argument in its second form derives at first sight some support from the secondary meanings of "accrue" given in the Century Dictionary as used in law for "to become a present and enforceable right" and in Bouvier's Law Lexicon as "to become a present right of demand," the suggestions being that

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respondent's profits in Saigon accrued to him in British India, when, being in the latter place, he had a right to demand them of his agent in the former; and to show that income is regarded in the Act as accruing, before it is received and when there is only a right to receive it; reference has been made to the use of the word "receivable" in section 7. There is however a short answer to this. Firstly, this meaning of "accrue" is excluded by the context in section 3 (1). For it is not the right to demand the profits, which it is proposed to tax, but the profits themselves. And secondly, if the word "receivable" in section 7 is interpreted in the light of the provision in section 15 (3) for the method of payment of the tax on interest on securities, the description of income with which section 7 deals, its use will be seen to involve recognition, not of any kind of income as existing independently of and before its receipt, but of income, to which liability for the tax attaches at the moment of its receipt, when the tax is to be deducted by the person responsible for its disbursement.

Some attempt has been made to support this argument by reference to English decisions. But it is useless to deal with them at length in view of the material differences between the wording of the Act before us and that of the English statute in question in *Colquhoun v. Brooke*(1), and of the New Zealand Statute in *Commissioner of Taxes for New Zealand v. Eastern Extension Australasia and China Telegraph Company*(2), and *Lorell and Christmas, Limited v. Commissioners of Taxes*(3). My conclusion is that respondent has not been shown to be liable for assessment; and that disposed of the main question raised by the case submitted to us.

It does not however dispose of the subsidiary question, which the learned Advocate-General has also argued, whether respondent carries on business in British India within the meaning of the Act. A decision on that question has been unnecessary, because, even on the assumption that it should be answered in the affirmative, a conclusion in favour of respondent's liability cannot be reached. If we had had to decide it, we should have had to call for much more definite information as to the facts

(1) (1889) 14 App. Cas., 493.

(2) [1906] A.C., 528.

(3) [1908] A.C., 46.

than we have been given; and I am constrained to express my doubts whether a question, which is so largely one of fact with reference to the method of carrying on the business of a particular assessee, is in any substantial degree one with reference to the interpretation of the Act, which we can deal with to advantage under section 51.

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SESHAGIRI AYYAR, J.—The undisputed facts are these. The principal (he is a minor) resides in Kanadugathan in the Madura district. He carries on the business of money-lending in and out of British India. Some of the places are within the British Empire, though outside British India, others are in foreign territory subject to the rule of France, Holland, etc. The trade in question is in Saigon which is outside the Empire. The point of agreement in all these businesses is that they are owned by a principal residing in British India and are worked by agents residing outside. On these facts the question for our opinion is whether the income from the trade in Saigon is assessable to income-tax in British India. It is assumed and not disputed that that income has not been transmitted to the principal in India.

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The question has been very elaborately argued. I shall in the main content myself with an examination of the statute law, because case law is not likely to help us much. Before doing that, I wish to draw attention to some well recognized principles bearing on the theory of legislation regarding income-tax. It is pointed out in Bar's International Law that

"it is the principle of domicile that regulates the levy of Income-tax."

Again—

"This is certainly the rule in most of the systems and that it should be so is perhaps to some extent accounted for by the fact that attempts to levy and to collect income-tax in a foreign country would very frequently encounter insurmountable difficulties."

The same principle has been a little more clearly stated in Wharton's Conflict of Laws, Volume I, section 80 (a). That learned author says:—

"The power of taxation of any state is, of necessity, limited to persons, property or business within its territorial jurisdiction."

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He further on states—

“that the principle is so fundamental that it has been declared that an act of state legislature in violation thereof would be as much a nullity as if in conflict with the most explicit constitutional inhibition.”

The *situs* of personal property for the purposes of taxation is therefore of the utmost importance in determining the limitations of the taxing power and the principles which should control the exercise of that power. He also refers to another maxim “*Mobilia sequuntur personam*” and concludes that legislatures should adopt either the one or the other and that the comity of nations can be preserved only if there is a clear understanding on this question. The English Income-tax Acts appear to have been based on the first of these principles. Lord HERSCHELL in *Colquhoun v. Brooke*(1) says

“the Income-tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.”

The same principle is traceable in the provisions of the Indian Income-tax Act. There is no reason for imputing to the Indian Legislature an intention to depart from the principle which has been so well recognized in England. One other observation preliminary to the examination of the sections may be made, and that relates to the rule of construction of all Income-tax enactments. In *Partington v. the Attorney-General*(2), Lord CAIRNS stated the rule thus—

“As I understand the principle of all fiscal legislation, it is this. If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction certainly such a construction is not admissible in a taxing statute where you should simply adhere to the words of the statute.”

In *Coltress Iron Company v. Black*(3) Lord BLACKBURN stated the same rule somewhat differently. The noble Lord said:

“No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him. But when that intention is sufficiently shown it is not open to speculate on what would be the fairest and most equitable mode of levying that tax.”

Bearing the above two considerations in mind—the one which is a guide to the principle of legislation and the other which is a guide to the construction of the language of the statute—I shall proceed to examine the sections of Act VII of 1918 and see whether the contention of the Board of Revenue is sustainable.

It was not seriously disputed by the learned Advocate-General that section 3, clause (1), is the governing section in regard to income-tax. The scheme of the Act seems to be this. There is first a general provision as to the *locale* of the income which is to be taxed. That is contained in section 3, clause (1). There are two parts of that clause. The first part deals with income actually accruing or arising or received in British India. The second, introduces a fiction by which certain incomes are deemed to have accrued, arisen or received in British India. The same section in clause (2) gives various classes of incomes exempted from the payment of tax. Section 4 exempts agricultural income. In section 5 an enumeration of the classes of income referred to in section 3, clause (1) is made and six categories are mentioned. From section 6 up to section 11 the mode of assessing income from the various heads tabled in section 5 is elaborated. The case we are dealing with comes under section 9 to which I shall advert later on. Sections 12 to 14 deal with the exemptions of a peculiar character. These sections exhaust Chapter I. Chapter II deals with the deductions of assessment with which we are not concerned. Chapter III deals with the procedure for what is known as summary assessment, with respect to a particular class of income. Then comes Chapter IV which was much commented upon during the argument. The scheme of this part of the Act is to amplify the principle stated in section 3, clause (1). It is intended to affect two classes of persons—persons who are not *sui juris* but who are resident in British India and carry on business through an agent or guardian or the Court of Wards, and persons *sui juris* who are not resident in British India but who conduct their business in British India through an agent. This is really another illustration of the

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(1) (1881) 14 App. Cas., 493, at p. 504.

(2) (1869) L.R., 4 H.L., 100.

(3) (1841) 6 App. Cas., 815.

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second clause of section 3 (1). It states a notional rule of law, the object aimed at being that the owner of the income should not escape liability either because he is not *sui juris* or because he is not a resident in British India, provided he receives the benefit of transactions in British India through somebody who represents him. The other chapters of the Act are not material and I shall not deal with them.

There is one section however on which a preliminary argument was addressed to us and it is as well that I should say a word about it.

The reference was made under section 51 to the High Court. It was not disputed that the reference was rendered necessary by the request of the assessee that in case the Board of Revenue did not agree with his view of the case, the matter should be placed before the High Court for their opinion. The learned Advocate-General contended that the Board of Revenue should have the right to begin the argument on the reference. Mr. Krishnaswami Ayyar contended that his client the assessee was really in the position of the plaintiff and that he was entitled to begin. In my opinion the contention of the learned vakil for the assessee is right. It is his case that was referred and it was at his instance that the reference was made. It is he that challenged the action of the Board, and although the letter has come from the Board of Revenue, it is as if he had preferred an appeal to the High Court against the conclusion of the Board of Revenue. In my opinion therefore, the Advocate-General as representing the Board was not entitled to be heard first. But this is only by the way. I now come back to the discussion of the merits of the respective contentions.

If my analysis of the Act is right, it follows that our answer must depend upon the meaning we attach to the words,

"to all income from whatever source it is derived if it *accrues or arises or is received in* British India."

Reading both parts of section 3 (1) together, the income should either actually or notionally accrue, arise or be received in British India. Various definitions of the words "accrues or arises" were placed before us. In Murray's Oxford Dictionary the words "accrues and arises," are regarded as synonymous. In the Century Dictionary the word accrue is defined to mean "to become a present or enforceable right to demand." Stroud

defines 'arising in the United Kingdom' as 'coming into the person's hands in the United Kingdom.' To my mind, all these definitions contemplate actual receipt of income and not an income which may at some future time pass into the hands of the person resident in British India. In a given year a particular sum of money may be remitted from foreign parts; that income would be taxable. But if that is retained in the hands of the agent for adjustment in the foreign country or for further employment there, can it be said that the income has accrued to the principal in British India? The learned Advocate-General argued that the second part of section 3 (1) made it clear that the income in the hands of the agent is income in the hands of the principal; and he referred to sections 31 and 33 for this proposition. It seems to me that these two sections are inconsistent with the contention advanced. I have already referred to the nature of these two sections. Now I shall examine once again section 33 on which so much stress was laid by the Advocate-General. There are two parts of it. One relates to 'profits or gains accruing or arising to such a person whether directly or indirectly through or from any business connexion in British India'; and the other to what 'shall be deemed to be income accruing or arising within British India.' The object of this section, as I understand it, is to observe the comity of nations which directs that all nations in enacting fiscal laws should as far as possible put a territorial limit to the operation of the fiscal enactment. In other words they should only tax property *in situ*. It is with that object, this section enacts that the income which is transmittable to a person outside British India shall be deemed to be income arising in British India if the non-resident foreigner has business in British India and transacts that business in British India through an agent. The object is secured by taxing the income made in British India before it leaves British India. Whether this theory may not result in the imposition of a double tax where the principal resides within the Empire, but outside British India it is unnecessary for us to consider: also whether it would not conflict with the laws of other nations where the principal resides in a foreign territory. What is material is, that this section introduces a fiction of law as regards a non-resident principal, in order that income due to him may be regarded as accruing or arising in British India.

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A significant omission by the legislature is almost fatal to the contention of the learned Advocate-General. Whereas the income received by an agent in British India on behalf of a foreign principal has been notionally described as income accruing or arising in British India, the converse, namely, of income belonging to a resident principal which has been received out of British India by an agent is not similarly brought under a legal fiction. The obvious principle which guided the legislature was that the tax should be imposed only on what is actually received or made in British India. I must therefore hold that the learned Advocate-General's contention that the second clause of section 3 (1) affects the receipt of income by the agent in Saigon is not sustainable.

Then it was attempted to argue that section 9 is comprehensive enough and it should not be fettered by reference to section 3. I do not think this contention is admissible at all. I shall say only a few words on the meaning to be attached to the words 'in any business carried on' in section 9. But even supposing that we come to the conclusion that the principal residing in Kanadukathan was carrying on business in Saigon, it will still have to be established that the income accrued or arose in British India, if it is to be taxed.

Now I shall deal with the contention put forward that the business was carried on in British India. The facts mentioned in the order of reference do not justify us in holding that the business in Saigon was controlled by the principal residing in Kanadukathan. As has been said in some cases, these are not facts which would enable us to hold that the brain was in Kanadukathan which directed the operations in Saigon. Mr. Krishnaswami Ayyar drew our attention to the difference between business being carried on and profits being received, as observed in *San Paulo Railway Company v. Carter*(1). The language employed by some of the noble Lords in that case was very strongly relied on by the learned Advocate-General. The observations of Lord DAVEY who subsequently explained the position in *Commissioners of Taxation v. Kirk*(2) do not support the view that by giving general instructions the business is carried on in the country from which these instructions issue.

(1) [1896] A.C., 31.

(2) [1900] A.C., 588.

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Moreover, the facts in *De Beers Consolidated Mines, Limited v. Howe*(1) and in *Cesena Sulphur Company v. Nicholson*(2) and in *Mitchell v. Egyptian Hotels, Limited*(3) were different from the facts on which we have been asked to give our opinion. I do not therefore think any good will be served by discussing these cases. In my opinion the facts to which our attention has been drawn are not specific enough to enable us to say that the business was really carried on in British India. There is only one other remark that need be made. It was elicited in the course of the argument that until the year 1914 or 1915 no income-tax was levied in respect of foreign trades of principals residing in British India. The old Act of 1886 was repealed in 1918. So, for about 30 years at least, the executive Government in India did not levy income-tax upon business of this kind. Mr. Krishnaswami Ayyar relied on this practice and quoted *Commissioner for Special Purposes of Income tax v. Pemsal*(4) and *Yewens v. Noakes*(5) as enunciating that the practice under a repealed enactment can be looked into for construing the later enactment. Whatever may be the weight we may attach to it, it seems to me that Courts will not be acting wrongly in referring to the practice in construing the Act. However, I do not invoke the aid of this practice as in my opinion there is nothing in the Act which on the face of it imposes a duty upon income of this kind. As I started by saying, unless the words are clear, a fiscal enactment should not be construed as imposing a tax by implication. For these reasons I am of opinion that the assessee is not taxable.

The Court.—We fix the assessee's Vakil's fee at Rs. 250; and his costs will be paid by Government within three months from this date.

N.R.

(1) [1906] A.C., p. 455.

(3) [1915] A.C., 1022.

(2) (1876) 1 Ex. D., 428.

(4) [1891] A.C., 531.

(5) (1880) 6 Q.B.D., 530.

APPELLATE CIVIL—FULL BENCH.

Before Sir Abdur Rahim, Kt., Offg. Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919,
October, 1.

NEELAVENI (PETITIONER), PLAINTIFF,

v.

NARAYANA REDDI (RESPONDENT), DEFENDANT.*

Civil Procedure Code (V of 1908), O. IX, r. 13—*Ex parte* decree, power of Court to set aside.

A Court has no power, apart from the provisions of Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* decree passed by itself.

Somayya v. Subbamma, (1903) I.L.R., 26 Mad., 599, overruled.

CIVIL REVISION PETITION filed under section 115, Civil Procedure Code, and section 107 of the Government of India Act, against the order of S. SUBBAYYA SASTRI, District Munsif of Tirupati, in Civil Miscellaneous Petition No. 244 of 1918 in Original Suit No. 623 of 1917.

One Neelaveni (the petitioner) filed a suit against one Narayana Reddi (the respondent) for the recovery of about Rs. 1,400 due on a promissory note and obtained a decree *ex parte*. The defendant filed an application under Order IX, rule 13, Civil Procedure Code, to set aside the *ex parte* decree and in support thereof filed an affidavit stating that he himself, his vakil, and his witnesses were present on the morning of the day of hearing, that the Court having then adjourned the case all of them left the Court, and that when the Court suddenly took up the case for hearing on the evening of the same day all of them were absent. On this petition the Court passed the following order " . . . There is no truth in the allegations of the petitioner that he was ready on 18th April (the day of hearing) with his witnesses; the allegations in the petition are even rash, hasty and ill-advised. Looking however to the heaviness of the amount involved and the relationship subsisting between the parties and looking to the unwillingness of the present surety to continue his

* Civil Revision Petition No. 1212 of 1918.

obligation (i.e., of the person who stood surety for any decree that might be passed), I shall allow the petition as a special case and give him a chance of contest"

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Against this order setting aside the *ex parte* decree, the plaintiff preferred this Revision Petition to the High Court.

N. Chandrasekhara Ayyar for petitioner.

V. Ramadas and T. Kumaraswamayya for respondent.

This petition came on for hearing in the first instance before SESHAGIRI AYYAR and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The facts are not in dispute. An *ex parte* decree was passed in the suit. The defendant applied to have it set aside under Order IX, rule 13, Civil Procedure Code. The District Munsif found that the allegations in the affidavit were not true. In effect, his finding would not have enabled him to set aside the decree under rule 13. He, however, held that as the amount involved was heavy and as a person who stood surety for the defendant on a previous occasion refused to continue to be surety, the decree should be set aside.

Against this order a Civil Revision Petition under section 115, Civil Procedure Code, has been preferred to this Court. Mr. Chandrasekhara Ayyar contended that a Court has no power, apart from the provisions of rule 13, to set aside an *ex parte* decree. Mr. Ramadas, on the other hand, argued that the conditions mentioned in the rule are not exhaustive and do not restrict the inherent power of the Court to set aside *ex parte* decrees.

In this Court, the view contended for by the learned vakil for the respondent is supported by *Somayya v. Subbamma*(1) and *Adyapadi Ramanna Udpa v. Krishna Udpa*(2). There are observations in *Murugappa Chetty v. Rajasami*(3) and in *Gopala Row v. Maria Susaya Pillai*(4), which support the view taken in *Somayya v. Subbamma*(1). On the other hand there is a considered judgment of this Court by two Judges in *Venkatarama Aiyar v. Nataraja Aiyar*(5), which dissents from *Somayya*

(1) (1903) I.L.R., 26 Mad., 599. (2) (1914) 27 M.L.J., 167.
(3) (1912) 22 M.L.J., 284, at p. 294. (4) (1907) I.L.R., 30 Mad., 274, at p. 277.
(5) (1913) 24 M.L.J., 285.

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v. Subbamma(1). *Karupayee v. Chinnammal*(2) is also inconsistent with *Somayya v. Subbamma*(1). We have refrained from discussing decisions of the other Courts, as, in our opinion, it is desirable that there should be consistency on a question of procedure in the same Court. In these circumstances and with a view to enunciate for the benefit of the mufassal Courts a clear and consistent view on the question, we think it desirable that the following question should be referred for the opinion of the Full Bench.

"Has a Court power, apart from the provisions of rule 13, Order IX, Civil Procedure Code, to set aside an ex parte decree passed by itself?"

ON THIS REFERENCE—

N. Chandrasekhara Ayyar for petitioner.—A Court can set aside an ex parte decree only on the grounds mentioned in Order IX, rule 13, Civil Procedure Code. There is no inherent power to set aside a decree on any other ground. The decisions in *Somayya v. Subbammal*(1) and *Murugappa Chetty v. Rajasami*(3) and the obiter dictum in *Gopala Row v. Maria Susaya Pillai*(4) are wrong. The decisions of this Court in support of my view are, *Venkatarama Aiyar v. Nataraja Aiyar*(5), *Adyapadi Ramanna Udpa v. Krishna Udpa*(6) and *Karuppayee v. Chinnammal*(2). Non-appearance for sufficient cause is within Order IX, rule 13. Section 151, Civil Procedure Code, cannot be invoked where other remedies such as review, revision or appeal are available; see *Muthia Chettiar v. Bava Sahib*(7). The essence of a Code is to be exhaustive on the subjects it deals with; *Gokul Mandar v. Pudmanund Singh*(8). The case of *Hukum Chand Boid v. Kamalanand Singh*(9) gives a list of what inherent powers a Court generally has. In *Anantaramu Shetty v. Appu Hegade*(10) it was held that there is no inherent power

- (1) (1908) I.L.R., 28 Mad., 592. (2) (1914) 16 M.L.T., 101.
(3) (1912) 22 M.L.J., 234. (4) (1907) I.L.R., 30 Mad., 274, at p. 277.
(5) (1913) 24 M.L.J., 235. (6) (1914) 27 M.L.J., 167.
(7) (1914) 27 M.L.J., 605, at p. 600.
(8) (1902) I.L.R., 29 Cal., 707, at p. 715 (P.C.).
(9) (1906) I.L.R., 33 Cal., 927. (10) (1919) 37 M.L.J., 162.

of review in cases coming under the Religious Endowments Act. As to want of inherent power; see *Esmail Ebrahim v. Haji Jan Mahomed*(1). *Manilal Dhunji v. Gulam Hussein Vazeer*(2), *Tyeb Beg Mahomed v. Allibhai*(3) hold that if the Code does not apply there is inherent power to set aside an ex parte decree. *Lalta Prasad v. Ram Karan*(4) and *Nalladaroo v. Hari Kissen Rathi*(5) hold that there is an inherent power; *Lalta Prasad v. Nand Kishore*(6) holds the contrary view.

V. Ramadoss (with *T. Kumaraswamayya*) for respondent.—Order IX, rule 13, deals in its first part both with an inherent power to set aside an ex parte decree and a power to set aside an application on the grounds mentioned later on in that rule. Even if that rule does not expressly deal with inherent power, there is an inherent power otherwise; see section 151, Civil Procedure Code. The second part of the rule only says that the Court shall set aside under certain circumstances. It does not say that in other circumstances the Court cannot; see *Somayya v. Subbamma*(7), *Murugappa Chetty v. Rajasami*(8), *Gopala Row v. Maria Susaya Pillai*(9). Compare Order-XLI, rules 19 and 21 of the present Code which are exactly similar in wording to Order IX, rule 13; cf. Order XLIII, clauses (c) and (d).

Even in a case where both the pleader and the defendant are unable to account for their absence satisfactorily, the Court can set aside the ex parte decree; see *Adhyapadi Ramanna Udpa v. Krishna Udpa*(10). The other High Courts hold that there is an inherent power—*Lalta Prasad v. Ram Karan*(4), *Nalladaroo v. Hari Kissen Rathi*(5), *Bibi Tasliman v. Harihar Mahto*(11) (a case arising under the Transfer of Property Act) *Madhavanand Ram v. Madhu Mahto*(12) *Sudevi Devi v. Sovaram Agarwallah*(13), *Tyeb Beg Mahomed v. Allibhai*(3), *Abdool*

- (1) (1908) 10 Bom. L.R., 904. (2) (1889) I.L.R., 13 Bom., 12.
(3) (1907) I.L.R., 31 Bom., 45. (4) (1912) I.L.R., 34 All., 426, at p. 428.
(5) (1918) 48 I.C., 961 (Calo.). (6) (1900) I.L.R., 22 All., 66 (F.B.).
(7) (1903) I.L.R., 28 Mad., 599. (8) (1912) 22 M.L.J., 284, at p. 295.
(9) (1907) I.L.R., 30 Mad., 274, at p. 277.
(10) (1914) 27 M.L.J., 167. (11) (1905) I.L.R., 32 Cal., 253, at p. 256 (F.B.).
(12) (1914) 27 I.C., 812 (Calo.). (13) (1906) 10 C.W.N., 806.

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Hoosein v. Esmailji(1). Compare *Ghuznavi v. The Allahabad Bank, Ltd.*(2). I submit that *Venkatarama Aiyar v. Nataraja Aiyar*(3) is wrong. *Radha Raman Shaha v. Pran Nath Roy*(4) and *Khagendra Nath Mahata v. Pran Nath Roy*(5) do not really touch this question of inherent power. If at all, they are in my favour as they approve of *Pran Nath Roy v. Mohesh Chandra Moitra*(6). In 18 Halsbury, page 215, it is laid down that Courts have an inherent power to set aside *ex parte* decrees.

N. Chandrasekhara Ayyar in reply.—No analogy can be drawn from the English practice as the English rule is clearly wider.

OPINION.

ABDUR
RAHIM,
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ABDUR RAHIM, OFFG. C.J.—The question referred to us in this case which is in these words: "Has a Court power, apart from the provisions of rule 13, Order IX, Civil Procedure Code, to set aside an *ex parte* decree passed by itself?" has been fully discussed before us and I shall shortly express my opinion. Upon an application made to him under Order IX, rule 13, Civil Procedure Code, the District Munsif, while holding that it was not proved that the summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, set aside the *ex parte* decree passed against the respondent, observing

"looking, however, to the heaviness of the amount involved and the relationship subsisting between the parties and looking at the unwillingness of the present surety to continue his obligation, I shall allow the petition as a special case and give him a chance of contest."

I should say that, even if the Court had inherent jurisdiction to set aside an *ex parte* decree on grounds other than those mentioned in rule 12, it could have no jurisdiction to do so arbitrarily and on fanciful grounds, such as those mentioned in the District Munsif's judgment. Section 151 says:

(1) (1910) 12 Bom., L.R., 462.

(2) (1917) I.L.R., 44 Cal., 929 (F.B.). (3) (1913) 24 M.L.J., 235.

(4) (1901) I.L.R., 28 Cal., 475 (P.O.).

(5) (1902) I.L.R., 29 Cal., 395 (P.O.).

(6) (1907) I.L.R., 24 Cal., 546 (P.O.).

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

An order, such as in this case, could not, by any stretch of language, be described as being

"necessary for the ends of justice or to prevent abuse of the process of the Court."

This section, as is well known, was inserted in the Code of 1908 in accordance with a number of decisions in which the inherent power of the Court *ex debito justitiae* was recognized.

Order IX, rule 13, provides a special summary remedy for a particular class of cases mentioned therein, i.e., those in which summons was not duly served on the defendant or in which he was prevented for any sufficient cause from appearing when the suit was called on for hearing and the jurisdiction is limited to the Court by which the decree was passed. To hold that such a remedy can be extended to cases other than those mentioned would be going against the clear intention of the legislature and cannot be brought within the scope of any inherent power recognized by section 151 or the rulings on the subject.

The opposite view was propounded, so far as it appears, for the first time by BHASHYAM AYYANGAR, J., in *Somayya v. Subbamma*(1), approved by SUNDARA AYYAR, J., in *Murugappa Chetty v. Rajasami*(2), and also to some extent supported by what appears to be a casual dictum of WHITE, C.J., in *Gopala Row v. Maria Susaya Pillai*(3). On the other hand a Division Bench of this Court in *Venkatarama Aiyar v. Nataraja Aiyar*(4), consisting of SANKARAN NAYAR, J., and myself dissented from the ruling of BHASHYAM AYYANGAR, J., and there is really nothing useful to be added to the reasons given in SANKARAN NAYAR, J.'s judgment in which I concurred.

So far as there was any attempt made in *Somayya v. Subbamma*(1) to construe the provision of the Civil Procedure Code, it seems to me that to read the first part of the rule that the defendant against whom an *ex parte* decree is passed may

(1) (1903) I.L.R., 28 Mad., 599.

(3) (1907) I.L.R., 30 Mad., 274

(2) (1912) 22 M.L.J., 281.

(4) (1913) 24 M.L.J., 235.

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apply to the Court by which the decree was passed for an order to set it aside as conferring a jurisdiction to pass such an order in cases other than those mentioned in the rest of the section is apparently fallacious and unsound. The main argument of BHASHYAM AYYANGAR, J., is based upon grounds of hardship in certain class of cases mentioned in the judgment and which in his opinion would not be covered by Order IX, rule 13. It has been pointed out in *Venkatarama Aiyar v. Nataraja Aiyar*(1) that in all those cases remedy could be obtained either by appeal or by review.

The question of inherent jurisdiction of the Court was elaborately discussed in *Hukum Chand Boid v. Kamalanand Singh*(2). There WOODROFFE, J., has collected a number of cases in which the Court's inherent power has been exercised. He says:

"It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiae* to consolidate; postpone pending the decision of a selected action; and to advance the hearing of suits; to stay on the ground of convenience cross suits; to ascertain whether the proper parties are before it; to inquire whether a plaintiff is entitled to sue as an adult; to entertain the application of a third person to be made a party; to add (section 32 not being exhaustive) a party; to allow a defence in *forma pauperis*; to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither section 562 nor section 566 applies; to stay the drawing up of the Courts' own orders or to suspend their operation, if the necessities of justice so require; to stay, apart from the question whether the case falls within the section 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay; to apply the principles of *res judicata* to cases not falling within sections 13 and 14 of the Code and so forth."

There is no instance, so far as I am aware, of an *ex parte* decree being set aside upon an application made for that purpose in cases other than those coming under rule 13 of Order IX.

(1) (1913) 24 M.L.J., 285.

(2) (1906) I.L.R., 33 Cal., 927 at p. 932.

I do not say that it is a conclusive argument against the existence of such a power, but it is certainly significant to show that this does not stand on the same footing as the cases mentioned. Most of the cases where the Court exercised its inherent power related to orders of an incidental or ancillary character. I do not, however, wish to suggest that the inherent power of the Court mentioned in section 151 is to be limited to cases in which it can be shown to have been already exercised, for that would be unduly limiting the scope of section 151. But I have no hesitation in holding that there is no inherent power in a Court to set aside an *ex parte* decree by summary procedure, but that the power of the Court in such connexion is limited to the circumstances mentioned in Order IX, rule 13. I am therefore of opinion that the ruling in *Somayya v. Subhamma*(1) is wrong as held in *Venkatarama Aiyar v. Nataraja Aiyar*(2) and the answer to the question referred to the Full Bench must be returned in the negative.

OLDFIELD, J.—That our Courts possess inherent power is recognized in section 151, Civil Procedure Code. But the exercise of the power in the particular form in which it is invoked must be justified in each case in the manner authorized by authority. To justify it directly by reference to a previous course of actual instances of its exercise with or without the endorsement of appellate tribunals will seldom be possible, when it is disputed; and generally the legitimacy of its exercise must be tested with reference to the principles, which authority has prescribed. Those principles have been laid down in judgments, which have so far met with no criticism and which I respectfully follow, by WOODROFFE and MOOKERJEE, JJ., in *Hukum Chand Boid v. Kamalanand Singh*(3) and *Nanda Kishore Singh v. Ram Golam Sahu*(4) as being that the inherent power shall be exercised, not capriciously or arbitrarily, but *ex debito justitiae* on sound general principles and not in conflict with the intentions of the legislature. I may refer also at this point to my judgment in *Muthiah Chetty v. Bava Sahib*(5).

To apply this to the present reference, I look in vain for any mention of general principle in the authorities relied on by

(1) (1903) I.L.R., 28 Mad. 599.

(2) (1913) 24 M.L.J., 285.

(3) (1906) I.L.R., 33 Cal., 927 at p. 932.

(4) (1913) I.L.R., 40 Cal., 955.

(5) (1914) 27 M.L.J., 605.

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OLDFIELD, J. respondent; and necessarily so, when the whole argument in them is directed towards supporting the exercise of the Court's power by reference to the special hardship of the circumstances in the particular case before it. In one of the three cases relied on by respondent, in which the matter was considered fully, *Lalta Prasad v. Ram Karan*(1), the Court in exercising its inherent power to pass orders necessary for the ends of justice, attempted no further definition of any general principle as covering its action. In the others, *Somayya v. Subbamma*(2), and *Adyapadi Ramanna Udpa v. Krishna Udpa*(3), the hardship to the party and the merits of the case he was debarred from advancing were statedly the only tests applied.

The second condition above referred to for the exercise of the inherent power, the absence of conflict between such exercise and the statute law, was no doubt considered at length in *Somayya v. Subbamma*(2), the conclusion being against the importation into sections 103 and 108 of the Code then in force, corresponding with the present Order IX, rules 8 and 13, of negative words to the effect that the Court shall not set aside a decree passed *ex parte*, except in cases in which the party or his *vakil* was prevented by sufficient cause from appearing. The principle relied on is that, although statutory enactments expressed in affirmative language may sometimes be construed as having a negative implication, such implication must be a necessary and reasonable one. But as regards necessity it must be remembered that *per* WOODROFFE, J., in *Hukum Chand Boid v. Kamalanand Singh*(4),

"the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and on any matters specifically dealt with by it the law must be ascertained by interpretation of the language used by the legislature."

It is in my opinion impossible to presume that the rules under consideration contain an imperfect statement of the law on the very definite topic, with which they deal, the provision of a summary procedure for the re-opening of *ex parte* proceedings.

And in fact, with all respect for the opinion of the learned Judges responsible for the decisions of this Court last referred

(1) (1912) I.L.R., 34, All., 426.
(3) (1914) 27 M.L.J., 167.

(2) (1903) I.L.R., 26, Mad., 599.
(4) (1906) I.L.R., 33 Cal., 927.

to, there is nothing unreasonable or inconvenient in this conclusion. BHASHYAM AYYANGAR, J., attached weight to the absence of any means of displacing an unjust *ex parte* decision, if the inherent power could not be utilized for the purpose. But I think that he overestimated the frequency with which review proceedings would be barred by Order XLVII, rule 2; he certainly overlooked the possibility of a suit by the aggrieved party, when his absence was due to the fraud of his opponent [vide *Khagendra Nath Mahata v. Pran Nath Roy*(1)], and he must have been misled by the decisions in *Gilkinson v. Subramania Ayyar*(2), and *Causse v. Soures*(3), which were afterwards overruled by *Krishna Ayyar v. Kuppan Ayyangar*(4), into making the erroneous statement that the circumstances in which the *ex parte* decree was obtained could not be considered in an appeal against it. As regards hardship, resort to the Court's inherent power is unnecessary, when, as it seems to me, the wording of rules 9 and 13 is wide enough to cover all ordinary cases of default, including those instanced by BASHYAM AYYANGAR, J., in which the circumstances of a failure to appear are in question; and it may be suggested that in them the matters referred to by him, the merits of the defaulter's case (if indeed they can safely be assumed at that stage in the proceedings) and the grave consequences of an *ex parte* disposal, can in fact be considered in order to estimate the honesty of the allegations as to the existence of sufficient cause. But in cases, in which the existence of a sufficient cause for the default is not alleged or is disproved and those matters alone are in question, I do not see how they can justify interference, if uniformity and certainty are to remain the foundations of our procedure.

Taking this view, I concur in the opinion proposed in the judgment just delivered.

SESHAGIRI AYYAR, J.—The very full discussion which this case has received has made it clear to me that we must overrule *Somayya v. Subbamma*(5) and *Murugappa Chetty v. Rajasami*(6). In both these decisions the reasons given for holding that there

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(1) (1902) I.L.R., 29 Cal., 395 (P.C.).
(2) (1899) I.L.R., 22 Mad., 221. (3) (1900) I.L.R., 23 Mad., 260.
(4) (1907) I.L.R., 30 Mad., 54 (F.B.). (5) (1908) I.L.R., 26 Mad., 599.
(6) (1912) 22 M.L.J., 284.

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must be a power outside Order IX, rule 13, *ex debito justitiae* are not convincing. For a defendant against whom a decree *ex parte* has been passed, the following remedies are open:—(a) He can bring a suit to set aside the decree if there has been any fraud in the obtaining of it [see *Radha Raman Shaha v. Pran Nath Roy*(1) and *Khagendra Nath Mahata v. Pran Nath Roy*(2)]. (b) He can prefer an appeal against the decree itself; there can be no doubt that the powers of the Appellate Court are large enough to enable it to set aside the *ex parte* decree if there has been a miscarriage of justice. The Appellate Court is not confined to the grounds mentioned in Order IX, rule 13, in dealing with the matter. (c) The aggrieved party can file an application for review; and the grounds for such an application would be wider than those covered by rule 13. (d) He can also file an application as provided by rule 13 to set aside the *ex parte* decree. The second clause

“or when he was prevented by any sufficient cause from appearing when the suit was called on for hearing,” is comprehensive enough to cover most cases of default of appearance. A suggestion was made that the default of a guardian of a minor defendant will not be covered by this clause. There is no reason for limiting the language of the clause in that way. Further there is the authority of *Kesho Pershad v. Hirday Narain*(3) against this suggestion.

Analysing what has been said by the two learned Judges in *Somayya v. Subbamma*(4) and *Murugappa Chetty v. Rajasami*(5) it seems to me that nothing that they suggest as a possible grievance will not be covered by any of the four classes of remedies mentioned by me. I am therefore of opinion that there is no reason for invoking the inherent power of the Court in respect of this matter.

On the question of a Court possessing such a power I have great doubts. It was held by Lord MACNAUGHTEN in *Rangoon Botatoung Company, Limited, v. The Collector, Rangoon*(6), that a right of appeal must be given by the statute, and should not be inferred from the inherent power of an Appellate Court. In this Court and in other High Courts it has been held that a right of review is not inherent in the Court but must be given

(1) (1901) I.L.R., 28 Calc., 475.

(3) (1880) 6 C.L.R., 69.

(5) (1912) 22 M.L.J., 284.

(2) (1902) I.L.R., 29 Calc., 395 (P.O.).

(4) (1903) I.L.R., 28 Mad., 599.

(6) (1913) I.L.R., 40 Calc., 21.

by the statute. A right to set aside an *ex parte* decree belongs to the same category as an appeal or a review. Because in either case the effect of entertaining the proceeding is to vacate a decree which has been obtained by one of the parties to the suit. To interfere with such a substantial right, it is not enough to invoke the inherent power of a Court. It was argued that as it has been held in a case, to which I was a party, following *Ghuznavi v. The Allahabad Bank, Limited*(1), that there is an inherent power of remand, it must be logically held that there is an inherent power to set aside *ex parte* decrees. I do not think that the two positions are *pari materia*. A right of remand is implied in the right to hear the appeal. An Appellate Court which has got jurisdiction to reverse the judgment of the lower Court must have power to set it aside and to direct a new trial. It is because of the idea that this power of remand is implied in the right of appeal that the legislature in the Act of 1882 by section 564 put restrictions upon that inherent power. By the Act of 1908 that restriction was removed. Therefore the possession of an inherent power to remand does not argue that there is a power to set aside an *ex parte* decree on grounds other than those mentioned in Order IX. Moreover, I am clear that section 151 must be construed not as empowering a Court to exercise power which it never possessed, but as preserving to it those powers which it has been in the habit of exercising and which by an oversight or by failure to specify have not been particularized in the statute. Section 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of Justice is competent to exercise: and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided for in the Code. As was pointed out by the Judicial Committee in *Gokul Mandar v. Pudmanund Singh*(2) the essence of a Code is to be exhaustive upon the matters for which it provides. This language was employed no doubt with reference to section 13 of the Code of Civil Procedure. It is equally applicable to Order IX, rule 13. The Legislature has provided a mode by which *ex parte* decrees can be set aside. As I pointed out already there is no

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1) (1917) I.L.R., 44 Calc., 929 (F.B.). (2) (1902) I.L.R., 29 Calc., 707 (P.O.)

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necessity for invoking the principle of the remedy *ex debito justitiae*, because in all conceivable cases excepting a case like the present in which the lower Court has made no attempt to conform itself to any rule or precedent, the party aggrieved can obtain justice by resorting to the proper procedure. As regards cases in the other High Courts, I do not propose to deal with them at any length. In *Tyeb Beg Mahomed v. Allibhai*(1) to which JENKINS, C.J., was a party, it was held that a Small Cause Court had inherent power in cases of eviction to set aside *ex parte* decrees. I do not think that decision covers the present case. On the other hand in *Manilal Dhunji v. Gulam Hussein Vazeer*(2) and in *Esmail Ebrahim v. Hajijan*(3) a different view was taken. *Fakhr-ud-din v. Ghafur-ud-din*(4) was a case of an appeal and not of an application. In *Lalta Prasad v. Ram Karan*(5) one would have thought that the application could be sustained on the grounds mentioned in rule 13. *Bibi Tasliman v. Harihar Mahato*(6) is another case in which it was not necessary to have appealed to the inherent power of the Court. But none of them are cases in which the question of setting aside an *ex parte* decree directly arose. In *Hukum Chand Boid v. Kamalnand Singh*(7) the learned Judges point out that there was by the practice of the Court an inherent power which should not be regarded as having been taken away by the Code of Civil Procedure. That is a typical instance of the application of section 151 of the Code. Speaking for myself, I am zealous of preserving the inherent power of the Court to render justice between party and party. But I am clear that where there is no proof that the power has been exercised by Courts, and where the Legislature has given that power with limitations, Courts are not at liberty to disregard the limitations. For these reasons I am of opinion that *Venkatarama Aiyar v. Nataraja Aiyar*(8) takes the right view of Order IX, rule 13, and that the answer to the question must be in the negative.

It is necessary however to state that the question relates only to applications for setting aside *ex parte* decrees and not to any other remedy which a party may have.

N.R.

- (1) (1907) I.L.R., 31 Bom., 45.
(2) (1883) I.L.R., 13 Bom., 12. (3) (1908) 10 Bom. L.R., 904.
(4) (1901) I.L.R., 23 All., 99. (5) (1912) I.L.R., 34 All., 426.
(6) (1903) I.L.R., 32 Cal., 253. (7) (1906) I.L.R., 33 Cal., 927.
(8) (1913) 24 M.L.J., 235.

APPELLATE CIVIL—FULL BENCH.

Before Sir Abdur Rahim, Kt., Offg. Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

VEYINDRAMUTHU PILLAI (RESPONDENT), APPELLANT,

v.

MAYA NADAN (PETITIONER), RESPONDENT.*

1919,
September 1
and 2 and
October 15.

Civil Procedure Code (Act V of 1908), sec. 47—Decree—Sale in Execution—Auction purchaser in execution of money decree whether representative of decree-holder—Stranger purchaser in execution of decree—Applicability of section 47, Civil Procedure Code.

A stranger purchaser at Court auction is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree under execution decided under section 47, Civil Procedure Code.

Per ABDUR RAHIM, OFFG. C.J.—A stranger purchaser by private contract is also so bound and entitled.

Whether a purchaser either by private contract or at Court auction in execution of a money decree is to be considered the representative of the decree-holder or judgment-debtor depends upon the nature of the question raised and on who the contesting party is.

Per OLDFIELD AND SESHAGIRI AYYAR, JJ.—The inclusion in the proceedings of a stranger purchaser at Court auction is justifiable on the ground of his interest in their result and without reference to his possession of any representative character.

Prosunno Kumar Sanyal v. Kali Das Sanyal, (1892) I.L.R., 19 Cal., 683 (P.C.), considered and applied.

An auction purchaser of property in execution of a money decree is not a representative of the decree-holder for the purpose of these execution proceedings.

Per OLDFIELD, J.—Such an auction purchaser is the representative of the judgment-debtor for the purpose of inquiring into a question relating to the subsequent execution of a distinct decree against the same judgment-debtor, affecting the same property.

Per SESHAGIRI AYYAR, J.—Where question relates to the rights of the parties to the decree, the matter should be decided in execution, although strangers are benefited by or interested in the result of such a decision.

APPEAL against the order of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Rāmnād at Madura, in Execution Appeal No. 374 of 1918, in Execution Appeal No. 322 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 (on the

* Appeal Against Order No. 188 of 1918.

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file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura).

The property in suit belongs to one P. P. Maya Nadar. One Muttuswami sued him in Original Suit No. 733 of 1915 and obtained a money decree on the 6th of January 1916. In pursuance of that decree the properties were attached on the 21st of June 1916. They were sold on the 24th of October of the same year, purchased by the decree-holder, and the sale was confirmed on the 27th of November 1916. The property was delivered on the 12th of February 1917. The decree-holder purchaser sold the property privately on the 28th of March 1917 to the present appellant. After the attachment under the money decree one M. V. Nadan brought a suit on a mortgage executed on the 14th of July 1916, by P. P. M. Nadar. He obtained a preliminary decree on the 25th of September 1916. The final decree was on the 11th of July 1917. The property was sold on the 17th of December 1917; three items out of four were purchased by the decree-holder himself and the fourth item by one Subbayya Nadan a stranger. The sale was confirmed on the 21st of January 1918. The purchasers under the mortgage decree in endeavouring to take possession were obstructed by the purchaser under the money decree. Thereupon they applied for the removal of the obstruction and the payment out to them of moneys deposited into Court, being sale-proceeds of crops standing on part of the property. The lower Court held that the purchase under the money decree was affected by the doctrine of *lis pendens*, as the sale was subsequent to the institution of the mortgage suit, and directed possession to be given to them as well as payment of the money. The present appeals are by the representatives of the purchaser under the money decree against the order of the lower Court.

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J. —The same preliminary objection has been taken to the hearing of each of these three appeals, that they are not authorized by section 47 of the Code of Civil Procedure.

The appellant in each is the same individual. But the circumstances differ, except in so far as the same two litigations are in question, in each as the origins of the respective titles of the parties. The appellant relies in Appeals against Order

Nos. 188 and 315 on the sale of part of the suit property to him in execution of a money decree and Appeal Against Order No. 260 on the sale of part of it to his vendor, the money decree-holder, and contends that for all purposes, including these appeals, he became the representative of the judgment-debtor. These sales were however subject to a mortgage. On it, without notice to the money decree-holder and (it is alleged) without his knowledge, between the attachment and sale under the money decree a suit was filed and a preliminary decree was obtained. After the delivery under the money decree, a final decree was passed on the mortgage and a sale took place. The purchasers of the portions of the property concerned in Appeals Against Order Nos. 188 and 315 were respectively the mortgage decree-holder and a stranger. They have obtained orders for removal of appellant's obstruction to their possession. Appeal Against Order No. 260 relates to a sum of money in Court, which represents the crop on part of the property and has been awarded by the lower Court to the mortgage decree-holder purchaser. Shortly the array of the parties in their legal character is as follows:—

A.A.O. No.	Money decree.	Mortgage decree.
188 ...	Purchaser	v. Decree-holder purchaser.
315 ...	Purchaser	v. Stranger purchaser.
260 ...	Decree-holder purchaser's vendee.	v. Decree-holder purchaser.

The first point requiring notice is that the parties' rights arose in two distinct litigations and the decision in *Mandavalli Rama Rao v. Sivannarayana*(1) gives some support to the view that this fact alone is sufficient to negative appellant's representative character for the present purpose. But that decision is expressed very shortly and it is possible that the learned Judges concerned in fact relied on the broader considerations to be referred to later. In *Muhammad Bava Sahib v. Ramachandra Thevar*(2) it was observed that the purchaser must be a representative for all purposes or none. If there is no objection on other grounds to treating the present appellant as a representative of the judgment-debtor, the fact that he obtained the latter's interest through a Court sale in another execution

(1) (1919) M.L.T., 153.

(2) Appeal No. 249 of 1916 (unreported).

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and not through a private transfer does not appear to affect his rights or to deprive him of the character of a person on whom an interest has devolved within the meaning of Order XXII, rule 10. It is only possible that one distinction may be necessary, and that only in Appeal Against Order No. 260. If the controversy had arisen in the execution of the money decree, it would have been necessary to regard appellant as the representative of the decree-holder, from whom he purchased, in accordance with the decision in *Sandhu Taraganar v. Hussain Sahib*(1) and the judgment of WALLIS, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(2). But in those cases only one litigation was in question as an origin of title and the identification of the transferee with the decree-holder was clearly necessary, if the controversy between the latter and the judgment-debtor or his representative was to be settled speedily in execution and a separate suit was to be avoided. In the present case the contrary will be the result, since, as was decided in *Gour Mohun Gouli v. Dinonath Karmokar*(3) and as the judgment of KRISHNASWAMI AYYAR, J., in the case last cited implies, section 47 does not cover disputes between a party and his representative or between the representatives of the same party. Where, as here, two litigations are in question, the purchase by a decree-holder in one of them and his temporary ownership of the property is material only in it and can have no significance with reference to the right of his transferee of the property to intervene in execution in the other. There would accordingly seem to be no substantial reason against holding that the purchaser in the one from a decree-holder purchaser is for the purpose of execution proceedings in the other the representative, no longer of that decree-holder, but of the common judgment-debtor, to whom his interest is ultimately to be traced. It may therefore be possible and advisable to restrict the effect of *Sandhu Taraganar v. Hussain Sahib*(1) in this direction.

The position of the parties in the present cases is, however, further complicated by the *dicta* of KRISHNASWAMI AYYAR, J., in

(1) (1903) I.L.R., 28 Mad., 87. (2) (1911) I.L.R., 34 Mad., 417.
(3) (1898) I.L.R., 25 Cal., 49.

Nadamuni Narayana Iyengar v. Veerabhadra Pillai(1), already referred to, that "where the decree is a mortgage decree, the purchaser in execution will be the representative of the judgment-debtor and that, where property is attached and sold under a money decree, a stranger purchasing the property is not the representative even of the judgment-debtor, still less can he be the representative of the decree-holder." These *dicta* were apparently accepted in *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib*(2), and were followed, although not specifically mentioned, in *Arasayes Ammal v. Sokkalinga Mudali*(3). To apply them to the present cases the appellant in Appeals Against Order Nos. 188 and 315 will not be the representative of either party to the money decree or of the judgment-debtor either under it or the mortgage decree; and the appellant in Appeal Against Order No. 260 will not be the representative of the judgment-debtor, whose property he has acquired, but with reference to *Sandhu Taraganar v. Hussain Sahib*(4), only of the money decree-holder who has no connexion with the mortgage proceedings. And accordingly section 47 will not be applicable to appellant's intervention in those proceedings in any of the cases. It has no doubt been argued before us that, if the purchaser under a money decree does not represent the judgment-debtor, he must represent the decree-holder. But the answer to this, so far as it is based on authority, is given in *Krishna Satapasti v. Sarasvatula Sambasiva Row*(5), and, as it assumes what KRISHNASWAMI AYYAR, J., did not hold, that the purchaser must have some representative character, and as it corresponds with no actual incident of the purchase, it is useless to pursue it further as a reconciliation between the alternative theories. To turn to the other party to these disputes, the person claiming under the mortgage decree sale, he will, as a stranger, be a representative in Appeal Against Order No. 315, but of the debtor according to the authority under consideration, whilst in Appeals Against Order Nos. 188 and 260, as he is himself the decree-holder, no question of representation need be considered.

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(1) (1911) I.L.R., 34 Mad., 417. (2) (1916) 3 L.W., 377.
(3) (1916) 1 M.W.N., 287. (4) (1905) I.L.R., 28 Mad., 87.
(5) (1908) I.L.R., 31 Mad., 177.

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I have referred to the application to the cases before us of the views of KRISHNASWAMI AYYAR, J., in detail in order to illustrate their effect in instance, typical of a majority of the combinations which can occur. The first result, that the purchaser at a money decree sale cannot be regarded as a representative, entails that disputes to which he is a party, and they will be a large proportion of those requiring settlement, cannot be dealt with except by separate suit, whether they arise in connexion with the execution of that decree or of some others. This is inconsistent with the expressed disposition of the Judicial Committee and other Courts to extend the scope of section 47. It moreover was not justified by the learned Judge by reference to any principle; and, where, as he admitted, the purchaser obtains the right of the judgment-debtor in the property, it is with all respect impossible to understand how the legal incidents, including the remedies with their appropriate procedure, attached to that right, do not pass with it. And there is no necessity to adhere to this view in order to be consistent with other decisions. For in *Paramananda Das v. Mahabeer Dossji*(1), *Kuppana Kavundan v. Kumara Kavundan*(2), and the very recent case of *Muhammad Bava Sahib v. Ramachandra Thevar*(3) the conclusion was in favour of representation of the judgment-debtor.

The case of a stranger purchaser under a mortgage decree is similarly dealt with without discussion by KRISHNASWAMI AYYAR, J. His statement that he is the representative of the judgment-debtor is opposed to the opinion of MOORE, J., in *Kasinatha Ayyar v. Uthumansa Rowthan*(4). But that decision was doubted in *Sivarama Sastri v. Somasundara Mudali*(5) and there appears to be nothing further in the authorized reports in this Presidency. Here again there is some uncertainty, although less than in the case of a purchaser under a money decree. It is moreover desirable that, if an authoritative decision is to be given on this part of the law, the position of purchasers at both descriptions of sales should be settled on identical considerations, so far as they are applicable. That an authoritative

decision, such as my learned brother and I cannot give, is rendered necessary by the judgment of KRISHNASWAMI AYYAR, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(1), and the cases, in which it has been followed, admits of no doubt. I therefore refer to a Full Bench, the questions as arising in the case before us:—

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- (1) Whether a purchaser at a sale held in execution of a money decree is a representative of a party and, if so, of which party for the purpose of inquiry into a question relating to the execution of (a) that money decree, (b) any other decree affecting the purchased property and against the same judgment-debtor.
- (2) Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so, of which.
- (4) Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which.

SESHAGIRI AYYAR, J.—I do not wish to express any decided opinion on the cases quoted before us. It is clear that they cannot be reconciled with each other. The recent judgment of the learned Chief Justice and KUMARASWAMI SASTRI, J., in *Muhammad Bava Sahib v. Ramachandra Thevar*(2) renders it necessary that the whole matter should be fully considered and that a definite rule of law should be laid down for the guidance of the Courts below. One proposition seems to be hardly disputed, namely, that the purchaser who is a decree-holder, is a party to the suit within the meaning of that expression in section 47 of the Civil Procedure Code. There is considerable divergence of opinion as to whether an auction-purchaser who is not a decree-holder, is a representative of any party to the suit. In this Presidency it seems to have been assumed that he would be the representative of the decree-holder. In Allahabad this view is not accepted. The recent judgment to which I referred, throws doubt upon the earlier Madras cases. It may lead to no

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(1) (1897) I.L.R., 20 Mad., 378.

(2) (1911) I.L.R., 34 Mad., 450.

(3) Appeal 249 of 1916 (unreported).

(4) (1902) I.L.R., 25 Mad., 529.

(5) (1905) I.L.R., 28 Mad., 119.

(1) (1911) I.L.R., 34 Mad., 417. (2) Appeal 249 of 1916 (unreported).

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violation of any general principle if he is regarded as representative of one party or the other. But it is absolutely necessary that it should be determined authoritatively whose representative he is, if he is a representative at all. I therefore agree that the questions proposed by my learned brother should be referred for the decision of the Full Bench

ON THIS REFERENCE—

T. R. Venkatarama Sastri for appellant.—The mortgage suit was instituted after the attachment was made in the execution proceedings in the money decree. The auction purchaser in a sale in execution of a money decree is a representative of the judgment-debtor. The question now is between the auction purchaser in a mortgage suit and the auction purchaser in execution of a money decree, who stands in the same position as a private vendee from the judgment-debtor. The question is one between the decree-holder and judgment-debtor's representative in the mortgage suit in which the present execution proceedings have been taken. The sale in execution of the money decree was during the pendency of the mortgage suit. Under section 64, Civil Procedure Code, a private purchaser after attachment will be bound by the decree and the vendee will be the representative of the judgment-debtor. Reference was made to *Peth Ayyar v. Sankaranarayana Pillai*(1), *Radhamadhub Holdar v. Monohur Mukerji*(2), *Ishan Chunder Sirkar v. Beni Madhub Sirkar*(3) and *Gulzari Lal v. Madho Ram*(4). *Narsinhbhat v. Bando Krishna*(5) holds that the auction-purchaser is a representative of neither party.

The third question is covered by the ruling of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(6). Some cases hold that the auction-purchaser is the representative of the decree-holder; see *Kasinatha Ayyar v. Uthumansa Rowthan*(7), *Manickka Odayan v. Rajagopala Pillai*(8), *Arthanari*

- (1) (1917) I.L.R., 40 Mad., 955.
(2) (1888) I.L.R., 15 Calc., 756 at 760 (P.C.).
(3) (1897) I.L.R., 24 Calc., 62 (F.B.).
(4) (1904) I.L.R., 28 All., 477 (F.B.). (5) (1918) I.L.R., 42 Bom., 411.
(6) (1892) I.L.R., 19 Calc., 683 (P.C.).
(7) (1902) I.L.R., 25 Mad., 529 (532). (8) (1907) I.L.R., 30 Mad., 507.

Chettiar v. Nagoji Rao(1) and *Sandhu Taraganar v. Hussain Sahib*(2). The following cases hold that an auction-purchaser is not a representative of the decree-holder:—*Krishna Satapasti v. Sarasvatula Sambasiva Row*(3), *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(4), *Subbamma v. Chennayya*(5). The case of *Krishnabhupati Devu v. Vikrama Devu*(6), lays down the true principle as to representation. The case of *Narayan Sadoha Halwal v. Umbar Adam Memon*(7) shows that the auction-purchaser is a representative of neither party. Section 47 does not say whether the question should be raised by either party but only that the question raised should be between the parties or their representative. Though the auction-purchaser is a representative of neither party, the question can come under section 47, Civil Procedure Code.

S. T. Srinivasagopala Achariyar for respondent.—This is not a dispute between parties to the suit or their representatives. The auction purchaser in execution of a money decree is not a representative of either party. It has been held that he is not the representative of the judgment-debtor; see *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(4), *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib*(8), *Arasayee Ammal v. Sokkalinga Mudaly*(9), *Krishna Satapasti v. Sarasvatula Sambasiva Row*(8) and *Subbamma v. Chennayya*(5). Even if the auction-purchaser is the representative of the decree-holder, as held in some cases, he is not the representative of the decree-holder in the mortgage suit. He may be the representative of the decree-holder in the money decree. That will not help him. Even if he is the representative of the judgment-debtor, the auction-purchaser in the mortgagee's suit will be equally the representative of the judgment-debtor. The contest must be between decree-holder or his representative on one side against the judgment-debtor or his representative on the other side; see *Maganlal v. Doshi Mulji*(10) and *Narsinhbhat v. Bando Krishna*(11).

- (1) (1912) M.W.N., 513. (2) (1905) I.L.R., 28 Mad., 87.
(3) (1908) I.L.R., 31 Mad., 177. (4) (1911) I.L.R., 34 Mad., 417.
(5) (1913) I.L.R., 41 Mad., 467. (6) (1895) I.L.R., 18 Mad., 13.
(7) (1911) I.L.R., 35 Bom., 275. (8) (1916) 3 L.W., 377.
(9) (1916) 1 M.W.N., 287.
(10) (1901) I.L.R., 25 Bom., 631. (11) (1918) I.L.R., 42 Bom., 411.

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OPINION.

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ABDUR RAHIM, OFFG. C.J.—This is a reference to the Full Bench made in certain Appeals against Orders which arose under the circumstances mentioned in the Order of Reference. Briefly speaking, the claims of the decree-holder-purchaser of the disputed property in execution of a money decree and of his vendee having been disallowed as against the purchasers under a mortgage-decree, one of them being the decree-holder himself with respect to a part of the property, the purchaser of the other part being a stranger, the question arose whether the order of the lower Court comes within the purview of section 47 of the Code of Civil Procedure and is therefore appealable. The suit on the mortgage was instituted after the attachment in execution of the money decree and the sale under the money decree which was subject to the mortgage was made between the dates of the preliminary mortgage decree and the final decree. I shall proceed on the basis assumed in the Order of Reference that the question that has arisen relates to execution, discharge, or satisfaction of the decree within the meaning of section 47, and that all that we are asked is whether such a question arose between the parties to the suit in which the decree was passed or their representatives.

As I understand the facts, the question in the appeal arose in execution of the mortgage decree; and, so far as the decree-holder-purchaser is concerned, there can be no question of his position as he is a party to the suit.

But the decisions of this Court as to who are to be deemed, within the meaning of section 47 of the Code of Civil Procedure, to be the representatives of the parties to the suit in which the decree which is being executed was passed are in a state of considerable conflict. On the question whether the purchaser can be regarded as the representative of the decree-holder in cases arising between him and the judgment-debtor or his representative, MOORE, J., had no hesitation in *Kasinatha Ayyar v. Uthumana Rowtham*(1), in holding that the auction-purchaser, even if he was not the decree-holder, was the representative of the

(1) (1902) I.L.R., 25 Mad., 529.

judgment-creditor, basing his opinion on the Privy Council ruling in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1), and on the Full Bench ruling of the Calcutta High Court in *Ishan Chunder Sirkar v. Beni Madhub Sirkar*(2), and on that of a Divisional Bench of the same Court in *Dwar Bulesh Sirkar v. Fatik Jali*(3). BHASHYAM AYYANGAR, J., the other learned Judge, did not express any dissent from that view, but pointed out that the order was none the less an order under section 244 (now section 47) because it was also passed under sections 318 and 834 of the Code of Civil Procedure (corresponding to rules 95, 97 and 98 of the Code of Civil Procedure). The ruling was followed by WHITE, C.J., and SUBRAHMANYA AYYAR, J., in *Sandhu Taraganar v. Hussain Sahib*(4), by WHITE, C.J., and SANKARAN NAYAR, J., in *Arthanari Chettiar v. Nagoji Rao*(5) and by BENSON and WALLIS, JJ., in *Manickka Odayan v. Rajagopala Pillai*(6). But the opposite view is expressed by WHITE, C.J., sitting with MILLER, J., in *Krishna Satapasti v. Sarasvatula Sambasiva Row*(7) and by WALLIS and KRISHNASWAMI AYYAR, JJ., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(8), and has been accepted by SAVASIVA AYYAR and BAXWELL, JJ., in *Subbamma v. Chennayya*(9). In this Court, therefore, the conflict of opinion on the point is such that one could not say that there is a clear preponderance of authority in support of one view rather than the other.

As regards the other High Courts, it was held by JENKINS, C.J., in *Maganlal v. Doshi Mulji*(10), that an auction-purchaser could not be regarded as the representative of the decree-holder for the purposes of an application under section 310 (a) of the old Code, but Order XXI, rule 89 of the new Code now expressly provides that a person owning property which has been sold, or holding an interest therein by virtue of a title acquired before such sale, may also apply to have the sale set aside on depositing the purchase-money. As regards Calcutta and Allahabad no express ruling on the question has been cited before us and I have not found any.

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| (1) (1892) I.L.R., 19 Calo., 683 (P.C.). | (2) (1897) I.L.R., 24 Calo., 62 (P.B.). |
| (3) (1892) I.L.R., 26 Calo., 250. | (4) (1905) I.L.R., 28 Mad., 87. |
| (5) (1912) M.W.N., 513. | (6) (1907) I.L.R., 30 Mad., 507. |
| (7) (1908) I.L.R., 31 Mad., 177. | (8) (1911) I.L.R., 34 Mad., 417. |
| (9) (1918) I.L.R., 41 Mad., 467. | (10) (1901) I.L.R., 25 Bom., 631. |

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On the question whether an auction-purchaser can be treated as the representative of the judgment-debtor, we find a similar conflict. In *Paramananda Das v. Mahabees Dosji*(1) SUBRAHMANYA AYYAR and BODDAM, JJ., and in *Sivarama Sastrial v. Somasundaram Mudali*(2), SUBRAHMANYA AYYAR and SANKARAN NAYAR, JJ., answered the question in the affirmative. But in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(3), already mentioned to which WALLIS, C.J., was a party, KRISHNASWAMI AYYAR, J., held that he was not such a representative and this view has been followed by SADASIYA AYYAR and MOORE, JJ., in *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib*(4), and in *Arasayee Ammal v. Sokkalinga Mudaly*(5), at least in cases where the decree does not mention or affect the property purchased. In another case *Kuppana Kavundan v. Kumara Kavundan*(6), both WALLIS and KRISHNASWAMI AYYAR, JJ., held that the auction-purchaser would be the representative of the judgment-debtor and in an unreported judgment in Appeal No. 249 of 1918, WALLIS, C.J., sitting with KUMARASWAMI SASTRI, J., expressly disapproved of the dictum of KRISHNASWAMI AYYAR, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(3), and of the rulings in *Thangavelu Mudaliar v. Mahomed Ibrahim Sahib*(4), and *Arasayee Ammal v. Sokkalinga Mudaly*(5), following *Paramananda Das v. Mahabees Dosji*(1), *Sivarama Sastrial v. Somasundaram Mudali*(2), *Narayanawami Naik v. Seshappier*(7), and *Kuppana Kavundan v. Kumara Kavundan*(6). Though on this aspect of the question also it cannot be said that the law is settled by a long current of decisions in this Court as the learned Chief Justice suggests in the unreported judgment, I agree with him so far that the view that an auction-purchaser of the judgment-debtor's interests in the property in dispute is his representative for the purposes of section 47 of the Code of Civil Procedure has a preponderance of authority in its favour. As regards the other High Courts, both Calcutta and Allahabad in *Ishan Chunder Sirkar v.*

(1) (1897) I.L.R., 20 Mad., 378.

(3) (1911) I.L.R., 34 Mad., 417.

(5) (1916) 1 M.W.N., 287.

(2) (1905) I.L.R., 28 Mad., 119.

(4) (1916) 8 L.W., 377.

(6) (1911) I.L.R., 34 Mad., 460.

(7) (1907) 17 M.L.J., 82.

Beni Madhub Sirkar(1), and in *Gulzari Lal v. Madho Ram*(2), have finally decided in favour of the view that the word 'representative' when taken with reference to the judgment-debtor does not mean only his legal representative, that is, his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest whether by a private sale or at Court auction, who, so far as such interest is concerned, is bound by the decree. In Allahabad *Madho Das v. Ramji Patak*(3), and probably also in Calcutta, the purchaser would not be regarded as the representative of the judgment-debtor except in cases where the property purchased by him is involved in the decree in the course of execution of which the question has arisen. But except in *Sree Mahant Prayag Doss Jee v. Chengama Naidu*(4), this distinction does not appear to have been drawn in the rulings of our Court. A recent Full Bench of the Bombay High Court in *Narsinhbhat v. Bando Krishna*(5), has ruled contrary to the view of the law as laid down by the Calcutta and Allahabad Full Benches.

Now, the Code has not defined the word 'representative' though it has defined the phrase 'legal representative'. But that the two terms are not used in a synonymous sense is obvious, for while in section 47 the legislature uses the word 'representative' it uses the phrase 'legal representative', as it were by contrast, in sections 50 and 52 and so on. Nor can there be any doubt that the word 'representative' was intended to have a wider meaning than 'legal representative'.

I think some light can be obtained on this question, if we find out in what matters the purchaser of the interest of the judgment-debtor in property sold in execution, can apply to the executing Court for redress or can be proceeded against in that Court. Under section 64 an alienation after attachment is void as against all claims enforceable under the attachment. Under section 74 where the purchaser has been obstructed in obtaining possession by the judgment-debtor or by any one on his behalf the latter can be dealt with by the Court at the instance of the decree-holder or purchaser. Then we find under

(1) (1897) I.L.R., 24 Cal., 82 (F.B.).

(2) (1904) I.L.R., 26 All., 447 (F.B.). (3) (1884) I.L.R., 10 All., 286.

(4) (1916) 2 M.W.N., 288.

(5) (1918) I.L.R., 42 Bom., 411.

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Order XXI, rule 35, that under a decree for delivery of immoveable property possession may be given by the Court executing the decree by removing any person bound by the decree which would apparently include a purchaser *pendente lite*. This seems to be made clear by the fact that under rule 54, which provides for attachment of immoveable property, persons are prohibited from taking any benefit under any transfer made after attachment. In the case of a person who claims a title to the property either independently of the defendant in the suit or if from the defendant he asserts a title anterior to the institution of the suit in which the decree under execution was passed his claim is placed on a different basis by the legislature. If such a person is in possession of the property the Court executing the decree cannot dispossess him and his right to establish his title by a separate suit is expressly recognized—see Order XXI, rules 58, 63, 99, 100 and 101. By rule 89 an application to set aside a sale by depositing the purchase-money may be made by any person owning the property or holding an interest in the property under a title acquired before sale, and such an application would clearly be one between the judgment-debtor or a person who has acquired his interest on the one hand and the decree-holder and the purchaser under the decree on the other. It further says that the judgment-debtor's liability for costs will not be affected by such application. By rule 90 an application to set aside the sale on the ground of irregularity may be made by the decree-holder or any person entitled to rateable distribution or a person whose interests are affected by the sale and to such an application the purchaser would clearly be a necessary party, and questions arising under the application may have to be determined between him and the decree-holder or the judgment debtor as the case may be. The purchaser may himself apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest and only on questions raised under rules 89, 90 or 91 being decided in favour of the purchaser that the sale will be confirmed. The purchaser can apply for the delivery of the property purchased by him as against the judgment-debtor or against any person claiming under a title created by the judgment-debtor subsequently to the attachment. If the holder

of a decree for possession of immoveable property or the purchaser of any such property sold in execution of a decree is obstructed in obtaining possession, that is a matter to be investigated by the executing Court. If the resistance or obstruction is by the judgment-debtor, or by a transferee from him after the institution of the suit in which the decree was passed, the question is to be decided finally in execution. On the other hand if the obstructor is a bona fide claimant claiming under a title independent of the judgment-debtor then, as already mentioned, he would have a right to sue in spite of the decision in execution.

I think, these provisions of the Code show that the legislature intended that all questions affecting a purchaser of the interest of the judgment-debtor in property which is either affected by the decree or is sold under a decree, are to be decided in execution between the parties interested if the purchase was after the institution of the suit, whether at a private sale or at a sale in execution of a money decree against the defendant. I may here also refer to section 146 which says that

"Save as otherwise provided by this Code, or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him."

Under this section the claim is not confined to an interest in property. It seems to me that the purchaser of property in execution of a decree may well be said to claim under the decree-holder for the purposes of proceedings under section 47 in which his rights are affected. It may also here be pointed out that the law, so far as the rulings of this Court and also of the Calcutta High Court go is, settled that not only the assignee of a decree-holder comes within the scope of section 47 but a person attaching the decree is the representative of the decree-holder within the meaning of this section—see *Sah Man Mull v. Kanagasabapathi*(1), *Krishnan v. Venkatapathi Chetty*(2) and *Peary Mohun Chowdhry v. Romesh Chunder Nundy*(3). I do not see how the case of a purchaser in execution of a decree can

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(1) (1893) I.L.R., 18 Mad., 20.

(2) (1906) I.L.R., 29 Mad., 318.

(3) (1888) I.L.R., 15 Cal., 371.

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well be distinguished on principle. On the other hand where the interest of the purchaser of property either in execution of the same decree or of another decree is affected by any question raised in execution by the holder of the decree under execution the purchaser is entitled to defend his interest as a person claiming under the judgment-debtor. As has been pointed out time after time by the Privy Council as well as by the High Courts, section 47, corresponding to the old section 244, should be interpreted in as liberal a spirit as the language would reasonably admit of. I would therefore have little hesitation in holding that the word 'representative' is not intended to be confined to legal representative but is used in the wider sense indicated in *Krishna Bhupati Devu v. Vikrama Devu*(1).

"It is a well-known principle that a purchaser in a Court-sale represents the judgment-debtor to the extent of the right, title and interest as he had in the property purchased at the date of sale and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of the decree."

This principle was laid down by MUTTUSWAMI AYYAR and BEST, JJ., in holding that the purchaser was a party claiming under the execution creditor within the meaning of section 13 of the old Civil Procedure Code; and there was thus privity of law between the two. No doubt the learned Judges with reference to some cases cited against that proposition dismissed them with the remark that they were cases under section 244 and not under section 13 but they were not considering any question under the former section. I do not see why the principle should not be applied to section 47 of the Code of Civil Procedure as well.

The question however seems to be concluded by the ruling of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(2) where their Lordships say:

"It is of the utmost importance that all objections to the execution sale should be disposed of as cheaply and as speedily as possible and their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that when a question has arisen as to execution, discharge, or satisfaction of the decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is not a party

to the suit, is interested in the result has never been held a bar to the application of the section."

Their Lordships in laying down the law in these terms observed that as the respondent was not represented before them they had examined the rulings of the Indian High Court for themselves; and they also mention that Mr. Doyne, who appeared for the appellant, admitted before them that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution sale. In that case the appellant wanted by a suit to have the judicial sale of the Zamindari set aside on the ground of fraud on the part of the decree-holder and it was held that the question was determinable by virtue of section 244 only by an order of the Court executing the decree and not by a separate suit. No doubt their Lordships do not say that the auction-purchaser would be a representative of either the judgment-debtor or the decree-holder within the meaning of section 244 but they clearly intended to lay down that as a party most interested in the result he would be entitled to be heard in any application under section 244 and that if the question was one of the character described therein, i.e., relating to the execution, discharge or satisfaction of the decree, then it must be determined by a proceeding under that section in which the auction-purchaser must be joined. In *Magan Lal v. Do-hi Mulji*(1) abovementioned it is observed that the Privy Council could not have intended to delete the words

"Arising between the parties to the suit in which the decree was passed or their representatives"

from section 244. But there seems to be no inconsistency if I may respectfully say so, in holding that the question was one arising between the parties, although an auction-purchaser who was most interested in the dispute was entitled and bound to ask for a decision by the Court executing the decree. Otherwise, the result would be that the judgment-debtor and the decree-holder would be bound to have the question settled by the executing Court and so far as the purchaser was concerned a fresh decision would have to be obtained by a separate suit.

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(1) (1901) I.L.R., 25 Bom., 631.

(1) (1893) I.L.R., 18 Mad., 13, at p. 18. (2) (1892) I.L.R., 19 Cal., 683 (P.C.)

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The law, therefore, in my opinion, is that a person who has bought the property of the defendant in a suit since the institution of that suit, whether at a Court auction held in execution of a money decree passed in another suit or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under section 47 by the Court executing the decree, when his interest is affected either by the decree itself or by the sale held in execution of that decree; and the same rule applies to a purchaser of the property under such sale whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. This is in accordance with the view of the law adopted in *Kasinath Ayyar v. Uthumansa Rowthan*(1), *Sandhu Taraganar v. Hussain Sahib*(2), *Arthanuri Chettiar v. Nagoji Rao*(3), *Manicka Udayan v. Rajagopala Pillai*(4), *Paramanada Das v. Mahabeer Dossji*(5), *Linga Reddy v. Hussain Reddy*(6), *Kuppana Kavundan v. Kumara Kavundan*(7) and the unreported judgment in appeal No. 249 of 1916, and is opposed to *Krishna Satapasti v. Sarasvatula Sambasiva Row*(8), *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(9), *Subbamma v. Chennayya*(10), *Thangavelu Mudaliar v. Muhomed Ibrahim Sahib*(11) and *Arasayee Ammal v. Sokkalinga Mudaly*(12) and the latter rulings to that extent must be considered to be overruled.

OLDFIELD, J. OLDFIELD, J.—It is clear that the questions before us were framed on the assumption that the applicability of section 47 of the Code of Civil Procedure to the cases before the Subordinate Judge can be disputed only on the ground that some of those who contested them were neither parties (that is not alleged) nor their representatives; and in particular that the

- (1) (1902) I.L.R., 25 Mad., 529.
(3) (1912) M.W.N., 513.
(5) (1897) I.L.R., 20 Mad., 378.
(7) (1911) I.L.R., 34 Mad., 450.
(9) (1911) I.L.R., 34 Mad., 417.
(11) (1911) 3 L.W., 377.

- (2) (1905) I.L.R., 28 Mad., 87.
(4) (1907) I.L.R., 30 Mad., 507.
(6) (1905) I.L.R., 28 Mad., 117.
(8) (1908) I.L.R., 31 Mad., 177.
(10) (1918) I.L.R., 41 Mad., 467.
(12) (1916) 1 M.W.N., 287.

stranger purchaser referred to in the third question at the Court sale in connexion with which these proceedings have arisen must be regarded as the representative of one party or other to the decree under execution, if section 47 is to be applied. That assumption, I agree with the learned Chief Justice, must be rejected, because, as the Judicial Committee held in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1), the auction-purchaser's inclusion in the proceedings is justifiable on the ground of his interest in their result and without reference to his possession of a representative character. In fact there was in that case, as I understand it, no attempt to decide whether he had one; and, if the judgment in *Magan Lal v. Doshi Mulji*(2) assumes such a decision, I would respectfully dissent from it. The committee regarded it as sufficient to attract the application of section 47 that a question relating to execution had arisen between the parties to the decree, without reference to the purchaser's inclusion in the proceedings. It need only be added that in order to the arising of such a question, it is not essential that all the parties to the decree should actually be impleaded in the proceedings, in which it is raised. For, although I deprecate the common practice, which is exemplified by the cases before us, of failing to implead in such proceedings either the decree-holder or the judgment-debtor, the nature of the question to be dealt with cannot be affected by their absence. In the cases before us the terms of the reference assume and it is evident that a question relating to the execution of the decree has arisen. It is therefore unnecessary to answer the third question referred directly or otherwise than by saying that the inclusion of the auction-purchaser as a party to proceedings relating to an auction sale does not make section 47 inapplicable to them.

The foregoing, of course, supplies no answer to the other questions referred, in which the representative character of the other contesting party in the cases before us, the purchaser in execution of a previous money decree or his transferee, is in issue. For the connexion of either with the proceedings in execution of the mortgage decree, in which the dispute to be adjudicated on has arisen, is indirect and their interest in the result of these proceedings accrued to them independently of the

- (1) (1892) I.L.R., 19 Cal., 683 (P.C.). (2) (1901) I.L.R., 25 Bom., 631.

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sale, which they impugn. And accordingly, so far as they are concerned, their possession of a representative character must be established, if section 47 is to be applied. It is not suggested that they can be regarded as the representatives of the holder of the decree under execution in the present proceedings, since he had no connexion with the Court sale and private sale, under which they claim. The conclusion will therefore depend on whether they represent the judgment-debtor in these proceedings, who is also the judgment-debtor under the money decree in execution of which that sale was held. It appeared, it may be observed, in the course of argument that the statement of the parties' characters in my order of reference was inaccurate, inasmuch as in all these appeals and not only in Appeal against Order No. 260, the contesting party was the vendee of the decree-holder purchaser under the money decree. This however authorizes hardly any restriction of the discussion of the general principle involved. For the three alternatives have still to be considered, that the purchaser represents (1) no one or (2) the judgment-debtor or (3) the money decree-holder, either because he in fact derived title from him or on other grounds.

It does not seem to me that any detailed discussion of the numerous decisions enumerated in the judgment just delivered is called for, since the conflict between them is for the most part beyond reconciliation. On two points however there is a distinct preponderance of authority in this Court; and I therefore take it as settled law that the representative mentioned in section 47 is not to be identified with a legal representative as defined in section 2(11), and that a purchaser at Court auction represents some one; that is, either the judgment-debtor or the decree-holder. For, although the latter conclusion is contrary to the dictum of KRISHNASWAMI AYYAR, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(1), and the cases from unauthorized reports, in which it is followed, to which my order of reference refers, it is, as I have pointed out there, unsupported by reference to principle and irreconcilable with another portion of the learned Judge's judgment and other earlier and later decisions.

(1) (1911) I.L.R., 34 Mad., 417.

The question is then whether the purchaser is the representative of the judgment-debtor or decree-holder; and it is sufficient for the present reference to deal with it as regards money decrees only and without regard to the special and more difficult considerations arising in connexion with sale under mortgage decrees, by which the interest of the mortgagee decree-holder as well as the equity of redemption is ordinarily transferred. As regards money decrees it seems to me very difficult, if not impossible, to imagine a case, in which the purchaser can become the representative of the decree-holder. The dictum of MOORE, J., in *Kasinath Ayyar v. Uthumansa Rowthan*(1) was obiter, the fact that the auction-purchaser was the decree-holder affording as he points out an alternative ground for his decision; and the sale was in execution of a mortgage decree and was therefore subject to the considerations above referred to. In *Sandhu Taraganar v. Hussain Sahib*(2), the question arose regarding a purchaser from the decree-holder purchaser at the Court sale; and in that case and in *Manicka Udayan v. Rajagopala Pillai*(3), the Court sale was held under the decree, in the execution of which the application of section 47 was proposed. Of the decisions relied on by MOORE, J., in *Sandhu Taraganar v. Hussain Sahib*(2), *Prosunno Kumar Sanyal v. Kali Das Sanyal*(4), has already been referred to, whilst *Ishan Chundir Sirkar v. Beni Madhub Sirkar*(5), does not, with all due deference, support him and *Dwar Buksh Sirkar v. Fatik Jali*(6) deals with the transferee from a decree-holder of his decree, not of what he had purchased in execution of it. On the other hand, as the learned Chief Justice has shown, the purchaser at Court sale has been regarded, so far as appears on general grounds, as the representative of the judgment-debtor in *Krishna Satapathi v. Sarawatula Sambasiva Row*(7) and *Subbamma v. Chennayya*(8). Apart from authority the fact recognized by KRISHNASWAMI AYYAR, J., in *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*(9), that the purchaser succeeds to the

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(1) (1902) I.L.R., 25 Mad., 529. (2) (1905) I.L.R., 28 Mad., 87.
(3) (1907) I.L.R., 30 Mad., 507. (4) (1892) I.L.R., 19 Cal., 683 (P.C.).
(5) (1897) I.L.R., 24 Cal., 62 (F.B.). (6) (1897) I.L.R., 26 Cal., 250.
(7) (1908) I.L.R., 31 Mad., 177. (8) (1913) I.L.R., 41 Mad., 437.
(9) (1911) I.L.R., 34 Mad., 417.

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judgment-debtor's rights in the property sold, would ordinarily be sufficient to constitute him his representative in interest, at least in proceedings regarding that property; and the only argument suggested to the contrary, that the purchaser and decree holder are both interested to support the sale, at which the purchase was made, appears to assume, what is not the case, that they both have or have had in succession an identical interest in the property sold.

Holding that the purchaser in execution of a money decree is ordinarily the representative of the judgment-debtor, I consider next whether he is so, when, as in the cases before us, he is also the decree-holder and when his position comes in question in a distinct proceeding. It may be pointed out that, where his position does not so come in question, the fact that he is the purchaser does not, consistently with the reference already made to *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1), require consideration. When it does, it seems to me that his character as decree-holder in one execution can have no effect on his position in another and that there is nothing in authority or on principle to debar us from treating him like any other stranger to the latter, no reason appearing for according him any other rights than a stranger purchaser would acquire from the judgment-debtor, whether by execution or private sale.

The foregoing entails that the purchaser from a decree-holder purchaser under a money decree is the representative of the judgment-debtor for the purpose of inquiry into a question relating to the execution of a distinct decree affecting the same property. I would answer the second question referred accordingly. An answer to the first question is not necessary.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—[His Lordship briefly stated the facts and continued:]

A preliminary objection was taken that no appeal lies because the purchaser under the money decree cannot be regarded as a representative of any of the parties to the decree. It was under these circumstances that the three questions have been referred for the opinion of the Full Bench.

(1) (1892) I.L.R., 19 Cal., 683 (P.C.).

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Upon one question there was no contest. It was conceded by the counsel for the respondent that where the equity of redemption is purchased under a money decree, in matters relating to execution of a mortgage decree, the auction-purchaser under the money decree will be the representative of the judgment-debtor in the mortgage decree. This matter apart from concession has been definitely decided by the Full Bench of the Calcutta High Court in *Ishan Chunder Sirkar v. Beni Madhub Sirkar*(1), and by the Full Bench of the Allahabad High Court in *Gulzari Lal v. Madho Ram*(2). In the first of these decisions it was held that the decision of the Judicial Committee in *Radha Madhub Holdar v. Monohur Mukerji*(3), is only consistent with the view that the auction-purchaser is the representative of the judgment-debtor. Although the point was not expressly decided by the Board, I respectfully concur with the view taken in Calcutta that that decision is authority for the proposition enunciated. It is true in Bombay they have held that the auction-purchaser is the representative of neither the decree-holder nor of the judgment-debtor; and in the latest decision of that Court in *Narsinhbhat v. Bando Krishna*(4), it was held that he is not a representative of the judgment-debtor. But having regard to the decisions of the Judicial Committee and the two Full Bench cases referred to by me, I am of opinion that the auction-purchaser represents the judgment-debtor in questions relating to the execution of the decree in the second suit on the mortgage. But the question whether in the same suit he would be the representative of the judgment-debtor is not quite settled. I shall not discuss the authorities bearing thereon as in the view I am taking the discussion would be unnecessary. Before proceeding further I might state that the view that the auction-purchaser is the representative of the decree-holder has not been accepted in Calcutta or in Allahabad. It is certainly not the law in Bombay. In this Presidency the weight of authority is against making him the representative of the decree-holder. *Krishna Satapathi v. Sarasvatula Sambasiva Row*(5), *Nadamuni Narayana Iyengar v.*

(1) (1897) I.L.R., 24 Cal., 62 (F.B.). (2) (1904) I.L.R., 23 All., 417.
(3) (1888) I.L.R., 15 Cal., 756 (P.C.). (4) (1918) I.L.R., 42 Bom., 411.
(5) (1908) I.L.R., 31 Mad., 177.

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Veerabhadra Pillai(1) and *Subbamma v. Chengayya*(2) take that view. On the other hand, we have *Manicka Udayan v. Rajagopala Pillai*(3) and *Arthanari Chettiar v. Nagoji Rao*(4), in favour of regarding the auction-purchaser as the representative of the decree-holder. On principle it seems to me that this latter view is wrong. He is certainly not a representative in interest. Because, beyond being the instrument for bringing the property of the judgment-debtor to sale, ordinarily speaking, a decree-holder does not transmit any of his rights to the auction-purchaser. I can understand his legal representative standing in his shoes. I can understand his assignee or heir prosecuting his right. But I am unable to hold that an auction-purchaser represents the decree-holder. On the motion of the decree-holder the Court proceeds to sell the property of the judgment-debtor and the principle of *caveat emptor* has been applied to purchases so made. The only provision in the Code of Civil Procedure which affects the decree-holder is that which provides for an application by the auction-purchaser for a refund of the money from the decree-holder in case the sale is set aside. I am therefore unable to accept as correct those decisions which hold that he is a representative of the decree-holder.

But I think all these difficulties may be overcome by a legitimate application of the principle enunciated in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(5). In that case a suit was brought by a judgment-debtor for setting aside the sale of his property on the ground that the decree-holder acted fraudulently. The auction-purchaser at the execution sale was made a defendant. When the matter finally went before the Judicial Committee their Lordships said:—

"Mr. Doyne, who appeared for the appellants, admitted that the question at issue was one relating to 'execution, discharge, or satisfaction of the decree'."

"But he argued with much ingenuity that the suit was not barred by the provisions of section 244, because the question concerned the auction-purchasers *as much as anybody* (the italics are

(1) (1911) I.L.R., 34 Mad., 417.

(3) (1907) I.L.R., 30 Mad., 507.

(2) (1918) I.L.R., 41 Mad., 467.

(4) (1912) M.W.N., 518.

(5) (1892) I.L.R., 19 Cal., 633 (P.O.).

mine) and therefore, as he contended, it could not properly be described as a question 'arising between the parties to the suit in which the decree was passed'."

Their Lordships say further on

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that, when a question has arisen as to the *execution, discharge or satisfaction of a decree between the parties to the suit* (the italics are mine) in which a decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section."

This statement shows that what the Courts have to see is whether the issues arising for decision relate (a) to execution; (b) to deciding rival rights of the decree-holder and of the judgment-debtor, in the subject-matter. If those conditions are satisfied, the fact that others are interested in the result of the decision should not affect the jurisdiction and competency of the executing Court to deal with the matter. Their Lordships lay special emphasis on the cheapness and speediness of remedies expected of an application in execution. If we turn to the language of section 47 which corresponds to section 244 of the Code of 1882 the same result would appear to follow. The section lays down only two conditions. It does not describe who the parties to the execution application should be. The obvious object of the legislature was that once a matter has been adjudicated upon by a regular trial, questions affecting the same matter should as far as possible be dealt with in the execution department. In very many cases the same Judicial Officer may have to deal with the matters in execution: that would be a distinct advantage. Further the parties will be saved considerable expense if the question is dealt with in execution. I am therefore of opinion that as extended an application should be given to the rule enunciated by the Judicial Committee as is consistent with the language of section 47. In *Ganapathi Mudaliar v. Krishnamachariar*(1), another decision of the Judicial Committee, they reiterated the principle

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enunciated in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1). In *Krishnabhupati Devu v. Vikrama Devu*(2), this view seems to have found favour with the learned Judges. In *Magan Lal v. Doshi Mulji*(3), there are observations of Sir LAWRENCE JENKINS which may be regarded as enunciating the same principle. The rule itself is so eminently a workable one and steers clear of many difficulties which have sprung round the application of section 47 that in my opinion, both the letter of the law and the reason of it demand, that this principle should be given wide effect by Courts in this country. I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge, or satisfaction of the decree it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect application under section 47.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Burn.

1919,
August, 1.

SUBRAMANIA PATTAR (PLAINTIFF), APPELLANT,

v.

KATTAMBALLI RAMA (DEFENDANT), RESPONDENT.*

Lessor and lessee—Agricultural lease—Flooding by sea-water—Land rendered unfit for cultivation—Right of lessee to abatement of rent—Duty to avoid lease in toto—Transfer of Property Act (IV of 1892), sec. 108, cl. B (e)—Principle of the section, applicability of.

If by an inundation of sea-water a portion of lands leased for agricultural purposes becomes unfit for cultivation and the landlord brings a suit to recover the whole rent reserved in the lease, the tenant can plead as a defence that he is entitled to a proportionate abatement and is not bound to have avoided the lease *in toto*. The principle of proportionate abatement was recognized in India prior to the Transfer of Property Act, and is in accordance with natural justice. Neither section 108 B (e), Transfer of Property Act, nor

(1) (1892) I.L.R., 19 Calc., 688 (P.C.).
(2) (1895) I.L.R., 18 Mad., 13. (3) (1901) I.L.R., 25 Bom., 631.

* Second Appeal No. 2041 of 1918.

its principle is applicable to cases of flooding by sea-water of lands leased for agricultural purposes.

Sheik Enayutollah v. Sheik Elaheebuksh, (1884) W.R. Gar. (Act X Rulings), 42, followed.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal Suit No. 73 of 1918, preferred against the decree of K. RAJU NAYAR, the District Munsif of Kasaragod at South Kanara, in Original Suit No. 524 of 1916.

This suit was instituted to recover part of the rent due for 1912 and the whole of the rent due for 1913 to 1916 on a marupat (counter-part of a lease) executed by the defendant in 1907 to one Kunhani. The present karnavan of Kunhani's tarwad assigned to the plaintiff by a deed, dated 1st April 1916, the right to collect the rents. The lease was for 20 years of a plot of paddy land and two plots of garden land. The rent fixed was 90 paras of paddy for the former and Rs. 10 for the garden plots, payable annually. The defendant, while admitting the lease, pleaded that in consequence of a rush of sea-water in 1912 the paddy land became unfit for cultivation and that it was not cultivated since then. He further pleaded that the karnavan had agreed to remit the rent. The lower Courts found that the paddy land was flooded by sea-water and was rendered unfit for cultivation, and that though the alleged agreement to remit rent was not proved the defendant was entitled to a remission of rent for the paddy land under the provisions of section 108, clause B (e) of the Transfer of Property Act. The plaintiff preferred this second appeal and contended *inter alia* that the defendant, not having avoided the lease *in toto*, was not entitled to an abatement of rent.

C. V. Anantakrishna Ayyar for the appellant.

K. P. Lakshmana Rao for the respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The finding of the Courts below is that a portion of the demised premises became unfit for paddy cultivation, because it was inundated by sea-water. The question therefore arises whether the tenant can plead as a defence to a suit for rent that he is entitled to proportionate abatement. There is not much authority on the subject. Mr. Anantakrishna Ayyar contended that the principle of section 108, clause B (e) of the Transfer of Property Act, was applicable

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and that the only remedy open to the tenant was to have avoided the lease *in toto*. Mr. Lakshmana Rao, for the respondent, argued that the Transfer of Property Act not being in terms applicable to agricultural tenancies, the application of the principle underlying the section must depend upon whether there are recognized pre-existing rules on the subject which render the application of the principle inequitable. He drew our attention to *Sheik Enayatoollah v. Sheik Elaheebuksh*(1) and *Salimullah v. Kaliprosanna*(2) and contended that prior to the enactment of the Transfer of Property Act, the principle of rateable apportionment was recognized in this country. We may say that the idea is in accordance with notions of natural justice and unless we are compelled to apply the provisions of the Act, there is no ground for not following the judgment of Sir BARNES PEACOCK in *Sheik Enayatoollah v. Sheik Elaheebuksh*(1).

Even if the principle of section 108, clause B (e), is to be invoked, it is not clear that the present case is covered by the accidents enumerated. From the earliest time flooding by sea-water has not been recognized in England as standing on the same footing as destruction by fresh water floods. It is explained in 18 Halsbury, 481, that whereas deterioration by fresh water flooding is repairable, flooding by sea-water would render the land practically unfit for all time to come. Whatever may be the reason, it was laid down in Bacon's Abridgment, Vol. VII, page 68, that the tenant can claim abatement when the leased land was flooded by sea-water and this view has been accepted as good law by all text writers—Woodfall, page 479; Foa, page 112; and Halsbury, Vol. 18, page 481. Therefore, even under the Transfer of Property Act, following these authorities, the word *flood* may have to be restricted to flooding by other than sea-water. Further, it is open to argument whether section 108 B (e) is exhaustive of the right of the tenants. Avoidance of tenancy is no doubt one mode of relief. But does it exclude the idea that the claim for abatement is available to him? The English law seems to countenance the view that avoidance is the only remedy, *Baker v. Holtzapffel*(3). In *Siddick Haji*

(1) (1864) W.R. Gap. (Act X Rulings) 42. (2) (1915) 22 C.L.J., 569.
(3) (1811) 4 Taunt, 45.

Hoossain v. Bruel & Co.(1) and *Dhuramsey v. Ahmedabhai*(2) this principle was accepted. However that may be, in our opinion, as the Act is not in terms applicable, there is no reason for importing by way of analogy these technical considerations in discussing rights between landlord and tenant in respect of agricultural tenancies. We think the learned Judge was right. The second appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir Abdur Rahim, Kt., Offg. Chief Justice,
and Mr. Justice Seshagiri Ayyar.

VEERAPPA CHETTY (SECOND DEFENDANT), APPELLANT,
v.

RAMASAMI CHETTY AND ANOTHER (SECOND PLAINTIFF
AND FIRST DEFENDANT), RESPONDENTS.*

1919.
April 10, 80,
May 1, and
August 1.

Execution—Attachment and sale of lands—Transfer of territorial jurisdiction of Court—Order of Court which did not pass the decree but to which execution was transferred—Attachment and sale of lands by Court after deprivation of territorial jurisdiction, Validity of—Estoppel against judgment-debtor, how far binding upon auction-purchaser.

A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immovables in execution, if at the time of the order such Court had no territorial jurisdiction over the immovables. Though a judgment-debtor, who does not object to a confirmation of a sale by such Court, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate against a subsequent purchaser of the same property in a sale held by a Court having jurisdiction, in execution of another decree against the same judgment-debtor.

Mahomed Musaffer Hossein v. Kishori Mohun Roy, (1895) I.L.R., 22, Cal., 908, explained; *Prayag Roy v. Sishu Prasad Tewari*, (1908) 35 Cal., 677 and *Parsidh Narain Singh v. Janaki Singh*, (1907) 7 C.L.J., 644, dissented from.

APPEAL against the decree of A. NARAYANAN NAMBIYAR, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 22 of 1916.

The facts are stated in the judgment.

A. Krishnaswami Ayyar and T. Ranga Achariyar for appellant.
T. R. Venkatarama Sastri for first respondent.

(1) (1901) I.L.R., 35 Bom., 333. (2) (1894) I.L.R., 23 Bom., 15.

* Appeal No. 272 of 1917.

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The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The facts of the case are not in dispute. The second defendant obtained a decree against the first defendant in the Temporary Subordinate Judge's Court at Rāmnād on 8th April 1913. It was transferred for execution to the permanent Sub-Court and an application for attachment was made to that Court on 18th April 1913. On 21st April 1913, the taluk in which the property sought to be attached was situated, was transferred from the jurisdiction of the Rāmnād Sub-Court to that of the Sivaganga Sub-Court. Even after this transfer, the Rāmnād Court issued an order of attachment on 25th June 1913. The property was sold on 10th November 1913 and the second defendant became the purchaser. The sale was confirmed on 11th December 1913. The judgment-debtor, the first defendant, did not object to the confirmation.

Plaintiff, on the other hand, instituted a suit against the first defendant in the Sub-Court at Sivaganga and obtained a decree in December 1912. He attached the same properties on 17th September 1913. The sale was on 30th June 1914 and plaintiff became the purchaser. The present suit is for possession.

The Subordinate Judge has given a decree to the plaintiff. The second defendant has appealed. Three main contentions were put forward by Mr. A. Krishnaswami Ayyar. It was first contended that by the transfer of the territorial jurisdiction, the Rāmnād Court did not cease to have jurisdiction, as at the time of the application for attachment it had jurisdiction. The recent Full Bench ruling—*Seeni Nadan v. Muthusami Pillai*(1),—that an application to the Court which passed the decree would be one in accordance with law, does not affect the present case. The permanent Sub-Court of Rāmnād which executed the decree was not the Court which passed the decree. Mr. Krishnaswami Ayyar referred to the analogy of cases in which it was held that the conferring of appellate jurisdiction on a new Court would not deprive the suitors to whom the right of preferring an appeal had accrued already from filing the appeal in the old appellate tribunal: vide, *Colonial Sugar Refining Company v. Irving*(2). Reference was made to *Subbaraya Mudaliyar v.*

(1) (1919) I.L.R., 42 Mad., 821.

(2) [1905] A.C., 383.

Rakki(1) and *Ramakrishna Chetti v. Subbaraya Ayyar*(2) in which it was held that pending suits are not transferred *ipso facto* by the vesting of jurisdiction in another Court. I do not think the analogy holds good. The essence of the notification is the deprivation of jurisdiction of one Court and the conferring of it on another. Therefore the notification must be read as speaking retrospectively and as declaring that from and after its date the first Court ceased to have jurisdiction over the subject matter. Moreover, the language of clause (b) of section 39 of the Code of Civil Procedure, to which the learned vakil for the respondent drew our attention, shows that the legislature conferred the power of dealing with immoveable property only on the Court which had territorial jurisdiction over it. This was the view taken in *Subbiah Naicker v. Ramanathan Chettiar*(3) and the cases following it. *Visvanathan Chetty v. Murugappa Chetty*(4) is an express decision on the point. This view was not dissented from by the learned Chief Justice in the recent Full Bench judgment, *Seeni Nadan v. Muthusami Pillai*(5) and the other two learned Judges have expressly re-affirmed this view. I am not satisfied that it is wrong. I am, therefore, of opinion that the Rāmnād Court had no jurisdiction to attach or sell the property on the dates on which it exercised those powers.

I shall now deal with the second branch of the argument which Mr. Krishnaswami Ayyar pressed on us with great force and ability. The argument was this. Even granting that the Rāmnād Court had no jurisdiction, as the attachment, sale and the confirmation of it were effected without objection by the judgment-debtor he was precluded from disputing the title conveyed. If it was not open to him to question the title, the plaintiff who purchased the property subsequently took only what the judgment-debtor could have conveyed and that consequently no title passed to the plaintiff. For the first portion of this contention, reliance was placed on *Velayutha Muppan v. Subramaniam Chetty*(6). It was held in that case that, at any

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(1) (1909) I.L.R., 32 Mad., 140.
(3) (1914) I.L.R., 37 Mad., 462.
(5) (1919) I.L.R., 42 Mad., 1918.

(2) (1915) I.L.R., 28 Mad., 101.
(4) (1917) 83 M.I.J., 750.
(6) (1913) 24 M.L.J., 70.

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rate after confirmation of the sale, the judgment-debtor was not entitled to impeach the title which he obtained under the certificate of sale. Reliance was also placed on sections 18 and 21 of the Code of Civil Procedure. Although these sections apply in terms only to suits, it was hardly disputed that execution applications would be within the principle. I am willing therefore to proceed on the ground that, if the judgment-debtor sued to recover possession on the ground that the sale by the Rāmnād Court was a nullity because of want of jurisdiction, he would be estopped from re-opening the earlier proceedings.

Does that infirmity affect the plaintiff? It was held by the Judicial Committee in *Dinendranatha Sannial v. Ramakumar Ghose*(1) —

“There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone: in the latter the sale must be made by public auction conducted by a public officer of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. Under the latter, the purchaser notwithstanding he acquires merely the right, title and interest of the judgment-debtor acquires that title by operation of law, adversely to the judgment-debtor and freed from all alienations or encumbrances effected by him subsequently to the attachment of the property sold in execution.”

In *Richards v. Johnston*(2), which was approved and followed by very eminent Judges in *Richards v. Jenkins*(3), it was held that an execution creditor is not affected by the estoppel against the judgment-debtor. The learned vakil for the appellant drew our attention to a sentence in the judgment of KAY, L.J., in *Madell v. Thomas and Co.* (4), wherein the Lord Justice says that the trustee in bankruptcy and an execution-creditor are affected by the same estoppel as the judgment-debtor. The observation was entirely *obiter* and the two other Lord Justices who took part in the case did not express concurrence with it. But it was strenuously argued that

(1) (1881) I.L.R., 7 Cal., 107.
(2) (1859) 4 H. & N., 660, at 664; s.c., 167 E.R., 1000. (3) (1867) 18 Q.B.D., 451.
(4) (1891) 1 Q.B.D., 230.

the Judicial Committee in *Mahomad Mozuffer Hossein v. Kishori Mohun Roy*(1) have definitely laid down this proposition. As, in my opinion, this case has been the parent of misconceptions which have affected many decisions, I shall examine it in some detail. In that case the property in suit stood in the name of the wife. To a mortgage by the wife, the husband was an assenting party. On the mortgage a decree was obtained. During execution, a person who obtained a decree against the husband put forward the contention that the property really belonged to the husband and that the wife was only a benamidar. Their Lordships held that the decree-holder was estopped from putting forward such a contention. The principle of the decision was that where title is ostensibly in a person and the real owner further acknowledges the title as true, persons who seek to prove that the title is illusory will not be permitted to do so. What is denied is the right to adduce evidence that the *prima facie* title is not the real title. Under section 41 of the Transfer of Property Act, the legislature has provided that a transfer from the ostensible owner confers title on the transferee. It is this kind of estoppel, which really confers title, that their Lordships were dealing with. They should not be understood as having disapproved *Richards v. Johnston*(2) and *Richards v. Jenkins*(3) and to have laid down that an execution creditor under all circumstances is estopped by considerations which affect the judgment-debtor. The same observations apply to *Porashonath Mukerji v. Anathnath Deb*(4). The contrary view would attribute to the Judicial Committee a departure from the decision in *Dinendranatha Sanniyal v. Ramakumar Ghose*(5) and from the high authority of the learned Lord Justices who decided *Richards v. Jenkins*(3). I do not see sufficient ground for reading *Mahomad Mozuffer Hossein v. Kishori Mohun Roy*(1) in that way. Mr. Justice MUKERJI, for whose opinion I have a very great regard, takes the view that *Mahomad Mozuffer Hossein v. Kishori Mohun Roy*(1) has overruled all previous pronouncements of the Judicial Committee; with all respect, I am unable to agree. For the

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(1) (1895) I.L.R., 22 Cal., 909. (2) (1859) 4 H. & N. 660 at 664.
(3) (1867) 18 Q.B.D., 451. (4) (1883) I.L.R., 9 Cal., 265.
(5) (1881) I.L.R., 7 Cal., 107.

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same reason I am unable to accept the broad statement as to estoppel contained in *Prayag Raj v. Sidhu Prasad Tewari*(1) and *Parsidh Narain Singh v. Janaki Singh*(2).

There is also another aspect of the case which leads to the same conclusion. Whatever may be the general position of an execution-creditor in regard to cases over which a Court has jurisdiction, the principle of *Debendranath Sen v. Mirza Abdul Samed Seraji*(3) should not be extended to cases where the judgment-debtor is sought to be affected by a rule of procedure relating to jurisdiction. I may illustrate my position by reference to the latest decision of the Judicial Committee in *Sri Rajah Satrucherla v. Maharaja of Jeypore*(4). In that case the Subordinate Judge of Vizagapatam directed the sale of property not within his jurisdiction. In this Court, on appeal, the procedure was justified on the principle enunciated in sections 18 and 21 of the Code of Civil Procedure. The Judicial Committee pointed out that as the Code of Civil Procedure was not applicable to the Agency Tracts where the property was situate the order for sale was *ultra vires*. It is clear that in the opinion of the Board, it is not a general rule of law that an order for sale by a Judge, who has no jurisdiction to direct it, can be upheld on the ground that the judgment-debtor did not oppose it. The justification for such a rule of estoppel is the legislative provision in that behalf. That provision must be regarded as an exception to the general rule that orders passed without jurisdiction are nullities. Consequently, this exceptional rule of estoppel should not be extended further than is warranted by the language. The sections do not bind in terms persons like execution-creditors and I am not prepared to extend the estoppel to them. Mr. Krishnaswami Ayyar seems to suggest that an auction-purchaser would be in a worse position than an execution-creditor. I see no justification in principle for this contention. Even if it is accepted, the plaintiff does not lose his right as decree-holder by becoming a purchaser.

Mr. Venkatarama Sastriyar sought to distinguish *Mahomad Mozuffer Hossein v. Kishori Mohun Roy*(5) and *Debendranath*

(1) (1908) I.L.R., 35 Cal., 877.

(2) (1908) 7 C.L.J., 644.

(3) (1909) 10 C. L.J., 150.

(4) 1919 I.L.R., 42 Mad., 821.

(5) (1895) I.L.R., 22 Cal., 909.

Sen v. Mirza Abdul Samed Seraji(1) on the ground that there was an attachment at the instance of his client before the sale to the second defendant. I am not prepared to base my decision on this distinction. It has been held that an attachment confers no right and I do not think that the sale following on it can really affect the title of the second defendant, if otherwise valid. Moreover an attachment under section 64 affects private alienations and not compulsory sales.

Mr. Krishnaswami Ayyar contended lastly, that as the plaintiff applied for rateable distribution, he is estopped from impeaching the second defendant's title. The facts which led to the application are not clear, as was pointed out by the Subordinate Judge. Even otherwise, the materials for basing a decision on section 115 are wanting. There is no question of anybody being misled to his prejudice.

For all these reasons, I am of opinion that the decree of the Subordinate Judge is right and would dismiss the appeal with costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

GARAPATHI BRAHMAYYA AND SIX OTHERS (DEFENDANTS),
APPELLANTS,

v.

KURELLA RAMIAH (PLAINTIFF) RESPONDENT.*

Licence to sell arrack—Prohibition to sell the privilege without permission—Taking partner without permission, legality of—Loan to such partnership with knowledge of prohibition—Onus on lender to prove legality of partnership—Right of lender to recover loan from licensee.

Where a licence to sell arrack contained the condition that "the privilege of supplying and vending shall not, without the permission of the Collector previously obtained, be sold, exchanged or sub-leased, nor, if the Collector has ordered, can an agent be appointed, without his permission previously obtained, for exercise of any such privilege",

Held that it was illegal for the licensee to take a partner in the business, without first obtaining permission, and that the plaintiff must be taken to have

(1) (1909) 10 C.L.J., 150.

* Second Appeal No. 1590 of 1918.

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had notice of the illegality. But the illegality was not of such a nature as to debar the plaintiff altogether from suing, and he was entitled to recover one half of the loan.

SECOND APPEAL against the decree of G. G. SOMAYAJULU Garu, Temporary Subordinate Judge at Ellore, in Appeal No. 206 of 1917, filed against the decree of R. V. KRISHNAN, District Munsif of Ellore, in Original Suit No. 550 of 1915.

The first defendant in the case obtained a licence from Government to sell arrack. One of the conditions was that "the privilege of supplying and vending shall not without the permission of the Collector previously obtained, be sold, exchanged, or sub-leased, nor if the Collector has ordered, can an agent be appointed, without his permission previously obtained, for exercise of any such privilege." The first defendant took the second defendant into partnership with him without obtaining the permission of the Collector. Knowing the above condition of the licence and the fact of the partnership between the two, the plaintiff lent to the partnership Rs. 550 to enable the partners to carry on their trade. On the plaintiff suing them both for the recovery of the loan, the two defendants pleaded inter alia that the partnership was illegal, that the loan was given with knowledge of the illegality and that neither of them was liable. Defendants Nos. 3 to 7 who were added as parties being the sons of the second defendant, adopted the pleas of defendants Nos. 1 and 2. Upholding the above pleas of the defendants the District Munsif dismissed the suit. On appeal by the plaintiff the Subordinate Judge decreed the claim in full against all the defendants. Thereupon the defendants preferred this Second Appeal.

P. Narayanamurti for the appellants.

A. Krishnaswami Ayyar for the respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—The main facts of the case are not in dispute. The first defendant obtained a licence to sell arrack. The principal condition in it with which this Second Appeal is concerned is in these terms:—

"Paragraph 16.—The privilege of supplying and vending shall, not, without the permission of the Collector previously obtained, be

sold, exchanged or sub-leased, nor, if the Collector has ordered, can an agent be appointed, without his permission previously obtained, for exercise of any such privilege."

The first defendant took the second defendant as his partner without obtaining the Collector's sanction. Plaintiff had dealings with both the defendants and the suit is for money due on those dealings.

The first question is whether the partnership became illegal by the second defendant joining the business. Mr. A. Krishnaswami Ayyar, vakil for the respondent, argued that as the licence does not in terms prohibit a partnership and as the word *transfer* is not to be found in it, the transaction was not illegal. He relied on *Karsan v. Gatlu Shivaji*(1) and on *Natla Bapiraju v. Puran Achutha Rajajee*(2). In the latter case the learned Judges based their decision on the fact that the licence was not before them. In *Karsan v. Gatlu Shivaji*(1) the learned Judges say that the omission of certain words in the new licences issued by the Government of Bombay indicated a change of intention on the part of the executive not to treat partnerships as illegal. We are not in a position to gather the intention of the Madras Government on this subject. We must therefore give to the language of the clause in the licence its ordinary meaning. The clause prohibits sale by a stranger and the employment of an agent. In our opinion the taking of a partner has the effect, ordinarily, of selling a portion of the business to him. It has certainly the effect of making him an agent for the sale of liquor. As this is prohibited, we think that the partnership is illegal. *Nalam Padmanubham v. Suit Badri Nadh Sardar*(3), *Thiti Pakurudasu v. Bheemudu*(4) and *Maruda Muthu Pillai v. Rungasami Muppan*(5) have consistently adopted this view in this Court.

The next question is whether the plaintiff had notice of the illegality of the partnership. Mr. Krishnaswami Ayyar relied on the observation of Lord BOWEN, L.J., in *Hire Purchase Furnishing Company v. Richens*(6) for this purpose. The learned Lord Justice had before him a case which would be governed in this country by section 263 of the Contract Act. It was held that

(1) (1913) I.L.R., 37 Bom., 320.
(3) (1912) I.L.R., 85 Mad., 582.
(5) (1901) I.L.R., 24 Mad., 401.

(2) (1910) M.W.N., 549.
(4) (1903) I.L.R., 28 Mad., 420.
(6) (1887) 20 Q.B.D., 387.

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where the carrying on of the business which is *prima facie* legal becomes *malum prohibitum* under certain circumstances, the burden of proving that the prohibition was known to the lessor was on him. *Waugh v. Morris*(1), is also to the same effect. But these decisions do not affect the present case. As admitted by the plaintiff in his plaint, he knew that the first defendant alone had the licence; he knew that the second defendant was taken as a partner and that the partner carried on the business. Under these circumstances it was incumbent on him to have made inquiries as to whether the Collector permitted the second defendant to join in the business. The burden was on him and we must hold that he has failed to discharge it. We must take it that the second defendant had knowledge of the illegality of the contract.

Now comes the third question which was argued with great insistence by Mr. Narayanamurti, vakil for the appellants. The question is whether, if the transaction is illegal by virtue of the fact that an unauthorized person was included in it, the plaintiff can have no cause of action even against the first defendant. It is not denied that the first defendant could have legitimately carried on the business. Nor is it denied that if the plaintiff lent to the first defendant, he could have recovered. Does he lose his rights altogether because the second defendant was joined in it? In other words where the transaction is not *malum in se* but *malum prohibitum* to a certain extent, is a third party to have no relief? We adopt the statement of law contained in Lindley on Partnership, 8th Edition, page 127. It is in these terms:

"The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person, who being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not *per se* afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio*; and he, not being implicated in any illegal act

(1) (1873) L.R., 8 Q.B., 202.

himself cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership."

The cases to which Mr. Narayanamurti drew our attention, notably *Bani Muncharam v. Regina Stanger*(1), are cases of transactions being unusual or illegal in themselves. In such cases the person who deals with the defendant is believed to have been *particeps criminis* and as such not entitled to recover anything. See also *Upfall v. Wright*(2). But where there is nothing illegal or opposed to public policy in the business itself, and there is nothing which touches the conscience of the lender, these decisions have no application. It was a perfectly legal business which by the inclusion of the second defendant became inoperative as a partnership. The last question is whether the plaintiff is entitled to recover the whole amount. Mr. A. Krishna-swami Ayyar relied on *Jamna Bai v. Vasanta Row*(3) for the position that the first defendant should pay the whole amount. That was a case of a void contract. Here the question is to what extent was the first defendant alone benefited. Section 45 of the Contract Act does not help us in such a case. We think the presumption is that he was benefited by half the loan. In modification of the decrees of the Courts below, we give the plaintiff a decree for half the amount sued for, with costs against the first defendant. The second defendant will bear his own costs.

N.R.

(1) (1908) I.L.R., 32 Bom., 581.

(2) [1911] 1 K.B., 508.

(3) (1916) I.L.R., 39 Mad., 409 (P.C.).

PRIVY COUNCIL.*

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v.

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TWO APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature
at Madras.]1919,
February 4,
17, 18, and 20
March 14.

Printing Presses and Newspapers Act (XXV of 1887), sec. 4—Indian Press Act (I of 1910), sec. 3, sub-sec. (1)—Control of press owners—Deposit of security, power of Magistrate to dispense with—Order for deposit made after dispensing with it—Declarations made by keeper of printing presses—Publishing objectionable matter in newspaper or other periodical—Order by Governor in Council forfeiting security and newspaper, with all copies wherever found and annulling declarations made—Petitions by owner of press to set aside or revise orders of Magistrate and Governor in Council—Articles in newspaper bringing Government into hatred and contempt—Criminal Procedure Code, 1898, sec. 435—Writ of certiorari—Appeal in criminal case—Practice in Privy Council—Indian Press Act (I of 1910), ss. 3, sub-sec. (1), 4, sub-sec. (1), 17 and 22.

Under the Printing Presses and Newspapers Act (XXV of 1887), section 4, any person who keeps a printing press in his possession must make and subscribe a declaration before a Magistrate stating that he has a press for printing and where it is situated; and by section 5 no printed newspaper or other periodical shall be published without the printer or publisher making a declaration that he is the printer or publisher, the name of the periodical, and the place where the printing is conducted. Under the Indian Press Act (I of 1910 of the Government of India), section 3, sub-section (1), the person making such declaration is required to deposit before a Magistrate a sum of money or other security not less than Rs. 500 but not more than Rs. 2,000 as the Magistrate thinks fit to require. The Magistrate however may for special reasons dispense with the deposit, and has certain powers of cancelling or varying any order made under this sub-section. By section 4, sub-section (1), the Local Government, in case of anything objectionable appearing in the paper, may by notice in writing addressed to the owner of the press, declare the security deposit, the newspaper in which the objectionable matter appears, and all copies of it wherever found, to be considered forfeited to the Crown, and the declaration made as above by the keeper of the press annulled. Sections 17 and 18 give power to any person interested in any property so forfeited to make an application to a Special Bench of the High Court to set aside such order, on the ground that the newspaper did not contain anything of an objectionable nature such as is described in section 4, sub-section (1).

* Present:—Viscount HALDANE, Viscount CAVE, Lord PHILLIMORE, Sir JOHN EDGE and Mr. AMER ALI.

The appellant was the owner and keeper of a printing press, and printed and published a newspaper called "New India" and on 2nd December 1914 she had made all the declarations required and had duly observed all the proceedings (except making a deposit of security with which the Magistrate had dispensed) necessary under the above Acts to enable her to carry on and print and publish the newspaper. On 28th May 1916, however, she received a notice from the Magistrate, dated 22nd May 1916, in which he had, under sub-section (1) of section 3 of Act I of 1910, cancelled his order dispensing with the security and required her within fourteen days to deposit Rs. 2,000 as security; and in accordance with that order the appellant deposited the amount, but under protest. On 28th August 1916 she was served with an order dated 25th August 1916 made by the Governor of Madras in Council reciting that twenty passages published in the newspaper "New India" and identified in the order were of the nature described in sub-section (1) of section 4 of Act I of 1910, and declaring that the security which the appellant had deposited and all copies of the newspaper in which the passages appeared were to be considered forfeited to the Crown.

The appellant thereupon presented two petitions to a Special Bench of the High Court, one a Criminal Revision Petition under sections 106 and 107 of the Government of India Act (5 & 6 Geo. V, Sc. 61), and section 435 of the Code of Criminal Procedure, 1898, against the order of the Magistrate requiring security and praying that it might be set aside; and the other under section 17 of Act I of 1910 against the order of forfeiture made by the Governor in Council praying that it might be revised and set aside. The application against the order of the Magistrate was described in the course of the proceedings as an application for a writ of certiorari.

Both applications were heard by a Special Bench and both were dismissed. In the petition under section 17 of Act I of 1910 the Special Bench unanimously held that three articles (2), (11) and (13) were within the terms of section 4, sub-section (1), clause (c): a majority, ABDUR RAHIM, Offg. C.J., and AYLING, J., thought articles (1), (6), (10) and (12) obnoxious to clause (c); AYLING, J., thought the same of articles (9) and (14); and SESHAGIRI AYYAR, J., of article (8); AYLING, J., was of opinion that article (7) was obnoxious to clause (c) and SESHAGIRI AYYAR, J., thought the same of article (11).

Applications to the High Court for leave to appeal to His Majesty in Council were refused, but the appellant obtained special leave to do so.

Held, with regard to the petition to set aside the order of the Magistrate that on the construction of section 3, sub-section (1) of Act I of 1910 the Magistrate had power to cancel his order dispensing with security; that the order cancelling the dispensation was not a judicial act, but one done in the exercise of administrative functions; that the omission to hear the appellant before making it was only an irregularity which could not be reviewed, at any rate by writ of certiorari, and not a case for revision under the Code of Criminal Procedure. The provisions of section 435 of the Code of Criminal Procedure, and of section 115 of the Code of Civil Procedure are not exhaustive and there may be rare cases which might not fall under either of those sections, and for those cases the powers of the High Courts which have inherited the ordinary or extra-ordinary jurisdiction of the Supreme Court to issue writs of certiorari cannot be

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said to have been taken away, though it is taken away in ordinary cases by the above sections of the Civil and Criminal Procedure Codes. And assuming the power to issue writs of certiorari remain, notwithstanding the existence of later procedure by way of revision, in the present case the procedure by certiorari would be precluded by section 22 of Act I of 1910.

Held, with respect to the petition under section 17 to set aside the forfeiture the question was as to whether the passages cited from the articles published in the newspaper came within section 4, sub-section (1) of the Act, and the Judicial Committee found that due weight had been given by the Special Bench to the several portions of the section and that it had not been misconstrued on any matters of law. Their Lordships acting on their usual practice would not, with regard to appeals in Criminal cases, interfere on the merits with the conclusions of the Court below. *Dal Singh v. King-Emperor*, (1917) I.L.R., 44 Cal., 876; L.R., 44 I.A., 137 and *Bal Ganjadhur Tilak v. Queen-Empress*, (1897) I.L.R., 22 Bom., 528; L.R. 25 I.A., 1, were referred to.

CONSOLIDATED APPEAL No. 12 of 1918 from two judgments (18th October 1916) of the High Court of Judicature at Madras respectively dismissing two petitions preferred by the present appellant.

One judgment was by the Court sitting as a Special Bench in accordance with section 17 of the Indian Press Act (1 of 1910); and the other by the same Court in the exercise of its original jurisdiction as a Court of Revision. Sitting as a Special Bench the Court dismissed a petition presented by the appellant in which she prayed for the revision and setting aside (a) of an order made by the Chief Presidency Magistrate of Madras on 22nd May 1916 calling on the appellant to deposit a security of Rs. 2,000 in accordance with section 3 (1) of the Indian Press Act; and (b) of an order purporting to be made on the appellant by the Governor of Madras in Council on 25th August 1916, whereby, purporting to act in accordance with section 4 (1) of the Indian Press Act, he declared to be forfeited to His Majesty the security of Rs. 2,000 and all copies of a newspaper called "New India" wherever found. Sitting in exercise of its ordinary jurisdiction the High Court also dismissed a petition by the appellant for revision of the order made on her by the Chief Presidency Magistrate of Madras on 22nd May 1916.

The judgments of the High Court (ABDUR RAHIM, Officiating C.J., and AYLING and SESHAGIRI AYYAR, JJ.) on the hearing of the petitions in this Court will be found reported in *Mrs. Besant*

v. *Emperor*(1) where the facts, proceedings and evidence are set out.

ON THIS APPEAL

Upjohn, K.C., *C. R. Cristie*, K.C., and *W. Ingram*, for the appellant, contended that the order of 22nd May 1916 by the Presidency Magistrate of Madras, on the appellant to deposit security to the amount of Rs. 2,000 was open to revision, as being the order of a Magistrate sitting as such, and the Court had jurisdiction to revise and set aside the order. The High Court was wrong in holding that the making of that order was a ministerial or executive act, and therefore not open to revision; it fell within the class of discretionary acts, it was submitted, which in England would be revised and, if necessary, set aside, by a writ of certiorari. The power to set aside or vary an order dispensing with security was not merely administrative: see *Sharp v. Wakefield*(2): "it is the exercise of a right or duty to decide"; and *Rex v. Woodhouse*(3). An application under section 17 of the Indian Press Act is not included by the terms of section 22 and in such an application the appellant can make any objection in law or fact to the forfeiture of the security deposited. The order was also *ultra vires* and void as having been made under the provisions of the Indian Press Act, 1910; and even if section 3, sub-section (1) of that Act was valid, the Magistrate was *functus officio* by his having made a prior order dispensing with any security. The order was made ex parte on materials of which the appellant had no knowledge, and without any notice to her, or opportunity of being heard, and is consequently invalid and not in accordance with equity; *Board of Education v. Rice*(4). The High Court had jurisdiction to issue a writ of certiorari as it had the same powers as the High Court at Calcutta by which such a writ had been issued: see *Nundo Lal Bose v. Calcutta Corporation*(5). Neither the terms of section 22 of the Indian Press Act, 1910, nor those of the Criminal Procedure Code, 1898, section 435, were sufficiently express to include the issue of such a writ, as only by express

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(1) (1918) I.L.R., 39 Mad., 1085.

(2) [1891] A.C., 178.

(3) [1906] 2 K.B., 501, 534.

(4) [1911] A.C., 179, 182.

(5) (1885) I.L.R., 11 Cal., 275.

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terms could a statutory right be excluded. Reference was made to *Rex v. Moreley*(1), *Rex v. Plowright*(2), *R. v. Jakes*(3), *Rex v. Cashibury Justices*(4), *Colonial Bank of Australasia v. William*(5). The appellant, it was contended, was entitled to a writ of certiorari as a remedy for a grievance to herself and not a public grievance, and *Reg. v. Surrey Justices*(6) was referred to. Reference was also made to *Reg. v. Nichol*(7). The Press Act of 1910 differed from the former Act XXV of 1867 as to the class of Magistrate empowered to make such an order, and the inference to be drawn from the variation made is that the intention was that the order is judicial. The High Court should, having jurisdiction to review the order, either by writ of certiorari or by its statutory power of revision, have granted the relief asked for. The order is now invalid for the reasons already given. Irregularity of the proceedings as a ground of revision is expressly mentioned in section 435 of the Criminal Procedure Code. But even if the order of the 22nd May 1916 was valid, the notice given by the Governor of Madras in Council was wrongly given. The articles from "New India" appended to the notice did not, it was submitted, come within the provisions of section 4, sub-section (1), of the Indian Press Act, 1910. The High Court, it was submitted, has misinterpreted section 4, so far as explanation 2 was applicable; because explanation 2 applied to all the extracts from the newspaper which the Special Bench held to be within section 4, sub-section (1), because they did not by adverse comment excite hatred, contempt, or disaffection against the Government, but only advocated "Home Rule for India", which was admitted by Government not to be by itself a ground of forfeiture. The burden of proof was on the respondent to show that each extract had in fact excited, or that the writer in fact had attempted thereby to excite hatred contempt or disaffection against Government and such burden had not been discharged. There was no evidence offered on the part of the respondent to show that the writer had attempted, to excite hatred, contempt, or

(1) (1760) 2 Burr. 1041.

(2) (1686) 3 Mod. Rep., 94.

(3) (1800) 8 T.R., 542, 625.

(4) (18.8) 3 Dow. & Ry. (K.B.), 35.

(5) (1874) L.R., P.O. 417.

(6) (1870) L.R., 5 Q.B., 463.

(7) (1899) 2 Q.B., 455, at p. 471.

disaffection. On the contrary the motives for writing them were loyal and patriotic. The Special Bench should have found that there was no sufficient foundation for the issue by the Governor in Council of the notice of 25th August 1916, and should have set it aside, and in refusing to do so had acted contrary to law and equity. It was also contended that the Indian Press Act (especially sections 4 and 22) was ultra vires, as being unconstitutional and not within the power of the Indian Legislature to enact, so far as it is inconsistent with statutes 24 & 25 Vict., c. 67, section 22, 21 & 22 Vict., c. 106, Government of India Act, 1858, section 65 of statutes 5 & 6 (Government of India Amendment Act, 1916) Geo. V, c. 61, and statutes 3 & 4 Will. VI, c. 85, section 6. Such an act is prohibited by the terms of all of them which were enacted to maintain and support the allegiance of any person to the Crown. Reference was made to *In re Anwar Khan*(1) per NORMAN, J.

Sir H. Erle Richards, K.C., De Gruyther, K.C., and K. Brown, for the respondents, contended that the High Court rightly held that the order of Government of 25th August 1916 was within the provisions of the Indian Press Act, 1910, section 4, sub-section (1). The High Court had no power to set aside the order of the magistrate on an application under the Indian Press Act, 1910, section 17. The Magistrate had power under that Act to make the order dispensing with security, which when made was liable to variation or even cancellation, and to require the appellant to give security. The functions exercised by the Magistrate under the Act are of a ministerial or executive, and not of a judicial character and such an order was not subject to the control of the High Court. There was nothing to show that there was any obligation to hear the appellant before making the order. She could always apply to the magistrate to vary or cancel his order. Many ex parte orders (as for injunctions, etc.) are made, but they are always subject to petitions to vary or discharge them; but here the delay that would so take place was not intended to occur. Reference was made to *Sankur Sarup v. Mejo Mal*(2), *Minakshi Naidu v. Subramanya Sastri*(3) and *Vijuravijhala Pillai v. Theogaroya*(4). In

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(1) (1870) 6 B.L.R., 392, 459.

(2) (1901) I.L.R., 23 All., 313.

(3) (1887) I.L.R., 11 Mad., 26.

(4) (1914) I.L.R., 38 Mad., 581.

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that view the order was not open to revision by *certiorari*, but if in any way by the power of revision given by the Criminal Procedure Code, 1898, sections 435 and 439, and by section 115 of the Civil Procedure Code, 1908. To these powers given by statute the rule that *certiorari* can only be excluded by express words does not apply. Section 22 of the Indian Press Act excludes all right to review by the High Court under the Criminal Procedure Code, 1898, section 435. Reference was made to *Calder v. Halket*(1), and *Clarke v. Brojendro Kishore Roy*(2). If the making of the order was a proceeding under the Act, section 17 only applied; if not a proceeding under the Act, it was an administrative order. Whether on the merits the extracts from the articles came within section 4, sub-section (1) of the Indian Press Act, 1910, depends on the tests laid down in reference to section 124 of the Indian Penal Code. Reference was made to *Queen-Empress v. Bal Gangadhar Tilak*(3) and approved by the Board in *Bal Gangadhar Tilak v. Queen-Empress*(4). But in any case neither of the appeals comes within the rules of the Board applicable to appeals to His Majesty in Council from judgments pronounced in the criminal jurisdiction of the Indian Courts. Reference was made to *Arnold v. King-Emperor*(5) and *Dal Singh v. King-Emperor*(6).

The JUDGMENT of their Lordships was delivered by

LORD
PHILLIMORE.

LORD PHILLIMORE.—These are two appeals for which the appellant, Mrs. Besant, obtained special leave from His Majesty in Council against two decisions of the High Court of Judicature at Madras.

They arise in the following circumstances:—There are in India two Legislative Acts of the Governor-General of India in Council relating to printing, one being The Printing Presses and Newspapers Act, No. XXV of 1867, and the other being Act No. 1 of 1910 entitled “An Act to provide for the better control of the Press,” and shortly “The Indian Press Act, 1910.” Under the first Act, section 4, the person who keeps in his possession

(1) (1840) 2 M.I.A., 293.

(2) (1912) I.L.R., 39 Cal., 953 (667) (P.C.); s.c., L.R., 39 I.A., 163 (177).

(3) (1897) I.L.R., 22 Bom., 112 (137).

(4) (1897) I.L.R., 22 Bom., 528 (P.C.); s.c., L.R., 25 I.A., 1.

(5) (1914) I.L.R., 41 Cal., 1023 (P.C.); s.c., L.R., 41 I.A., 149.

(6) (1917) I.L.R., 44 Cal., 878 (P.C.); s.c., L.R., 44 I.A., 137.

a printing press must make and subscribe a declaration before a magistrate, stating that he has a press for printing, and where it is situated. And by section 5, no printed periodical work containing public news, or comments on public news, shall be published without the printer and publisher making a declaration stating that he is the printer or publisher, the name of the periodical and the place where the printing or publishing is conducted.

Under the second Act, section 3, sub-section 1, the person making the declaration is required to deposit before a magistrate in money, or in certain securities, a sum not being less than Rs. 500, or more than Rs. 2,000, as the magistrate may think fit to require.

But the magistrate may, for special reasons which he is to record, dispense with the deposit, and he has certain powers of cancelling or varying any order made under this sub-section.

By section 4 of the Act, the Local Government, when it appears to it that any printing press, in respect of which any security has been deposited, is used for the purpose of printing any newspaper which contains words, signs or visible representations of a nature deemed to be objectionable under the detailed provisions of the section which will be hereinafter specifically set forth, may by notice in writing addressed to the keeper of the press, declare the security and all copies of the newspaper wherever found forfeited to His Majesty, and after the expiry of ten days from the date of the issue of the notice of forfeiture, the declaration required of every keeper of a press is to be deemed to be annulled.

By section 17

“Any person having an interest in any property in respect of which an order of forfeiture has been made under section 4 . . . [or under certain other sections not material to the present Appeal] may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the newspaper . . . in respect of which the order was made did not contain any words, signs, or visible representations of the nature described in section 4, sub-section (1).”

And by section 18

“Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges. . . .”

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By section 23, anyone who keeps in his possession a press without making a deposit under section 3 when required so to do, shall be liable to the same penalty as if he had failed to make the declaration required by the first Act.

On the 2nd December 1914, the appellant being the owner and keeper of a printing press, and printer and publisher of a newspaper called at that time, and thereafter, "New India," made the declaration required of her under the Act of 1867, and the magistrate before whom it was made, using the power of dispensation given to him by section 3 of the Act of 1910, thought fit to dispense with the deposit of the security which under the provisions of the same section she would otherwise have had to give. The document in which the dispensation was embodied is not contained in the record of these appeals, and their Lordships have not before them the reasons which the magistrate recorded as the grounds for granting this dispensation.

On the 28th May 1916, the appellant received a notice from the magistrate dated the 22nd May, in which it was stated that he, under sub-section 1 of section 3, cancelled the order dispensing with the security and required her within 14 days to deposit Rs. 2,000 as security.

In accordance with this order the appellant, under protest, as she says in one of her affidavits, deposited the security.

On the 28th August 1916, she was served with an order dated the 25th August and made by the Governor in Council reciting that 20 passages published in the newspaper and identified in the order were of the nature described in sub-section 1 of section 4 of the Act of 1910, and declaring that the security which the appellant had deposited and all copies of "New India" wherever found were to be forfeited to the Crown.

The appellant thereupon purporting to avail herself of the provisions of section 17 of the Act presented her petition to a Special Bench of the High Court of Judicature at Madras, praying that both the order of the magistrate requiring security and the order of the Governor in Council should be revised and set aside. It being, however, obvious that the procedure under section 17 was not available for questioning any act of the magistrate, the appellant the next day presented what is called a Criminal Revision Petition under sections 106 and 107 of the

Government of India Act (5 and 6, George V., c. 61) and section 435 of the Code of Criminal Procedure. This application, described in the course of the proceedings as an application for a certiorari, was also heard by the Special Bench.

After argument, both applications were refused; all the Judges agreeing that they should be refused, but not being in agreement as to the grounds on which the revision petition failed, and not being wholly in agreement as to all the articles in the newspapers which might merit condemnation.

The petitioner, thereupon, applied to the High Court for leave to appeal in both cases, and on this leave being refused by the High Court applied to His Majesty in Council for special leave to appeal, and this leave having been given (as already stated) in respect of both orders, both matters are now before their Lordships.

It will be convenient to consider first the application to quash the order of the magistrate. This question divides itself into two parts: was the procedure adopted a competent and suitable method of reviewing the order, and if it be open to review is it to be deemed an illegal and unwarranted order?

It is convenient to consider first the nature of the order, or supposed order. The Statute contemplates that in ordinary cases security shall be deposited, and the only duty of the magistrate is to fix the amount, having regard to the two limits, and to receive it.

Then follows the proviso:—

"Provided that the magistrate may, if he thinks fit, for special reasons to be recorded by him, dispense with the deposit of any security or may from time to time cancel or vary any order under this sub-section."

It was contended before their Lordships that to read this proviso as enabling the magistrate to cancel or vary an order of dispensation would be to make a proviso upon a proviso, and to collect a positive enactment out of that which was only a qualifying provision. But it is well settled that there is no magic in the words of a proviso, and that the plain meaning must be given to the words of the legislature; and those words enable the magistrate to cancel or vary any order made under the sub-section, which should mean, among other orders, orders of dispensation.

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If the magistrate having fixed the minimum security may vary his order by imposing the maximum, there is no reason why he should not, as time goes on, think fit to require security when at first he thought fit to require none. Under the second sub-section a power of requiring a deposit, where none up to that moment had been required, is given in certain cases to the local Government, and it is natural to suppose that what the local Government may do in a proper case under sub-section 2 may be done in a proper case by the magistrate under sub-section 1. It is somewhat difficult to find any case, other than this one, to which the word cancel would be properly applicable. If the normal course is adopted, and a deposit is required and, if the magistrate thereafter thinks it too much or too little, the appropriate word for the new order is that it is one varying the old. But if he were to cancel *simpliciter* an order fixing the deposit at a particular sum, it is difficult to see what would happen. There must be a deposit unless there is a positive order of dispensation; the cancelling of an order fixing the deposit, at say Rs. 2,000, would leave the keeper of the printing press in the position of having to apply to the magistrate to make some further order, either fixing a new sum or dispensing with any; and till such new order had been made and complied with, the keeping of the printing press would apparently be an unlawful act, so that the cancellation of the order fixing the deposit at Rs. 2,000 would be injurious instead of beneficent to the keeper of the press. But if the magistrate had originally thought fit to dispense with security and afterwards changed his mind, the right phrase to use would be that he had cancelled his order of dispensation.

Their Lordships are therefore of opinion that the magistrate has power under the section to cancel an order of dispensation, the necessary consequence of which will be that security will have to be deposited according to the amount thereupon fixed by him within the limits prescribed, as would be done in normal course on the first making of a declaration.

Their Lordships are in agreement in this respect with the opinion of AYLING, J., and in disagreement with the view of SESHAGIRI AYYAR, J. The officiating Chief Justice ABDUS RAHIM agreed in principle with SESHAGIRI AYYAR, J., and so expressed himself in his judgment upon the other application.

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It is next contended, on behalf of the appellant, that the act of the magistrate in cancelling the dispensation was a judicial order, and was bad, because she was given no opportunity of being heard before an adverse order was made against her.

To this argument several answers have been given; that the order might be treated as an ex-parte order which it would have been open to her to move to discharge instead of complying with it as she did under protest; that as a judicial order it was still one made by the magistrate within the exercise of his jurisdiction, and that the omission to hear her was only an irregularity which could not be reviewed, or at any rate could not be reviewed by process of certiorari; and lastly, that the act was not a judicial act but one done in the exercise of administrative functions.

It was on this last ground that all three Judges in the High Court decided the point against the appellant; and without pronouncing any opinion on the other grounds their Lordships agree that this one furnishes a sufficient answer.

The magistrates to whom this power is entrusted by the Act are the District Magistrates and the Chief Presidency Magistrates. Those to whom power was entrusted by the Act of 1867 were "any person exercising the full powers of a Magistrate," and were to include "Magistrates of Police and Justices of the Peace." At that time there were no Chief Presidency Magistrates.

It was argued before their Lordships that the change in the second Act, that is in especial the substitution of the Chief Presidency Magistrate for territory within his jurisdiction, showed an intention on the part of the Legislature to make the action of the magistrate judicial and not administrative. But their Lordships do not think that this change alters the nature or character of the action of the magistrate. It is true that the duties of the Chief Presidency Magistrate are primarily judicial; but the magistrates outside the Presidency town exercise both judicial and administrative functions, and the district magistrate is principally an administrative officer. These two considerations appear to balance one another. The action of the magistrate under sub-section 1 of section 3 is (like the action of the magistrate under sub-section 1 of section 8) analogous to the

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action of the Local Government under the second sub-section in the same clauses, and the action of the Local Government is clearly administrative.

It being once established that the normal course is to have a deposit, the action of the magistrate in increasing or diminishing, withdrawing or imposing, is a pure matter of administrative discretion. It is only in one case that he is to record his reasons and that is when there is a departure from the normal, and the object of recording them is, as the Officiating Chief Justice rightly said, for the information of his superiors in the Government.

Further, in this connexion the provisions of section 22, upon which comment will shortly be made, must not be left out of sight. If a declaration of forfeiture by the Local Government can only be questioned in one respect and by one method—it is not unreasonable to suppose that the legislature did not intend to open the Courts of Law to inquiries as to the exercise of so comparatively unimportant an official act, discretionary and in some respect facultative as it is.

The act of the magistrate is after all only the withdrawal of a privilege which need never have been granted. It is not like a condemnation in which case justice requires that the person to be condemned should first be heard. It would have been in their Lordship's opinion more discreet, and it would have removed an occasion for comment and complaint, if the magistrate had given the appellant some opportunity for making her observations before the privilege was withdrawn; it might have been a wiser discharge of his duty as an officer. But having said this, their Lordships are unable to go any further.

It results, therefore, that if the order of the magistrate was open to examination, either upon process of certiorari or by way of revision, the consequence of an examination would be to leave the order as it stands; and this consequence is not without its bearing upon the question, which is prior in order of reasoning, whether it was competent to the Court to enter upon any such examination. The appellant based her demand partly upon the Code of Criminal Procedure and partly upon the supposed common law power to grant a writ of certiorari. She did not rely upon the power of revision given by the Code of Civil Procedure.

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It is not easy to see how these proceedings could be deemed criminal proceedings within the Code of Criminal Procedure. They are not proceedings against the appellant as charged with an offence. They are at the utmost proceedings which rendered the appellant if she should thereafter commit a criminal or forbidden act, open to a particular form of procedure for a penalty.

In any view, as their Lordships have intimated their opinion that the magistrate in withdrawing the order of dispensation was not acting judicially, it follows that this is not a case for revision under the Code of Criminal Procedure.

As to certiorari it was contended on behalf of the respondent in the High Court, that there is no power in the High Court to issue a writ of certiorari, or alternatively that the provisions of section 22 forbid recourse to this writ in cases which come under the Press Act.

As to the first point it would seem that at any rate the three High Courts of Calcutta, Madras and Bombay, possessed the power of issuing this writ [see *Re the Justices of the Supreme Court of Judicature at Bombay*(1); and *Nundo Lal Bose v. The Corporation for the Town of Calcutta*(2).] Whether any of the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of certiorari is another question.

Supposing that this power once existed, has it been taken away by the two Codes of Procedure? No doubt these Codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of section 435 of the Criminal Procedure Code and section 115 of the Civil Procedure Code of 1908 are exhaustive. Their Lordships can imagine cases, though rare ones, which may not fall under either of these sections. For such cases, their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of certiorari, can be said to have been taken away.

But assuming that the power to issue the writ remains, and that it might be exercised notwithstanding the existence of

(1) (1829) 1 Knapp, 1, 49, 51, 55.

(2) (1885) I.L.R., 11 Cal., 275.

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procedure by way of revision, section 22 has still to be considered.

"22. Every declaration of forfeiture purporting to be made under this Act shall, against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

As to this section it was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away, the right to it remained notwithstanding the very express but still general words of this section.

However that might be according to English Law, where there is no such revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act. Certiorari according to the English rule is only to be granted where no other suitable remedy exists. If the order of the magistrate were a judicial order, it would have been made in the exercise either of his civil or of his criminal jurisdiction, and procedure by way of revision would have been open.

Even were it to be said that the order was of that quasi-judicial kind to which certiorari has sometimes been applied in England or in India, the Press Act may quite reasonably have intended to take it away, and there is no reason why full effect should not be given to its language.

It was contended in the High Court and before this Board, that it was beyond the competency of the Indian Legislature to enact section 22 and possibly even to enact the Press Act. This argument which was mainly founded upon the language of NORMAN, J., *In re Ameer Khan*(1), received some encouragement from the Officiating Chief Justice. But their Lordships find themselves unable to appreciate it.

The order of the High Court dismissing the application was therefore right, and the appeal from it must be dismissed.

If their Lordships thought that the appellant had made any way, they would have had to consider whether she was not,

(1) (1870) 6 B.L.R., 461.

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according to the practice prevailing in cases of certiorari, too late in making her application. Indeed, what advantage the appellant would have gained if she had succeeded upon this application is not very apparent. The power of the Local Government to make a forfeiture under section 4 no doubt depends upon there being a deposit to forfeit. But at the time the order was made, 25th August 1916, there had been in fact a deposit since 5th June; and the appellant had taken no steps to get herself relieved from the order made on the 22nd May directing the deposit, or to get it back.

Even were it contended that the deposit ought to be regarded as having been so unwarrantably exacted that it ought to count as non-existent, there was nothing to show that the Local Government was or ought to have been aware of this. Further, section 22 makes the declaration of the Local Government conclusive as to there being a forfeiture.

Lastly, the appellant made no application by way of certiorari or otherwise to quash the declaration of forfeiture; and the only way in which it was attacked was by using the procedure under section 17, which as pointed out in the High Court is available only for one purpose, that is of showing on the merits that the published articles were not deserving of forfeiture.

Their Lordships have now to deal with the other appeal. Section 4, sub-section (1), of the Indian Press Act is in so far as it is material in the following terms:—

"(1) Whenever it appears to the Local Government that any printing press in respect of which any security has been deposited as required by section 3 is used for the purpose of printing or publishing any newspaper, book, or other document containing any words, signs, or visible representations which are likely or may have a tendency—directly or indirectly—whether by inference, suggestion, allusion, metaphor, implication, or otherwise—

(c) to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India, or any Native Prince or Chief under the suzerainty of His Majesty, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government or any such Prince or Chief; or . . .

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(e) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order ; . . .

the Local Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs, or visible representations which in its opinion are of the nature described above, declare the security deposited in respect of such press and all copies of such newspaper, book, or other document, wherever found, to be forfeited to His Majesty.

"*Explanation I.*—In clause (c) the expression 'disaffection' includes disloyalty and all feelings of enmity.

"*Explanation II.*—Comments expressing disapproval of the measures of the Government or of any such Native Prince or Chief as aforesaid with a view to obtain their alteration by lawful means, or of the administrative or other action of the Government or of any such Native Prince or Chief or of the administration of justice in British India without exciting or attempting to excite hatred, contempt, or disaffection do not come within the scope of clause (c)."

The notice of forfeiture issued on the 25th August 1916 stated that in the opinion of the Governor in Council 20 passages published in the appellant's newspaper on various dates from the 7th June to the 17th August were of the nature described in section 4, sub-section 1, and declared the security deposited by the appellant to be forfeited. The articles in question were numbered consecutively from 1 to 14, seven articles being numbered 4 and marked with consecutive letters of the alphabet. Thereupon the appellant availed herself of the remedy given to her by sections 17 and 18 and applied to a Special Bench of the High Court to set aside the order on the ground that the newspaper did not contain "any words, signs or visible representations" of the nature described in section 4, sub-section (1).

This application as already stated was heard by the same Judges as those who sat upon the application for a *certiorari*. In the unanimous opinion of the Bench, the articles numbered 2, 11, and 13 were within the terms of section 4, sub-section (1), clause (c). SESHAGIRI AYYAR, J., thought that article 11 was also obnoxious to clause (e). The majority of the Bench, that is to say, the Officiating Chief Justice and AYLING, J., thought articles 1, 6, 10 and 12 obnoxious to clause (c). AYLING, J., thought article 7 obnoxious to clause (e), and articles 9 and 14 obnoxious to clause (c). SESHAGIRI AYYAR, J., thought article 8 obnoxious

to clause (c). In accordance with these conclusions the Court dismissed the application made by the appellant.

The balancing of important political considerations which is effected by adding Explanation II to the enacting words, which are found in the earlier part of the section has its analogy in sections 124-A and 153-A of the Indian Penal Code. The language is not precisely the same, but there is the same delicate balancing of two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any bona fide argument for reform.

It is perhaps not easy to see how Explanation II with its qualifications, adds to, or detracts from the direct language of clause (c). A similar observation might be made upon section 124-A of the Penal Code. The utmost that can be said is that the addition of the explanation with its apparent repetition of the positive enactment in the guise of a qualification of the explanation shows an almost meticulous care by the Legislature to balance the two considerations, prominence being given to the first consideration in the first part of the section, and to the second in the explanation.

In applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony.

The section 124-A of the Indian Penal Code has been the subject of careful consideration in the cases of *Queen-Empress v. Bal Gangadhar Tilak*(1) (in which case this Board refused leave to appeal), *Queen-Empress v. Ramchandra Narayan*(2) and *Queen-Empress v. Amba Prasad*(3) and though as already stated the language of this section is not precisely the same as the language in the Press Act, these judgments are of considerable assistance towards the construction of section 4.

In substance the question under clause (c) of section 4, sub-section (1), comes to this; are the passages such as in fact to excite, or do they disclose an attempt (which implies intention) to excite, hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India;

(1) (1897) I.L.R., 22 Bom., 112 and 528: S.C. L.R., 25 I.A., 1.

(2) (1897) I.L.R., 22 Bom., 152. (3) (1898) I.L.R., 20 All., 55 (F.B.).

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and in judging the question of intent the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to the character and description of that part of the public who are to be expected to read the articles.

As regards the question of hatred or contempt of a class or section, it was argued that the object of the article was to attack the system, not a class or section. It may be assumed, for the purposes of this case, that there may be reference to a class or section of His Majesty's subjects so couched as to show that the attack is merely upon a school of opinion, and that unless the language is such as to excite hatred or contempt of persons, it may escape condemnation. But assuming this, the appellant remains face to face with the difficulty that there is language used in certain of the articles which may legitimately be construed as tending by inference or suggestion to excite hatred or contempt in such a fashion that it may become personal.

It may well be that the primary object was a legitimate attack upon a system, but unless care is taken it becomes difficult to make a fierce attack upon a system without conveying some imputation upon the class which the system makes or which carries the system into practice. And it must be remembered that those words in clause (c) which refer to the hatred or contempt of a class or section are not limited by explanation II, and that there has been in this respect some departure from the policy of the Penal Code, which superadded a qualifying explanation which has not found place in the Press Act.

As to clause (c) the majority of the Judges in the High Court were brought to the conclusion that the attacks on Anglo-India or Anglo-Indians or the bureaucracy as the case may be, were calculated whatever might have been the primary object of the writer to bring into hatred or contempt persons forming a class or section of His Majesty's subjects, namely, English Civil servants in India, in some cases Englishmen in India generally.

All the Judges thought that several passages were calculated to bring the Government into hatred and contempt, and this after giving due weight to Explanation II. There were also as already stated findings by AYLING and SESHAGIRI AYYAR, JJ., bringing some of the articles under clause (e), a clause which it should be noted is not qualified by any explanation.

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Upon careful perusal of the several judgments their Lordships find that weight has been properly given to the several portions of the section. They do not find that the section has been misconstrued. There remains only the question of application in detail of the principles of law to the language of the various articles.

When their Lordships have progressed so far, the question becomes one which partakes so much of the nature of a question of fact, that it would be difficult for their Lordships, even if they were inclined to construe the natural tendency of the words differently, to interfere with the conclusions arrived at by the Court in India. For the Judicial Committee when it sits to advise His Majesty in the exercise of His prerogative in criminal cases, does so under constitutional limitations which, as has often been explained and notably in the case of *Dal Singh v. The King-Emperor*(1) and in *Tilak's case*(2), already quoted, preclude it from exercising the full functions of a Court of Criminal Appeal.

It should be added that for the purpose of considering, not the intention to excite, but the fact whether the articles are such as to excite, the Judges in India with a far closer knowledge of the character of the people likely to read the articles, have better means of judging than their Lordships in England.

Here the matter might rest. But in the particular circumstances of this case, and after the elaborate argument at the Bar, their Lordships think it well to go further, and to say that if they considered it proper to look into the matter in detail, they would hold that the articles which were the subject of unanimous condemnation, and at least some of those which came under the censure of Judges in the High Court, were obnoxious to the provisions of clause (c), and possibly in some cases to those of clause (e), and that the Court was right in supporting the declaration of forfeiture. Their Lordships will therefore humbly recommend His Majesty that both these appeals should be dismissed with costs.

Appeals dismissed.
J.V.W.

Solicitor for the appellant: *D. Graham Pole.*
Solicitor for the respondents: *Solicitor, India Office.*

(1) (1917) I.L.R., 44 Cal., 876: L.R., 44 I.A., 187.
(2) (1897) I.L.R., 22 Bom., 528: L.R., 25 I.A., 1.

PRIVY COUNCIL.*

UPADRASHTA VENKATA SASTRULU (PLAINTIFF),

v.

DIVI SEETHARAMUDU AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Madras.]

Madras Estates Land Act, 1908, sec. 3, sub-sec. 2 (d) and sec. 189—Grant of inam village—Leases by inamdars to tenants—Claim by tenants to rights of occupancy—Presumption as to transfer of kudivaram—Suits in Civil Court for ejectment—'Estate' under Estates Land Act—No evidence of any permanent occupancy rights—Jurisdiction.

The appellant was the inamdar of a village consisting of both cultivated and waste lands, and he held it under a grant made to his ancestor in 1748, and since confirmed and recognized by the British Government. To suits in the Civil Court for ejectment against tenants of waste lands the defence was that the respondents had permanent rights of occupancy, and that as the inam village was an 'estate' under section 3, sub-section (2), clause (d) of the Madras Estates Land Act, 1908, the Civil Court had no jurisdiction to entertain the suits.

Held, that since the decision of the Board in *Suryanarayana v. Patanna*, (1918) I.L.R., 41 Mad., 1012 (P.O.), which was decided subsequently to the judgment now appealed from, there was no presumption of law that an inam grant of a village did not include the kudivaram. Each case must be considered on its own facts, and in order to ascertain the effect of the grant, resort must be had to the terms of the grant, and to the whole circumstances, so far as they could now be ascertained.

Held, having regard to the facts, the terms of the grant, the history of the estate, and the conclusions to be drawn from the other documentary evidence in the case, they were all inconsistent with the existence of any permanent occupancy rights, and lead to the conclusion that the inam grant carried not the land revenue alone but the whole proprietary interest in the property. The lands in suit therefore were not an 'estate' within the meaning of the Act, and section 189 did not apply. The Civil Courts consequently had jurisdiction to entertain the suits.

CONSOLIDATED APPEAL No. 48 of 1917 from the judgment and decree (18th March 1914) of the High Court of Madras which affirmed the judgment and decree (2nd August 1911) of the District Judge of Kistna, which reversed the judgment and decree (22nd November 1919) of the District Munsif of Gudivāda which was in favour of the plaintiff.

* *Present*:—Viscount HALDANE, Viscount CAVE, Lord PHILLIMORE and Sir JOHN EDER.

The suits which gave rise to the present appeal were suits for ejectment, brought by the appellant who was the owner of part of the inam village of Billapadu. The defendants were lessees from him but their leases had expired. Their defence was that they were entitled to retain possession notwithstanding the expiry of their leases, and they set up a special defence to the suits, namely, that the lands in suit constituted an 'estate', or 'part of an estate,' under the Madras Estates Land Act, 1908, and consequently the jurisdiction of the Civil Court was excluded by that Act, and that was the chief point in dispute.

The village of Billapadu agraaharam was granted to the ancestors of the appellant in 1748, and in 1783 the grant was confirmed by the holder of the zamindari within which it was situated. Subsequently the Government recognized and confirmed the grant, and an inam title deed was issued by the Commissioner on 27th June 1865.

The documents evidencing the grant of the village refer to it as sarva (entire) agraaharam and contained no indication that the grantee was to enjoy thereunder the land revenue thereof alone without the other rights of proprietorship. The village consisted of 300 acres. It has not been shown whether or not the grantee was already in occupation of any and what portions of the land at the date of the grant—and there was no evidence to suggest that there were any tenants in the village holding lands with any rights of permanent occupancy by custom or otherwise. It was admitted that 60 acres which are the lands in question in this litigation were then unoccupied waste lands. These 60 acres were for a time in the occupation of other tenants (without any right of permanent occupancy), but were surrendered by them at the end of Fasli 1313 (March 1904) and remained for a time untenanted. The defendants came in in Fasli 1317 (1907) under the leases in suit each of which contained a clause to the following effect.

"Except the right of cultivating the said lands for Fasli 1317 according to this khat, we the tenants have no other right whatever thereto. So we agree to your taking possession of the lands at the end of March 1908, along with the land ploughed for seed beds without any need for a notice from you, or a relinquishment from us."

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The previous history of the village shows that tenancies had been short and the holdings constantly changed hands, and also that the rates of rent frequently varied. Except for two instances which the defendants sought unsuccessfully to establish, no serious attempts were made to show that the tenancies had been in any way transferred by the tenants. And it was proved that when tenanted lands were compulsorily acquired by Government, the occupants advanced no claim to share in the compensation. Apart from the Estates Land Act, the defendants were held to have no right of permanent occupancy.

The following sections of that Act were referred to in the course of the hearing; 'Estate' is referred to as meaning (*inter alia*) in section 3, sub-section (2), clause (d) as

"Any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognized by the British Government, or any separate part of such village."

Section 8, the last paragraph, enacts that:

"Notwithstanding anything contained in this section, where, before or after the commencement of this Act, the kudivaram interest in any land comprised in an estate falling within clause (d) of sub-section (2) of section 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate."

The defendants refused to vacate the lands on the expiry of the leases on 30th March 1908, and the inamdar filed the present suits on 2nd December 1908 and prayed for a decree for possession. The defence was as stated above.

The District Munsif decided in favour of the appellant, holding that the village and the lands in suit were not an 'estate' or 'part of an estate' within the definition above quoted.

On appeal the District Judge cited various cases decided by the Madras and Bombay High Courts as establishing a legal presumption that an inamdar has not the kudivaram in his lands. He relied on the case of *Suryanarayana v. Patanna*(1) as supporting such a presumption; that case however since the District Judge's decision has been reversed by the Judicial Committee. The District Judge made a decree that the plaintiffs should be returned for presentation in the Revenue Court.

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.)

On appeal the High Court (SADASIVA AYYAR and SESHAGIRI AYYAR, JJ.) affirmed the decree of the District Judge. The High Court's judgment will be found reported in *Venkata Sastrulu v. Seetaramudu*(1).

ON THIS APPEAL, which was heard *ex parte*.

Kenworthy Brown, for the appellant, contended that neither was the village as a whole, nor were the lands in suit an 'estate' within the definition contained in section 3, sub-section (2), clause (d) of the Estates Land Act, 1908. The judgment of the High Court now appealed from, and also that of the District Judge rested on presumptions which were not warranted by law, or by the evidence. There was no such legal presumption, as they relied upon, that the inamdar had not the kudivaram interest in his lands: that question was now concluded by the case decided by the Board in 1918, *Suryanarayana v. Patanna*(2). The respondents had not proved that Billapadu is a village of which the land revenue alone had been granted on inam to a person not owning the kudivaram thereof. If the kudivaram was not included in the grant it was acquired by the inamdar when the tenancies were surrendered in 1904. It was shown by the admitted facts that the grantee took an absolute proprietorship in the lands. The respondent had no rights in them apart from the leases in which their respective tenancies originated and which have expired. The case comes within the exception to section 8 of the Act. Reference was made to *Ponnusamy Padayachi v. Karuppadaya*(3); Madras Regulation XXXI of 1802; and Wilson's Glossary, 'inam', 'agraharam' and 'mauza'. The respondents had established by evidence no fact which excluded the jurisdiction of the Civil Courts to try the suits.

The JUDGMENT of their Lordships was delivered by

VISCOUNT CAVE.—These are consolidated appeals against a judgment delivered by the High Court of Judicature at Madras on the 18th March, 1914, and decrees made in pursuance thereof in eleven suits. The High Court by its judgment affirmed a judgment of the District Judge of Kistna whereby

(1) (1915) I.L.R., 38 Mad., 891. (2) (1918) I.L.R., 41 Mad., 1012 (P.C.)
(3) (1915) I.L.R., 38 Mad., 843.

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he set aside the decision of the Munsif of Gudivāda and directed the return of the plaints in all the suits for presentation in the Revenue Court.

The suits out of which these appeals arose were suits for ejectment in respect of different parts of the inam village of Billapadu in the Gudivāda sub-district of the Kistna district. The appellant, who was the plaintiff in all the suits, is the inamdar of the village, holding under a grant made to his ancestor in or about the year 1748, and since confirmed and recognized by the British Government. The defendants were persons who at various dates in the year 1907 had been let into possession by the plaintiff under tenancy agreements, expiring in 1908. Each of these agreements contained a declaration by the tenant to the effect that except the right of cultivating the land for a year under the agreement he had no other right whatever thereto, and accordingly that he agreed to the landlord (the plaintiff) taking possession of the land at the end of the year of tenancy without any relinquishment by the tenant. The tenancies having expired, and these suits having been brought for possession, the defendants pleaded that they were ryots having permanent *jeroyaty* rights, and that as the inam village was an 'estate' governed by the Madras Estates Land Act, 1908, the Civil Courts had no jurisdiction to try the suits. The Munsif overruled this plea and granted decrees in favour of the plaintiff; but the District Judge, holding that the property was an 'estate' under the Act of 1908, set aside the Munsif's decision and directed the plaints to be returned. This decision was affirmed by the High Court, and thereupon this appeal was brought.

The decision on the appeal must turn on the question whether the property is or is not an 'estate' within the meaning of the Madras Estates Land Act, 1908; and for the purpose of determining this question reference must be made to the definition of the term 'estate' contained in section 3 of the Act. That definition, so far as it is applicable here, is as follows:—

"In the Act, unless there is something repugnant in the subject or context . . . (2) 'Estate, means . . . (d) Any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been confirmed or recognized by the British Government, or any separated part of such village."

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The term 'kudivaram' is not defined in the Act; but in *Suryanarayana v. Patanna*(1) it was explained as being a Tamil word literally signifying a cultivator's share in the produce of land as distinguished from the landlord's share, which is sometimes designated 'melvaram.' The 'kudivaram' 'or kudivaram interest,' as it is called in section 8 of the Act, is in fact a species of tenant-right or right of permanent occupancy. The question, therefore, to be considered in this case is whether the inam grant was a grant of the land-revenue alone to a person not having a permanent right of occupancy, or whether it vested in the grantee the whole proprietary interest in the village. In the former case this appeal will fail but in the latter it should succeed.

In dealing with this question the District Judge and the High Court acted upon a supposed presumption of law that an inam grant of a village, particularly if made to a Brahman, is *prima facie* a grant of the 'melvaram' right only and does not include the 'kudivaram'. This view was supported, when the High Court gave its decision, by some previous decisions of the High Courts of Madras and Bombay, but in the case above cited of *Suryanarayana v. Patanna*(1) it was held by their Lordships that no such presumption exists. Each case must therefore be considered on its own facts; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained.

The original grant of 1748 is not now forthcoming, although it is referred to in Exhibit Z (an extract from the Cazulet Register of 1802), and there is no doubt of its having existed. The earliest deed which is produced is a 'gift deed of *agraharam*,' executed in September, 1783, by the zamindars in favour of the plaintiff's ancestor, which appears to be a confirmation of the original grant. The operative part of this deed is as follows:—

"We have conveyed to you, as *sarva agraaharam*, the village of Billapadu, attached to Gudivada Parganah, together with gardens, holy shrines, wells, big and small tanks, etc. So you shall cultivate

(1) (1918) I.L.R., 41 Mad., 1012 (P.O.); s.c. I.R., 45 I.A., 209.

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the same and enjoy the produce thereof every year as a dedication to the God Sri—, hereditarily from son to grandson " and so on.

" Sanskrit Sloka.—'To administer (or confirm) the gift of another is twice as meritorious as one's own gift-making.'"

Other confirmatory documents were executed at or about the same date; and in one of these, being a 'hakikhat' (or representation) made to William Oram, Esq., the Collector, by officials of the district, dated 23rd July 1788, it was stated that the village of Billapadu agrabaram had continued to be in the enjoyment of the plaintiff's ancestor, who is referred to as 'a resident of the aforesaid place.' There are also some *dumbalas* (or orders) dated in the year 1793 requesting that the plaintiff's ancestor shall be allowed to reap and enjoy the crops pertaining to Billapadu.

In the Cazulet Register of 1802, above referred to, and in similar registers, dated 1860 and 1865, the property is entered in the name of the plaintiff's ancestor; and on 27th June 1865 a recognition of title was duly granted to the plaintiff's ancestor.

There is not in any of the documents above referred to any trace of a claim by any person other than the inamdar to a permanent right of occupancy; and the fact that by the terms of the grant the grantee is desired to cultivate the lands, and that he is referred to as residing in the village, tend to show that no such right existed in any other person. In the judgments under appeal stress is laid on the fact that the confirmatory grant of 1783 refers to the existence on the property at that date of gardens, wells, tanks, etc., and also on the fact that in the Register of 1802 Billapadu is called a *mouje* (or *mausa*), these expressions indicating (it is suggested) that the village was the home of proprietary inhabitants who had planted gardens and dug wells; but it does not appear to their Lordships that it would be safe to build on the use of expressions of this character in 1783 and 1802 an inference as to the existence in 1748 of tenants having permanent rights of occupancy. And when the subsequent history of the estate comes to be examined, it is found to be wholly inconsistent with the existence of any permanent occupancy rights. Tenancies have been continually granted by the inamdars for short periods and at variable rents. When tenancy lands were compulsorily acquired by Government

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decision of the High Court), that a contract under Section 11 must be one that is enforceable, and that the implied contract pleaded was not enforceable, inasmuch as no consideration for it had been proved; but as, prior to the construction of the wells, the tenants had for very long periods always been paying the dry rate of four fanams a kuli for the lands in suit, a contract to hold the lands at the lower rate might legitimately be implied which contract was enforceable and by the terms of section 11 had to be enforced. There was no estoppel on the tenants by their conduct in paying the enhanced rate for a series of years; such an estoppel rested on an implied representation of some existing fact on the faith of which the Zamindar had changed his position and of that there was no evidence. The Zamindar throughout contended for a new contract arising in each case when the eight fanam rate first began to be paid, but there was, in their Lordships' opinion, no consideration for any such new promise to pay at the rate of eight fanams a kuli for land which was already held on a binding contract of tenancy at the rate of four fanams a kuli.

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MUHAMMADAN LAW—Dower—Widow in lawful possession of her husband's property—Right of widow to retain possession against husband's heirs till dower is satisfied—Necessity for consent of or agreement with her husband or his heirs—Sale by widow for payment of dower—Validity of sale—Right of vendee to retain possession until dower is satisfied.] A Muhammadan widow, whose dower remains unpaid, is entitled to retain possession of the properties of her husband which she obtained lawfully, without force or fraud but without the consent of, or any agreement with, the husband or his heirs as to the payment of her dower; nor can such properties be divided among the heirs, until the dower debt has been satisfied. *Hamira Bibi v. Zubaida Bibi* (1916) I.L.R., 38 All., 581 (P.C.), discussed. Though the sale by such widow to satisfy the dower debt is not binding on the other heirs of her husband, the vendee is entitled to retain possession of the property sold to him against the other heirs until the dower debt is satisfied.

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and compensation was paid to the *agraharamdar*, no claim to compensation was put forward by the tenants. In the year 1904 all the tenants formally relinquished their lands to the plaintiff and put them in his possession, and from that date until tenancies were granted in the year 1907 the property remained vacant. When the defendants were admitted as tenants, they severally declared (as stated above) that they had no right of occupancy except such as was given to them by the tenancy agreements. It has been found in these suits on issues specially directed that the land in question was waste land at the time of the grant of the inam, and that at the time of the letting to the defendants they had no occupancy right.

Having regard to all the facts it appears to their Lordships to be impossible to resist the conclusion that the inam grant carried, not the land revenue alone, but the whole proprietary interest in the property; and it appears probable that, but for the supposed presumption above referred to, the High Court would have come to the same conclusion. If so, it follows that the property is not an 'estate' within the meaning of the Madras Estates Land Act, 1908, and that section 189 of that Act does not apply. In view of this conclusion, it is unnecessary to consider the effect, having regard to section 8 of the Act of the relinquishment of tenancy rights made in the year 1904. Section 153, as amended by section 8 of Act IV of 1909, appears to have no application to this case.

For the above reasons their Lordships are of opinion that this appeal should be allowed and the decrees under appeal should be set aside and the decrees of the Munsif restored, and that the defendants should pay the plaintiff's costs in all the Courts and his costs of this appeal; and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitor for the appellant: *Douglas Grant.*

J.V.W.

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PRIVY COUNCIL.*

1918,
May 10, 13,
14 and
July 2.

RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA
MAHARAJA AVARGAL (DEFENDANT),

v.

ARUMUGAM CHETTY (PLAINTIFF).

On appeal from the High Court of Judicature
at Madras.

[*Madras Rent Recovery Act (VIII of 1865), ss. 8, 11—Right of landlord to enhance rent on land which used to be dry, but was afterwards cultivated with garden crops by irrigation from wells dug at tenant's expense—Implied contract from paying increased rent for some years—Occupancy right with permanent tenure.*]

Tenants with permanent rights of occupancy in a zamindari constructed wells at their own expense without permission of the Zamindar, and cultivated dry lands which they had admittedly held at four fanams a kuli, for periods as far back as could be traced, with garden crops. The Zamindar for the lands so cultivated claimed, and the tenants paid, for a number of years an enhanced rent of eight fanams a kuli. In suits by the tenants against the Zamindar under section 8 of the Madras Rent Recovery Act to compel him to grant them proper pattas for fasli 1312 the defendant pleaded, inter alia, that he was entitled to the enhanced rate by virtue of a contract within Section 11, clause (8) of the Act, to be implied from the continuous payments at that rate.

Held (affirming the decision of the High Court), that a contract under Section 11 must be one that is enforceable, and that the implied contract pleaded was not enforceable, inasmuch as no consideration for it had been proved; but as, prior to the construction of the wells, the tenants had for very long periods always been paying the dry rate of 4 fanams a kuli for the lands in suit, a contract to hold the lands at the lower rate might legitimately be implied which contract was enforceable and by the terms of section 11 had to be enforced.

There was no estoppel on the tenants by their conduct in paying the enhanced rate for a series of years; such an estoppel rested on an implied representation of some existing fact on the faith of which the Zamindar had changed his position and of that there was no evidence.

The Zamindar throughout contended for a new contract arising in each case when the 8-fanam rate first began to be paid, but there was, in their Lordships' opinion, no consideration for any such new promise to pay at the rate of 8 fanams a kuli for land which was already held on a binding contract of tenancy at the rate of 4 fanams a kuli.

* Present:—Lord SUMNER, Sir JOHN EDGE, Mr AMEER ALI and Sir WALTER PHILLIMORE Bart.

CONSOLIDATED APPEAL No. 86 of 1916 from a judgment and several decrees (21st September 1910) of the High Court at Madras, which reversed the judgment and decrees (24th March 1908) of the District Judge of Madura, and restored the judgment and decrees (26th March 1907) of the Court of the Sub-Collector of Dindigul division.

RAJA JAGA-
VEERA RAMA
VENKATES-
WARA
ETTAPPA
v.
ARUMUGAM
CHETTY.

The sole question for determination in this appeal is whether the appellant, the proprietor of a zamindari called Gundamanuyakkanur, is entitled under the provisions of the Madras Rent Recovery Act (Madras Act VIII of 1865) to charge rent at the enhanced rate of 8 fanams a kuli on the lands originally dry but cultivated with garden crops by means of wells sunk at the expense of the respondents who are his ryots (occupancy tenants).

The facts and the course of the previous litigation between the parties, a portion of which will be found in I.L.R., 28 Mad., 444, appear from the judgment of the Judicial Committee. The judgment now appealed from is reported in I.L.R., 35 Mad., 134.

On this appeal,

De Gruyther, K.C., and *B. Dubs*, for the appellant, contended that the finding of fact by the District Judge that there was an implied contract on the part of the plaintiffs to pay the higher rate of rent for garden crops was justified by the evidence on the record, and that finding should not have been interfered with by the High Court which wrongly held that there was no consideration for such a contract. Before the Madras Act of 1865 the Zamindar used to receive as rent a share of the produce. That Act made provision for an agreement for rent either express or implied. In the present cases the rent fixed was for a dry system of cultivation, and was liable to be enhanced if garden cultivation was adopted. Here too the respondents had been for a period of some years paying the enhanced rate without objection, which, it was submitted, resulted in an implied contract, within the meaning of section 11 of the Act, to continue to pay rent at that rate. The contract at the lower rate ceased under the circumstances to be applicable, and there was good consideration, and the respondents were estopped from denying their liability to pay rent at the enhanced rate. Reference was

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VEERA RAMA
VENKATES-
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made to *Natesa Gramani v. Venkatarama Reddi*(1); *Suppa Pillai v. Nagayasami Thumbichi Naicker*(2); *Parthasarathi Appa Row v. Chevendra Venkata Narasayya*(3); Madras Rent Recovery Act (Madras Act VIII of 1865), sections 3, 6, 7, 8 and 11; and the Fifth Report (Madras), page 8.

J. M. Parikh, for the respondents, contended that there was no evidence to support the finding of the District Judge that there was an implied contract as alleged. The contention as to the effect of the original contract was not raised in the lower Courts at any prior stage of the suits, and could not, it was submitted, be raised now. The appeal to the High Court proceeded entirely on the question whether there was an implied contract under section 11 of the Act. The contention was in any case opposed to the policy and the provisions of the Act. The rents were originally fixed on the basis of dry cultivation and had been paid on that basis until wells were constructed by the tenants or irrigation was adopted. The presumption to be drawn from that was that there was an implied contract to pay rent at the dry rate. Reference was made to *Venkatagopal v. Rangappa*(4). No contract could be presumed at a higher rate; and no amount of acquiescence by the tenants could make such an implied contract as alleged by the appellant. There was moreover no consideration for it and therefore it could not be enforced. The cases cited for the appellant were distinguishable. In *Parthasarathi Appa Row v. Chevendra Venkata Narasayya*(3), and *Natesa Gramani v. Venkatarama Reddi*(1) rent had not been fixed, and in the latter case there was no question of want of consideration; and in the case of *Suppa Pillai v. Nagayasami Thumbichi Naicker*(2) an express contract was proved.

De. Gruyther, K.C., replied.

The JUDGMENT of their Lordships was delivered by

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LORD SUMNER.—This was a consolidated appeal in suits brought by a number of ryots in the Zamin of Gandamanayakkanur against their landlord, the Zamindar of Ettiyapuram, in the district of Tinnevely. He had tendered pattas for fasli

1312, at 8 fanams per kuli, at which rate they had paid rent for several years. These the ryots rejected, claiming that the proper rate was four fanams only, and brought these suits under section 8 of the Madras Rent Recovery Act (VIII of 1865) to obtain such pattas as they said they were entitled to receive.

The Act of 1865, though since repealed by the Madras Estates Land Act (I of 1908) was the Act then in force, and in suits "involving disputes regarding rates of rent," section 11 provides that "all contracts for rent, express or implied, shall be enforced." Though this statute does not define 'rent,' section 3, which makes the delivery of pattas and muchilkas mutually obligatory, requires that they shall state "the amount and nature of the rent," according as "it is payable in money or in kind or by a share in the produce." Regulation XXX of 1802, which had provided for such written records, and for fixing rents by the rates in the Government assessment, was generally silent as to rents fixed by contract between the parties. *Venkatagopal's Case*(1) explains the circumstances under which, between 1802 and 1865, it had become necessary to give effect to contracts and not merely to status and usage, and more particularly to such contracts as are implied from bare payment and acceptance of rent at a particular rate or measured in a particular way. Whether the framers of the Act fully appreciated its effect or not, the expression 'implied contract' is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English law. Accordingly the scheme of the section was as follows:—If a contract, express or implied, and legally enforceable, was once established, the issue was determined, and the proper patta was one giving effect to that contract. If, on the other hand, no such contract could be established, then since in the words of the District Judge on the second hearing in his Court, "it is not pretended that this Zamindari was surveyed by Government before the 1st January 1859," local usage could be proved. If such usage established a proper rent, then either party, if dissatisfied with it, could require resort to the *varam* customary in the village for the division of the crop between landlord and tenant (of which no

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(1) (1907) I.L.R., 30 Mad., 510 and 511. (2) (1908) I.L.R., 31 Mad., 19.

(3) (1910) I.L.R., 33 Mad., 177; L.R., 87 I.A., 110.

(4) (1884) I.L.R., 7 Mad., 365 (369) (F.B.)

(1) (1884) I.L.R., 7 Mad., 365 (F.B.)

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evidence was given or could have been given in these suits, as events happened), and, failing proof of such a customary *varam* it would have been the Collector's duty to fix such rate as he thought just, "after ascertaining if any increase in the value of the produce or in the productive power of the land has taken place, otherwise than by the agency or at the expense of the ryot." It followed, under this scheme, that if these ryots failed to prove an implied contract at four fanams enforceable between the parties, and, if the landlord succeeded in proving such a contract at 8 fanams, no further issue arose for decision.

The course which the litigation took was this: thirty-eight suits were begun in 1903 and, although the ryots came from different villages in the zamindari and had paid the garden rate for very varying terms, one alone, taken as typical of the rest at any rate so far as concerns the present appeal, was gone into. It was the suit brought by Arumugam Chetti, of the village of Poomalaigundu, in the Zamin of Gandamanayakkanur. The common state of facts was this. At some date, which varied a good deal from case to case, the ryot had made a well or tank at his own expense to water the land, which had been 'punja' or dry land before, and thereafter, thanks to the water-supply, he resorted to garden cultivation. No permission for the working of these wells was required on the part of the Zamindar. Rent had previously been paid at the rate of 4 fanams per Kuli, the usual 'dry' rate: thenceforward, it was always demanded and paid at the rate of 8 fanams per Kuli, which was alleged to be the usual rate for 'garden' cultivation. There seems to have been no demur to the 8-fanams rate till 1903, and presumably pattas and muchilkas at this rate were regularly exchanged, in accordance with the Act.

Arumugam Chetti, the selected plaintiff, pleaded, rather indefinitely, that the field in question "was a punja land, bearing 4-fanam rate of assessment," but that since the well had been sunk "the defendant had been charging garden assessment" without having any right to do so. The Zamindar did not deny the ryot's statement quoted above, but, besides relying on the actual payment of rent without dispute at the rate of 8 fanams, pleaded "a long standing custom for the Zamindar to collect *tirva* from the ryots according to the following rate: from 8 fanams to 10 fanams per Kuli for garden cultivation, and that, "in the said Zamindari, the *faisa*

rates have been fixed in fasli 1210 at 15 fanams per Kuli for garden cultivation." The record leaves the actual course taken at the trial on these pleadings somewhat conjectural.

The Sub-Collector rejected the Zamindar's evidence of custom, and made decrees in favour of the ryots, observing that their lands were "lands formerly paying punja rates (4 fanams)." He appears to have understood the custom pleaded by the Zamindar to have been

"a general custom to charge enhanced rents for garden crops, when raised by plaintiffs, irrespective of any improvement or alteration in the land made at plaintiffs' expense,"

and he held such a custom to be bad in law, as being contrary to the policy of the Act, relying on the case of *Venkatagiri Raja v. Pitchana*(1) and *Fischer v. Kamakshi Pillai*(2). There is nothing in his judgment to show, that a contract, existing before the wells were made, for a rent at the dry rate of 4 fanams was either expressly proved on the one hand, or expressly questioned on the other, but there is good ground for thinking that the case could not have taken the course it did, unless the Zamindar had conceded the existence of such a contract before the wells were made, and had alleged its supersession by another contract, since the payments at the garden rate began. In the High Court on the first hearing, SUBRAHMANYA AYYAR, J., says in terms that,

"in the Lower Courts the parties throughout proceeded in all these cases on the footing, that there were no facts to try, except as to the existence of the alleged custom,"

and then proceeds to discuss the validity of such a custom, and whether or not the alleged contract to pay at the 8-fanam rate was or was not *nudum pactum*. This is only consistent with his having taken the view above stated of the course of the case at the trial on the arguments presented to the Court. Twenty-seven of these suits were appealed to the District Judge. In these cases the maximum period since the wells were made and payment of the garden rate of rent began was eighteen years. Eleven others, in which the period was over forty years and therefore went back to a date before the passing of Act VIII of 1865, had been reserved by the Sub-Collector for separate trial.

(1) (1836) I.L.R., 9 Mad., 27.

(2) (1898) I.L.R., 21 Mad., 136.

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The District Judge allowed these appeals and made an order for a remand. On appeal to the High Court there was a difference of opinion on the first hearing, and on a second, under Clause 15 of the Letters Patent, the order of the District Judge was affirmed and the cases were sent back to the Sub-Collector. It is important to observe two things: (1) the Zamindar had not appealed against the order as actually made by the District Judge: he appears to have been satisfied with it as it stood, whatever its true meaning and effect might be; (2) the High Court interpreted that order as meaning merely that the Sub-Collector ought to try the question, whether a presumption of the fact of an implied contract arose in any particular case, on the facts of that case, and declared that "Under the order of remand it is not competent to either party to reopen the question of custom raised in the first preliminary issue." Accordingly, neither on the remand nor in the subsequent proceedings until the appeal to their Lordships' Board has this question of custom been further raised. As the now appellant acquiesced in its being thus disposed of, and as the judgment appealed against accordingly does not deal with it, their Lordships cannot now entertain this point as a ground of appeal. It is enough to say that, if the custom was meant to refer to the determination of rates of rent "according to local usage," the evidence was irrelevant, unless and until it appeared that no contract, express or implied, had been made on the subject; and if, on the other hand, it was meant to be, as the Sub-Collector understood, a general custom to enhance rent if the tenant enhanced the value of the land at his own expense, then the zamindar was asking the Sub-Collector to do what the Act forbade him to do, at any rate when, in the last resort, and in default of proof of contract or of 'varam', he came to fix a rent which he considered to be just. It never appears to have been suggested that what was meant was a custom of the country, with reference to which the ryots or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the zamindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, and to imply a new contract for that purpose.

The hearing upon the remand took place in 1907. By this time seventeen of the thirty-eight suits of 1903 had been disposed of, or in some way had disappeared; but further suits had been brought for 1904 and 1905, respectively thirty-one and thirty-eight. Thus ninety suits were eventually dealt with; but again the suit of Arumugam Chetti was treated as typical of all, though he had "paid this enhanced rate for the first and only time in fasli 1311, the year before suit." (Record, page 185). Again the Sub-Collector decided for and the District Judge against the ryots, though neither Sub-Collector nor District Judge was the same person who had officiated before. Again, on appeal to the High Court, the ryots succeeded, and now it is the zamindar who appeals to their Lordships' Board.

The judgment of the High Court, now appealed against, says,

"In the present suits it is admitted that, prior to the construction of the wells, the tenants had always been paying the uniform punja rate of four fanams a kuli for the suit lands, and this as far back as can be traced."

From such facts it would be a legitimate inference that a contract to hold the lands at a four-fanam rate of rent might be implied, and, when this is taken in conjunction with the terms of ryoti tenure, such a contract has at any rate an element of fixity, since so long as the ryot's rent is paid the zamindar cannot dispossess him against his will. It need not necessarily be inferred that such an implied contract gives a right of occupation at the punja rate in perpetuity. It would be enough for the purpose of the present case if its duration is implied to be so long as circumstances affecting the holding remain unchanged, otherwise than by the labour and outlay of the ryot himself. This is the basis of the decisions in favour of the ryots. How then is another and subsequent contract to be implied replacing the contract at the 'dry' rate by a new one at the 'garden' rate? The District Judge found as a fact, at the second hearing in his Court, that, in view of the long continuance of payments of rent at the garden rate,

"in each and every case there was an implied contract to go on paying those rates, if not as long as the relationship of landlord and tenant continued, certainly as long as the conditions remained unchanged,"

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and on this AYLING, J., delivering the judgment of the High Court, which is now under review, says—

“The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants for a number of years varying from two to forty. The corroborative evidence is meagre, but I am not prepared, on second appeal, to set aside the District Judge’s finding in this respect.”

The question for their Lordships then comes to be that of consideration for the subsequent agreement at garden rate thus implied. What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the ryot was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the ryot’s assumed promise to pay at the eight-fanam rate. The District Judge appears to have found consideration in the landlord’s abstention from exercising his right to resort to the ‘varam’ system, if the ryot refused to consent to pay at the rate of eight fanams, but, under the Act, if there was an implied contract for the four-fanam rate, that contract had to be enforced, and there was no question of resorting to the ‘varam’ system. By the admissions, such an implied contract did exist. As, by consent, all the cases have been treated as typified sufficiently by Arumugam Chetty’s case, no point can be made that in the cases where the eight-fanam rate had been paid for over forty years, the question arose before the Act of 1865 was passed; but, even if it could, there is no evidence that there was any ‘varam’ in the village in question. If it be said that at any rate the landlord could have put the tenants to the trouble of proceedings in the Sub-Collector’s Court and forbore to do so, there is no evidence that there was actually any such forbearance. Besides, if he had done so, still by the hypothesis, proof of the implied contract for the dry rate would have promptly defeated him, nor can it be said that a valid consideration can be found for the abandonment of the ryot’s rights in the zamindar’s submission not to raise a hopeless and groundless dispute of those rights; any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum.

The High Court therefore concluded that the implied agreement to pay the eight-fanam rate, though found as a fact, could not be enforced for want of consideration, and accordingly if the contract to pay the four-fanam rate still stood, it was enforceable. Some contention was raised that the ryots were estopped by their conduct in paying the garden rate, but this estoppel in pais, for what it might be worth, rested on an implied representation of some existing fact, on the faith of which the zamindar had changed his position, and of this there was no evidence. The contention was really only the implied contract for the garden rate in another form.

A further argument has been advanced, turning on the supposed true intent of the original contract for the 4-fanam rate, namely, either that it was a promise to pay the 4-fanam rate so long as the land should remain dry, and then, if garden cultivation should take place, to determine that contract, leaving the parties to make a new one, express or implied, and in default to resort to the ‘varam’ system, or else, in the alternative, that there never had been two implied contracts, but really from the beginning only one, to the effect that the ryot would pay at the four-fanam rate for the land while dry, and at the eight-fanam rate or some appropriate garden rate for the land when under garden cultivation, no matter at whose expense the water-supply should be procured, and this, as the legal result of this tenure having originated historically, as it is said, in a division of the produce of the holding, such as it might be from time to time, between ryot and zamindar in accustomed proportions. To both arguments there must be the same answer. The zamindar throughout contended for a new contract, arising in each case when the 8-fanam rate first began to be paid, and this is what the District Judge found and the High Court accepted. No case was made below, when the facts were examined or admitted, that the question was merely one of applying a very ancient agreement to new circumstances in accordance with its terms; nor would it be easy, to say the least of it, to suppose that any ryot voluntarily agreed to have his rent enhanced, whenever his own outlay should have rendered an improved mode of cultivation possible. Furthermore, such a theory, if applicable at all, is of general application and is repugnant to the whole scheme of Act VIII of 1865, which is

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based on the idea of making contract paramount, even when it is only implied, and of recognizing agreed rents in supersession of division of the produce, which is to be resorted to only if no contract for a rent can be proved and if the fixing of rent according to the local rate is objected to.

In the result the whole case now turns on the question whether there was any consideration for the new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of four fanams per kuli. Their Lordships agree with the High Court that the answer must be 'none.' If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost patta at eight fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen. As it is, their Lordships must deal with the case as they find it. They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitor for the respondents: *T. L. Wilson & Co., Limited.*
J.V.W.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Abdur Rahim, Offg. Chief Justice, Mr. Justice Oldfield,
Mr. Justice Sadasiva Ayyar, Mr. Justice Seshagiri Ayyar
and Mr. Justice Burn.*

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v.

MADAR AMMAL AND OTHERS (DECREE-HOLDERS, PURCHASERS
AND PETITIONERS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 180—Application by decree-holder for possession of properties purchased in Court auction—Application filed more than three years after confirmation of sale—Proceedings to set aside sale, effect of—Suspension of cause of action.

After a Court sale had been confirmed without opposition on 26th April 1913, an application was made on 3rd January 1914 to set it aside on the ground of fraud, and it was set aside on 25th June 1915 as to part of the properties sold. The auction purchaser having applied on 17th February 1917 for delivery of remaining properties, on a reference to a Full Bench,

Held (Per ABDUR RAHIM, OFFG. C.J., SADASIVA AYYAR, J., SESHAGIRI AYYAR, J., and BURN, J.), that the application was not barred under article 180 of the Limitation Act as time should be computed from the date of the order disallowing the petition to set aside the sale on the ground of fraud, and not from the date of the first confirmation.

Bajinath Sahai v. Ramgout Singh (1896) I.L.R., 23 Cal., 775 (P.C.), followed.

Per OLDFIELD, J.—As the question referred was not 'when the cause of action arose on the facts of the case' but whether the existing cause of action became suspended, the answer is that when once a cause of action has arisen, it is not suspended by later events.

Per SADASIVA AYYAR, J.—The cause of action was suspended during the interval.

APPEAL against the Order of C. KRISHNASWAMI RAO, District Judge of Rāmnād at Madura, in Appeal No. 462 of 1917, filed against the Order of S. V. PADMANABHA AYYANGAR, District Munsif of Paramagudi, in Execution Application No. 343 of 1917, in O.S. No. 680 of 1910.

A decree-holder brought several items of property to sale, in execution of his decree, and bought them on 25th March 1913.

* Civil Miscellaneous Second Appeal No. 87 of 1918.

1919,
March,
24 and 25,
April, 3,
September,
4 and 5,
October, 1.

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No application to set aside the sale having been made within 30 days of the sale, the sale was confirmed on 26th April 1913. On 3rd January 1914 an application, by the sons of a deceased judgment-debtor and the remaining judgment-debtors, was made to set aside the sale. On 25th June 1915, the Court set aside the sale as regards the interests of the sons of the deceased judgment-debtor on the ground that they had not been brought on record as the legal representatives of their deceased father and dismissed the petition as regards the other judgment-debtors. This order was confirmed on appeal on 13th May 1916. Thereupon the purchaser on 19th February 1917 filed an application for possession of the other portion. The District Munsif dismissed the petition, holding that it was barred by limitation. The District Judge on appeal allowed the petition, holding the contrary. The judgment-debtors preferred this appeal to the High Court.

K. Bashyam Ayyangar for the appellants.

B. Sitaram Rao for the respondents.

This Appeal came on for hearing in the first instance before OLDFIELD and SESHAGIRI AYYAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—Petitioner, whose legal representatives are the respondents, bought properties at Court auction in execution of his own decree on 25th March 1913 and the sale was confirmed on 26th April 1913. On 3rd January 1914, before the three years, within which he could apply for possession under article 180, schedule 1, Limitation Act, had elapsed, an application for the setting aside of the sale was presented and was admitted out of due time on the ground of fraud. On it the sale was set aside as regards some items and sustained as regards others, the order to this effect being passed in the Court of first instance on 25th June 1915 and in the Appellate Court on 13th May 1916. The present petition for delivery was presented on 19th February 1917. On these facts the questions raised are whether that petition is in time and incidentally whether such a petition is sustainable in the circumstances with reference to the earlier or later order of confirmation.

The latter question arises on the argument accepted by the Lower Appellate Court, that the delivery asked for is to be

based on the second order of confirmation and could not have been asked for until it had been passed and a fresh sale certificate had been drawn up. For the suggestion in the judgment under appeal that such a fresh certificate is necessary we have been shown no warrant. There is no reason for holding that delivery can be asked for or should be granted only of the whole property sold and not of a particular item included in it. Whether or no the Court's last order included any explicit cancellation of the certificate as regards the items affected by it, this argument cannot be regarded as substantial, there being no reason why the original certificate should be treated as superseded so far as the items, of which the sale was sustained, were concerned and not as amended in conformity with the order in respect of the others. It is urged however, more generally, either that the admission of the application for cancellation of the sale deprived the previous confirmation of the finality which enabled petitioner to ask for delivery in accordance with it, or that in any case, time did not run and petitioner was under no obligation to apply so long as the confirmation, which would be the basis of his petition, might possibly or probably be set aside.

In dealing with the first of these contentions it is to be observed that there is no question of suspension of petitioners' right to apply during any part of the period in question pending an appeal. For the application for cancellation of the sale was not an appeal, being made under Order XXI, rule 90, to a Court of first instance; and it is not suggested that the subsequent appeal related to the items of which delivery is now claimed. There is no question of an explicit injunction or other direct obstacle to petitioners' obtaining relief. Reference has not been made to any provision of law as authorizing the view that a mere attack on an order can render it ineffective or suspend its efficacy or stop the running of time, which has once begun to run, against the person who obtained it.

This is material as entailing the failure of the first of the two contentions above referred to. With reference to the second, although the conclusion proposed is the same, the principle relied on differs slightly. That principle is not that the validity of the order of confirmation is affected by the filing of the petition for its cancellation, but that the running of time for action on it is

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suspended directly. It is, to adopt the language used by my learned brother in *Doraisami Padayachi v. Vaidyalinga Padayachi*(1), the suspension, not of the existence of the cause of action, but of the running of time. For this contention also no statutory basis has been alleged. The question is only of the effect of the authorities to be referred to.

In *Somasundaram Pillai v. Vannilinga Pillai*(2) AYLING, J., and my learned brother endorsed the principle that,

"if circumstances exist which would render a suit or application infructuous, a party should not be compelled to institute it, until the impediment which stands in the way is removed"

and in *Secretary of State v. Raja Vadrevu Ranganayakam*(3) the decision of ABDUR RAHIM, J., which prevailed, seems to me to entail that, as I put the point in dispute, the running of time is suspended so long as any pending proceeding, in which any matter essential to the determination of the claim is in issue, remains undecided. The authorities now relied on are with one exception—*Baijnath Sahai v. Ramgut Singh*(4)—referred to in my judgment in that case and on one ground or another rejected as inapplicable to the facts then before us and as insufficient to support the general proposition then necessary for the appellant plaintiff's success. They in fact, as I understand the points actually decided in them, fall into three classes: those firstly in which the plaintiff was allowed the time occupied in seeking one remedy, usually specific performance of an agreement, before he sought another, for instance damages to which he ultimately discovered his right; those next (and *Baijnath Sahai v. Ramgut Singh*(4) is one of them) in which his right to sue was suspended whilst he had, or in good faith believed that he had, secured what he claimed; and lastly those, if the decision in *Jogesh Chunder Dutt v. Kali Churn Dutt*(5) is correct, in which an outstanding adjudication could have been pleaded against his claim. None of these classes accordingly, if the actual result of the cases comprised in them is regarded, covers the case before us. For here throughout the right of the

(1) (1917) 32 M.L.J., 46.

(2) C.M.A. 355 of 1915 (unreported.).

(3) S.A. Nos. 113 and 402 of 1917 (unreported.).

(4) (1896) I.L.R., 23 Cal., 775 (P.C.).

(5) (1878) I.L.R., 3 Cal., 80 (F.B.).

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petitioner to apply for delivery of the items, in respect of which he is applying was known to be enforceable and to require enforcing; and there was no obstacle in the way of its being enforced in the shape of any actual collateral adjudication. There was in fact merely the possibility of one; and I do not think that the principle relied on covers or should be extended to cover such a case.

The difficulty however arises, not from the actual conclusions in these cases, but from the way in which the reasons for those conclusions are stated. For, especially in *Baijnath Sahai v. Ramgut Singh*(1), there is much to suggest that a general rule was being enunciated and that the intention was to hold generally in favour of the right of a plaintiff or applicant to defer institution of his proceedings, so long as any reasonable doubt existed regarding his position and the necessity for or possibility of proceedings being taken. It is not clear how that language or the principle underlying the judgments, in which it occurs, can be reconciled with the other interpretations of the Limitation Act, to which my learned brother has referred in the judgment, which I have had the advantage of reading; and I therefore agree to the reference proposed by him.

The question referred is—

Whether the existence of the cause of action for an application for delivery, to which article 180, schedule I, Limitation Act applies, is suspended during the pendency of proceedings for the setting aside of the sale?

SESHAGIRI AYYAR, J.—I agree that the question raised by my learned brother should be referred to the Full Bench. The sale in question was made in Court auction on the 25th of March 1913. It was confirmed on the 26th of April in the same year. An application to set aside the sale followed. The final order was on the 25th of June 1915. It is in these terms: "In the result I set aside the sale so far as the interest of petitioners 1 to 3 in the properties sold is concerned and dismiss the petition so far as petitioners 4 and 5 are concerned". The present application is for delivery of the right, title and interest of the defendants against whom the application to set aside the sale was dismissed.

(1) (1896) I.L.R., 23 Cal., 775 (P.C.).

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The District Judge held that time began to run only from the 25th of June 1915. The question for consideration is whether he is right. The article applicable is 180, and under it the starting point is the date on which the sale becomes absolute. There can be no doubt that this language in column 3 of the third schedule has been taken from Order XXI, rule 92 of the Code of Civil Procedure. The article is a new one. Under the old Code there were differences of opinion as to whether an application for delivery must be made only in execution or whether a suit can be instituted even though more than three years had elapsed from the date of the confirmation of the sale. The new article has been introduced with a view to remove these doubts. The suggestion made by the learned vakil for the respondent, that the application may be brought under article 181 should be rejected. His contention, that as in 1915 the sale was partly confirmed and partly set aside article 180 is not in terms applicable, is not well-founded. It is true there is no provision in the Code of Civil Procedure for a second confirmation either partially or wholly when the application to set aside a sale succeeds or fails. I do not think that is a good reason for applying the residuary article, where there is one which in terms applies to the application made.

Mr. Sitarama Rao then argued that although in terms the sale was confirmed and made absolute on 26th April 1913, the confirmation must be deemed to have been suspended until the 25th of June 1915 when the final order on the application to set aside the sale was made. The strongest case that was quoted by him is *Bajinath Sahai v. Ramgut Singh*(1). That decision was given with reference to article 12 of the Limitation Act. The short facts were that a sale was confirmed by the Collector in 1882 and was upheld in appeal by the Commissioner. In 1884, the Revenue Board set aside both these orders. On an application for review the Board discharged its own order in 1886. The suit was brought in 1887, within a year of the last order of the Board of Revenue but more than a year after the order confirming the sale. The Judicial Committee held that the suit was in time. By the language of article 12 time begins to run from the date when the sale is confirmed. The Judicial Committee, at page 785, say :—

(1) (1896) I.L.R., 23 Calo., 775 (P.C.).

" Their Lordships are of opinion that there was no final conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date."

They further on say :—

" It cannot be said in the opinion of their Lordships when the parties were litigating before the Revenue Courts as to whether the sale should be confirmed or not, because that was the object of the litigation before the Revenue Courts, that the sale had become either final or conclusive."

The same language might not be inaptly employed in the present case. So long as the judgment-debtors or any of them disputed the finality of the sale by seeking to set it aside, it may be said that there was no final or conclusive sale or to use the language of Lord DAVEY :

" that for the purpose of the Law of Limitation the sale had not become absolute "

until 25th June 1915. In *Bajinath Sahai v. Ramgut Singh*(1) it was pointed out that the Board of Revenue acted without jurisdiction in interfering with the order of the Commissioner. Still, the Judicial Committee held that these infructuous proceedings before the Board had the effect of suspending the operation of the confirmation of the sale. The view taken by the Calcutta High Court in *Janak Prosad v. Net Ram*(2) also supports the respondent. *Sabapathy Chetty v. Rangappa Naicken*(3) is also in his favour.

As against these decisions, it must be said that the language of the Limitation Act is so explicit that it is not open to us to import considerations, like those which influenced the Judicial Committee into the present case. Other decisions of the Privy Council containing similar observations were quoted before us and I shall now refer to them. In *Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*(4) which was a case in which a revenue sale was set aside by the Collector, the landlord sued to

(1) (1896) I.L.R., 23 Calo., 775 (P.C.).
(3) (1903) 13 M.L.J., 225.

(2) (1914) 22 I.C., 497.
(4) (1868) 12 M.I.A., 244.

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recover arrears of revenue within three years of the setting aside of the sale. It was contended that the claim for arrears was barred by limitation as the suit was brought more than three years after the rent became due. Their Lordships say :—

“It seems to their Lordships to be perfectly clear, that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay the sum of money revived.”

They further on say :

“that upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent ; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place.”

This decision does not by itself lend support to the contention of the respondent. But this has been relied on in very many subsequent cases as indicating the view of the Judicial Committee that there can be a suspension of a cause of action during the period when it would be infructuous to sue on the original cause of action. The next Privy Council case relied on was *Bassu Kuar v. Dhum Singh*(1). Some general observations in that judgment are often quoted at the bar. Their Lordships said :—

“It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in any particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all.”

In a later case, *Nrityamoni Dassi v. Lakhan Chandra Sen*(2) their Lordships expressed their concurrence with the view taken in *Lakhan Chunder Sen v. Madhusudan Sen*(3). When the Calcutta decision is examined, it will be found that the learned Judges introduced a theory of suspension of limitation which is not warranted either by section 14 or 15 of the Limitation Act. Sitting with AYLING, J., I had to consider the applicability of these cases in *Somasundaram Pillai v. Vannilinga Pillai*(4). Sitting with the learned Chief Justice, a similar question was

(1) (1889) I.L.R., 11 All., 47 (P.C.).
(3) (1908) I.L.R., 35 Cal., 209.

(2) (1916) I.L.R., 43 Cal., 660 (P.C.).
(4) C.M.A No. 355 of 1915 (unreported).

considered in *Doraisami Padayachi v. Vaidyalinga Padayachi*(1). Speaking for myself, I must say that I always felt with reference to these Privy Council decisions there is as much to be said against my view as in favour of it. The dicta of the Judicial Committee in the above cases may be said to conflict to some extent with the view of the Board in *Soni Ram v. Kanhaiya Lal*(2) and in *Mani Singh Mandhata v. Nawab Bahadur of Murshidabad*(3). In the latter case their Lordships suggest that no suspension or extension of limitation is allowable unless the same is specifically provided in the Limitation Act. In *Soni Ram v. Kanhaiya Lal*(2), the right of a mortgagor to redeem became inoperative for a time owing to the fusion of rights as mortgagor and as purchaser. After the dissolution of this dual capacity, he applied to redeem the property and claimed to deduct the time during which the fusion subsisted. Sir JOHN EDGE in delivering the judgment of the Board stated :—

“There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would be deciding contrary to the express enactment of that section that ‘when once time has begun to run no subsequent disability or inability to sue stops it.’”

This language can equally well be applied to the present case. Once time began to run under article 180, on the sale becoming absolute, the subsequent inability consequent on the application to set aside the sale cannot stop the limitation which had already begun to run. Apart from other cases, I think there is a conflict between *Bajinath Sahai v. Ramgut Singh*(4) and *Soni Ram v. Kanhaiya Lal*(2), both of which are decisions of the Judicial Committee. I therefore agree that the question should be referred to the Full Bench.

ON THIS REFERENCE—

B. Sitarama Rao, for the respondent, began, at the request of *K. Bhashyam Ayyangar*, for appellant. It is

(1) (1917) 33 M.L.J., 46. (2) (1913) I.L.R., 35 All., 227 (P.C.).
(3) (1919) I.L.R., 46 Cal., 694 (P.C.). (4) (1896) I.L.R., 23 Cal., 775 (P.C.).

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true that in *Mani Singh Mandhata v. Nawab Bahadur of Murshidabad*(1) the Privy Council holds that no exemptions other than those enunciated in the Limitation Act can be claimed. Section 16 of the Limitation Act does not apply as the decree-holder is the purchaser. I contend that limitation in this case began only on 25th June 1915. I rely on *Bajinath Sahai v. Ramgout Singh*(2) which holds that limitation begins to run only after proceedings taken *bona fide* to set aside a sale are terminated, whether the proceedings were *ultra vires* or otherwise. That case is on all fours with the present case: see the analogous case of *Mussamut Raneesurno Moyee v. Shoohee Mokhee Burmonia*(3) where it was held that limitation for a suit for rent begins only after the termination of proceedings to set aside a sale of the holding. The case of *Hero Pershad Roy v. Gopal Das Dutt*(4) holds that it is not every suit for possession that will stop limitation running but only suits in which title to collect rent is in question. *Deen Dayal Parmanick v. Radha Kishoree Debee*(5) and *Eshan Chunder Roy v. Khajah Assanoollah*(6) were suits in ejectment by the landlord against the tenant. *Bassu Kuar v. Dhum Singh*(7), *Amma Bibi v. Udit Narain Misra*(8) and *Rangayya Appa Rao v. Bobba Sriramulu*(9), show when cause of action arises in cases for rent. The case of *Soni Ram v. Kanhaiya Lal*(10) holds that in India there is no suspension of limitation once begun; hence it is not relevant to the present case. Reference was also made to *Nrityamoni Dassi v. Lakhan Chandra Sen*(11) [on appeal from *Lakhan Chunder Sen v. Madhusudan Sen*(12)] in which the Privy Council upheld the reasons given by the High Court for holding that there was no bar of limitation. The present case is governed by article 180. Reference was made to Order XXI, rules 90 to

(1) (1919) I.L.R., 46 Cal., 694 (P.C.).

(2) (1896) I.L.R., 23 Cal., 775 (P.C.).

(3) (1868) 12 M. I.A., 244.

(4) (1883) I.L.R., 9 Cal., 255 (P.C.).

(5) (1872) 17 W.R., 415.

(6) (1871) 16 W.R., 79.

(7) (1889) I.L.R., 11 All., 47, at pp. 50, 57 (P.C.).

(8) (1909) I.L.R., 31 All., 68 (P.C.).

(9) (1904) I.L.R., 27 Mad., 143, at p. 152 (P.C.).

(10) (1913) I.L.R., 35 All., 227 (P.C.).

(11) (1916) I.L.R., 43 Cal., 660 (P.C.).

(12) (1908) I.L.R., 35 Cal., 209.

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92, Civil Procedure Code, and to the absence of a provision similar to section 15 of the Limitation Act in respect of applications to set aside sales. *Ashfaq Husain v. Gauri Sahai*(1), *Doraisami Padayachi v. Vaidyalinga Padayachi*(2), *Rajagopalan v. Somasundara Thambiran*(3), *Venugopal Mudali v. Venkatasubbiah Chetty*(4) show that even pendency of appeal or review would postpone the starting point of limitation for execution of a decree: see also *Surajiram v. Barhamdeo Pershad*(5) and *Janak Prasad Singh v. Net Ram*(6).

K. Bhashyam Ayyangar for the appellants.—The question referred is not, when the cause of action arose in this case for the application for possession; but whether the cause of action that has arisen, and that has been held by the Order of Reference to have arisen, can be said to be suspended during the time of the proceedings taken to set aside the sale. Two matters are clear even from the decisions quoted by the other side—(1) when a cause of action has arisen it cannot by any means be suspended by later events; (2) there are no other exemptions besides those specified in the Limitation Act. No case has been quoted to show that the equitable principle contended for by the other side can be applied to stop the running of time. The cases quoted can be classed under one or other of the following heads; some [e.g., *Rangayya Appa Rao v. Bobba Sriramulu*(7) and *Mussamut Raneesurno Moyee v. Shoohee Mokhee Burmonia*(8)] simply explain when under certain circumstances the cause of action in the particular cases arose, e.g., for rent [see also *Inderbuttee Kcer v. Mukhboob Ali*(9)]; others, e.g. [*Bassu Kuar v. Dhum Singh*(10)], deal with the question whether on the facts of the case a new cause of action has arisen. Others, like *Bajinath Sahai v. Ramgout Singh*(11), only deal with the question as to what meaning is to be given to particular words of the first or the third column of an article, e.g., article 12 of the Limitation Act. Moreover, it was eventually held in that case that there was no sale; hence no suit could be brought. Cases like

(1) (1911) I.L.R., 33 All., 264 (P.C.).

(2) (1917) 32 M.L.J., 46 (F.B.).

(3) (1907) I.L.R., 30 Mad., 316.

(4) (1916) I.L.R., 39 Mad., 1196, at p. 1202.

(5) (1905) 1 C.L.J., 337.

(6) (1914) 22 I.O., 497.

(7) (1904) I.L.R., 27 Mad., 143 (P.C.).

(8) (1868) 12 M.I.A., 244.

(9) (1875) 24 W.R., 44.

(10) (1889) I.L.R., 11 All., 47 (P.C.).

(11) (1896) I.L.R., 23 Cal., 775 (P.C.).

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Ashfaq Husain v. Gauri Sahai(1) deal with the question as to when on the facts of the case there is a *complete* decree capable of execution. The case of *Nrityamoni Dass v. Lakhan Chandra Sen*(2) is explained in *Ragavendra Row v. Venkatarama Aiyar*(3). Section 14 is not relied upon by the other side and it does not apply to the facts of the case; see *Abkan Sahib v. Soran Bivi Saiba Ammal*(4). In this case, there was a cause of action, as stated in the Order of Reference, from the date of the confirmation of sale; hence there can be no suspension of the running of time.

OPINION.

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ABDUR RAHIM, OFFG. C.J.—The question referred to the Full Bench arises under article 180 of the Limitation Act.

A person, who purchased certain properties at a Court auction in execution of his own decree on 25th March 1913, applied for delivery of possession on 19th February 1917. An order confirming the sale was made on 26th April 1913, but on 3rd January 1914, that is, more than thirty days afterwards, an application was made on behalf of the judgment-debtor for the setting aside of the sale. That application was disposed of by the Court of first instance on 25th June 1915, the Court setting aside the sale in respect of some of the items and upholding it as regards the other items. That order was appealed from and the Appellate Court dismissed the appeal on 13th May 1916.

It will thus be seen that the application for delivery of possession of the property would be barred under article 180, if the time of three years allowed by the second column be reckoned from 26th April 1913 when the sale was confirmed under rule 92 of Order XXI of the Civil Procedure Code, no application for setting aside the sale having been made by that time; but it would be within time if the period of limitation commenced on 25th June 1915, the date of the order adjudicating upon the application made under rule 90 to set aside the sale on the ground of irregularity or fraud by which

(1) (1911) I.L.R., 33 All., 264 (P.C.).

(2) (1916) I.L.R., 43 Cal., 660 (P.C.).

(3) (1917) 38 M.L.J., 682.

(4) (1915) I.L.R., 38 Mad., 260.

the sale as regards some of the items was set aside and the sale as regards the other items was upheld.

There can be no doubt that article 180 applies to cases where the sale is confirmed and thereupon becomes absolute under the provisions of rule 92. That rule contemplates that such an order is not to be made until the application to set aside the sale under rule 89 or 90 or 91 if any, has been disposed of and disallowed. The question under reference would hardly arise in cases where the application to set aside the sale is made in the ordinary way within the period of thirty days under article 166. The difficulty has evidently arisen, because, no application to set aside the sale having been made within thirty days, the Court had in the usual course made the order confirming the sale.

The question then is, when the Court entertains an application to set aside the sale after the order confirming the sale had been made but before the period of three years allowed to the purchaser for applying for delivery of possession has expired, whether time must be reckoned against the applicant from the date of the order of confirmation of sale, or whether that order should be treated as not having the effect of making the sale absolute within the meaning of article 180, but that the sale should be deemed to have so become absolute from the date when the application for setting it aside was disposed of. I do not think the fact that the sale was set aside in respect of some of the items included therein and upheld as regards the other items should make any difference as to the application of article 180, for we are not concerned with the properties the sale of which has been set aside, and as regards the rest possession of which alone is sought, the point for decision is whether the entertainment of the application to set aside the sale had or had not the effect of preventing the sale becoming absolute within the intendment of article 180. Even without the help of the Privy Council rulings, which I shall presently notice, I should answer, that in the given circumstances, the sale did not become absolute until the petition made to set it aside had been disallowed. Rule 92 has primarily in contemplation cases where the application to set aside the sale is made within the limit of thirty days allowed by the law so that any order confirming the sale would

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be ordinarily made after the disposal of such applications. But if the Court in this case was justified—and I take it that it was—in entertaining the application to set aside the sale after it had made the order confirming the same, can it be said that, whatever be the result of the application, the order confirming the sale remained effective so as to make the sale absolute from the date on which it was drawn up? To my mind, obviously not. The effect of entertainment of the application to set aside the sale after the order of confirmation must, having regard to the intention of the legislature as disclosed in this rule and quite apart from any general theory in such connexions, be to render the order ineffective so as to make the sale absolute. If we were to proceed upon an absolutely literal interpretation of the language of rule 92 without paying due regard to the intention of the legislature, this case would have to be treated as lying outside that rule, for it requires that the order of confirmation should be made after the disposal of any application to set aside the sale. If so treated, there would be no difficulty in the application of article 180. Whether it is the practice to issue a second certificate on the disposal of such an application or not cannot, to my mind, affect the application of article 180; but I should suggest that a fresh certificate ought to be issued, if not in all cases, at least in those cases where the sale is only partly upheld as the result of an application made to set it aside after the passing of the order conforming the sale.

Upon a proper interpretation, therefore, of article 180 read with rule 92 of Order XXI, Civil Procedure Code, I should hold that, where an application is made for delivery of possession of property sold in execution of a decree, the sale does not become absolute within the meaning of the third column of article 180 until the application made to set aside the sale under rule 89 or 90 or 91 has been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made. The question referred to the Full Bench, I may mention, is framed in the form as it is apparently with a view to ascertain the scope and effect of certain rulings of the Judicial Committee which have latterly been the subject of much discussion in this Court. But I do not feel myself bound by the frame of the question to state my conclusion as to the application of article 180 to circumstances such as arose in

this case with reference only to the mode of computation mentioned in the question.

Of the Privy Council rulings, the one that has the closest application to the facts of this case is that of *Bajinath Sahai v. Ramgut Singh*(1). There, stating shortly the effect of the judgment of the Judicial Committee as given in the head note, the Board of Revenue of Bengal discharged an order of the Commissioner, dated 25th January 1884, which had confirmed a sale by the Collector in 1882, but afterwards on 21st August 1886, discharged its own order and revived that of the Commissioner. It was held that the confirmation of sale dated only from the last order of 21st August 1886, within the meaning of article 12 of Act XV of 1877, which provides one year, for a suit to set aside a sale for arrears of Government revenue or for any demand recoverable as such arrears, from the date on which the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. At page 785 their Lordships say that they did not base their decision on the provision of section 14 of the Limitation Act which provides for the exclusion of the time of a bona fide proceeding in a Court without jurisdiction, but because they were of opinion

“that there was no final, conclusive and definite order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definite and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date.”

I do not think that much light would be obtained on the present question by discussing in detail the other rulings of the Privy Council cited before us, a summary of which is set out in the Order of Reference and which I also had occasion to discuss previously in Appeals Nos. 113 and 402 of 1917. No doubt there are general observations in some of the cases such as *Bassu Kuar v. Dhum Singh*(2) where it is stated,

“It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not,”

(1) (1896) I.L.R., 23 Cal., 775 (P.C.).

(2) (1889) I.L.R., 11 All., 47 (P.C.), at p. 56.

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or that the right of plaintiffs to bring an action to recover certain property would be suspended because of certain intermediate litigation (see *Lakhan Chunder Sen v. Madhusudan Sen*(1) and *Nrityamoni Dassi v. Lakhan Chandra Sen*(2) in which his title to the property happened to be under investigation. But it is hardly to be inferred from such observations that the Privy Council intended to lay down any rule or rules for exclusion of time other than those mentioned in various sections of the Limitation Act, such as, 12, 14, etc. Or that when time has once begun to run, it will be suspended otherwise than according to the provisions of section 9 or any other similar provision of the Limitation Act itself. In *Mussumot Rane Surno Moyee v. Shooshi Mokhee Burmonia*(3) their Lordships had to determine when the cause of action accrued with reference to section 32 of Act X of 1859, whether at the end of each fasli year when the rent became due, or on the date of the decree reversing the auction sale of the Putnee taluk belonging to the plaintiff zamindar, and they decided in favour of the date of the decree reversing the auction sale. I do not see that any general principle of interpretation or application of the Limitation Act can be deduced from this decision which would be of any guidance in the present case. In *Bassu Kuar v. Dhum Singh*(4), in a suit for specific performance for sale of land, it was ruled that the plaintiff's cause of action, for recovering the debt which was the consideration for the agreement for sale which failed, arose on the date the decree refusing specific performance was passed, because a new obligation was imposed on the defendant by that decree. *Udit Narain Misr v. Muhammad Minnatulla* (5) and *Jamna Das v. Najm-un-nissa Bibi*(6) were also of a similar nature. And in all these cases the article under consideration was article 97 of Act XV of 1877 which was applicable to suits for money paid upon an existing consideration which afterwards failed. In *Rangayya Appa Rao v. Bobba Sriramulu*(7) the Judicial Committee held that until the puttah was settled under the special provision of the Rent Recovery Act

(1) (1908) I.L.R., 35 Cal., 209.

(3) (1868) 12 M.I.A., 244.

(5) (1908) I.L.R., 25 All., 618.

(2) (1910) I.L.R., 43 Cal., 680 (P.C.).

(4) (1899) I.L.R., 11 All., 47 (P.C.).

(6) (1906) I.L.R., 28 All., 466.

(7) (1904) I.L.R., 27 Mad., 143 (P.C.).

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(VIII of 1865), time did not run, but that limitation was to be computed only from the date of the final decree determining the rent. I must however observe that it would almost look that in my judgment in *Secretary of State v. Raja Vadrevu Ranganayakama*(1) I tried to deduce from these cases a principle of general and unlimited application to the effect that where the rights of the parties have been subjected to determination by the Court, it is from the date of the determination of such rights that limitation should be computed. But on further consideration, I am persuaded that any such deduction would be unjustified, if it be meant thereby to introduce a rule of exclusion or suspension of time covering a larger ground than that traversed by sections 12, 14, 15, 16, 9 and other similar provisions of the Limitation Act. I need hardly say that I do not desire to express any opinion on the question of limitation involved in *Secretary of State v. Raja Vadrevu Ranganayakama* (1) as a Letters Patent Appeal is now pending from my judgment. But as I have already suggested, it is not necessary to attempt to deduce any rule of general application in order to answer the question which arises in this case and that the answer, as I have stated, should be that time should be computed from the date of the order disallowing the petition to set aside the sale and not from the date of confirmation passed before the application to set aside the sale was made.

OLDFIELD, J.—The question I propose to answer is that which has been referred and not any other, which may appear to afford a ground of disposal in the appeal, in which the reference has been made.

That question is whether the existence of the cause of action for an application for delivery is suspended during the pendency of proceedings for the setting aside of the sale; and I do not understand it as raising the distinct question whether the order of confirmation, which had been passed in the case before the referring Judges, had been deprived of the finality which it originally possessed. The distinction is clearly marked in my referring order by the reference to the judgment of SESHAGIRI AYYAR, J., in *Doraisami Padayachi v. Vaidyalinga Padayachi*(2) and I propose to adhere to it.

(1) Appeals Nos. 113 and 402 of 1917 (unreported.) (2) (1917) 33 M.L.J., 46.

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The conflict we have to resolve is on the one hand between the unrestricted language of sections 3 and 9, Limitation Act, which has more than once, as the referring order of SESHAGIRI AYYAR, J., shows, been regarded as subject only to the exceptions allowed by some specific provision of law, and on the other, certain decisions of the Judicial Committee and the language used in them, which are relied on as involving the existence of an equitable power to relax the provisions of the Act in such cases as the one before us.

It is unnecessary to extract the sections of the Act or to insist on their unrestricted character except by pointing out, what will be material in the sequel, that section 3 is affected by section 14 in the case of an application, only when the applicant has been prosecuting, not when, as in the case under reference, he has been on his defence in another proceeding. That is involved by the reference in section 14 to prosecution in good faith, by the terms of explanation II and by the absence of any reason for supposing that a change in the law was intended when the clear language in the corresponding section of the former Act XV of 1877 was abandoned. Subject however to this, sections 3 and 9 are comprehensive. In order to evade them, reliance has been placed on decisions of the Judicial Committee, the effect of which was stated in the recent judgment in *Somasundaram Pillai v. Vannilinga Pillai*(1), to which SESHAGIRI AYYAR, J., was a party, as being that

"if circumstances exist, which would render a suit or application infructuous, a party should not be compelled to institute it, until the impediment in the way is removed."

It is for us to decide whether this general principle can be deduced from the cases relied on.

Those cases have been referred to in my order of reference as falling into three classes; and I adhere to that classification in supporting the conclusion, which the fuller arguments we have now heard in my opinion entails, that the proceedings in each case were really regarded as in time, with reference not to any extension of the period available for taking them but to the adoption of a starting point for limitation, which was discovered, either where none had been available before or in supersession of one already in existence. This is, if I

(1) C.M.A. No. 355 of 1915 (unreported.)

understand the opinion to be given by SESHAGIRI AYYAR, J., correctly, in accordance with the view which he would take, although I should respectfully describe it as putting a more accurate, not a more liberal, construction on column 3 of the schedule.

Thus in the first class of cases referred to, those in which the plaintiff after claiming one remedy in good faith, but unsuccessfully, sought another to which his right was ascertained in this previous proceedings. The decision in *Bassu Kuar v. Dhum Singh*(1) was based statedly on the fact that from the date, on which an agreement to convey property in satisfaction of a debt was held unenforceable, a new liability for money paid on a consideration which failed was imposed on the debtor in supersession of his liability under the agreement or for the debt; and the *dictum* relied on here,

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation on pain of losing his property"

can be fairly applied, as stating, not any general principle, but merely an *argumentum ab inconvenienti* to connexion with the reference immediately preceding it to the period during which the decree of the Court of First Instance upholding the agreement was in force. This is in fact the explanation of the decision, which was given in *Jamna Das v. Najm Un-nissa Bibi*(2) and approved by the Judicial Committee in *Udit Narain Misr v. Muhammad Minnatulla*(3) and *Amma Bibi v. Udit Narain Misr*(4).

The next class of cases comprised those in which the plaintiff, having obtained all he wanted in previous proceedings, had, when those proceedings were set aside, to take fresh ones in connexion with which limitation was pleaded; and the decisions in his favour are easily intelligible with reference to the date of his deprivation of the relief he had secured. Thus in *Mussumat Raneesurno Moyee v. Shooshee Mokhee Burmonias*(5) the plaintiff's claim having, as the Committee pointed out, once been satisfied by the sale, which was afterwards set aside, it was only when it ceased to be satisfied that the cause of action

(1) (1884) I.L.R., 11 All., 47 (P.C.). (2) (1906) I.L.R., 28 All., 466.

(3) (1903) I.L.R., 25 All., 618.

(4) (1909) I.L.R., 31 All., 68 (P.C.).

(5) (1868) 12 M.T.A., 244.

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afterwards sued on became available; and, although Sir R. COLLIER in *Huro Pershad Roy v. Gopal Das Dutt*(1) referred to this case, as establishing an exception to the operation of the statute, and in explaining it spoke of the 'period of time in which the statute might not run' he described the exception as 'rather apparent than real' and the whole tenor of his judgment was consistent with the view I am taking. Another case in this class, *Lakhan Chunder Sen v. Madhusudan Sen*(2), calls for notice, because there is no doubt that the judgments in it contain language, in which a suspension of the running of time is referred to. The facts however need cause no difficulty. Certain defendants in a suit for possession and account in respect of a share, from which the plaintiffs alleged dis-possession, succeeded in obtaining a decree for ascertainment of their own share; and the suit for such ascertainment which they had to bring when the decree in their favour was set aside, was held to be in time, as it might be consistently with the principle under discussion, on the ground that their cause of action arose, only when they were deprived of the relief they had once obtained. In the High Court, however, although the judgment mentions the inability of these parties, so long as the decree in their favour subsisted, 'to institute a fresh suit for the object, which had been successfully attained,' their case is described as having been that their rights were suspended; and *Prannath Roy Chowdry v. Rookea Begum*(3) and the observations of LORD ELDON in *Pulteney v. Warren*(4) are referred to, the former dealing with the existence of sufficient cause within the meaning of Bengal Regulation III of 1873, section 14, and the latter with the English principle reproduced in our section 15 (1). The Judicial Committee also, in shortly approving the High Court's decision, referred to the suspension of limitation and the deduction of the period spent in the previous litigation. The High Court however had relied on *Mussumat Ranee Surnomoyee's*(5) case and the Judicial Committee had also referred to the existence of an effective decree, which was capable of being enforced until set aside; and in these circumstances these judgments indicate only that, although the

(1) (1883) I.L.R., 9 Cal., 255 (P.C.). (2) (1908) I.L.R., 35 Cal., 209.
(3) (1859) 7 M.I.A., 323.
(4) (1801) 6 Ves. 73; s.c., 81 E.R., 944. (5) (1868) 12 M.I.A., 244.

existence of alternative grounds for their conclusions was present to the minds of the Courts concerned, it was not thought worth while to maintain the distinction between them for the purpose in hand. In the last case of this kind to which I need refer, *Bajinath Sahai v. Ramgut Singh*(1), the ground of decision is clearly not any suspension of the right to sue. For the judgment statedly expresses no opinion on the applicability of section 14 of the Act and is based on the absence of any sale, which the plaintiff could have sued to have set aside, until the cancellation order obtained by him in good faith had been displaced.

In the remaining class of cases the plaintiff's claim depended on the principle stated in the judgment of MACPHERSON, J., in *Jogesh Chunder Dutt v. Kali Churn Dutt*(2) as deducible from *Shama Purshad Roy Chowdry v. Huro Purshad Roy Chowdry*(3), that on the reversal of the main decree, which was the basis of subsequent decrees, the latter are superseded and a suit lies to recover what has been wrongfully paid under them. This principle is of course not one of limitation and its exact scope may come under discussion in another case now pending, to which reference is made in the judgment of the learned Chief Justice. But *Jogesh Chunder Dutt v. Kali Churn Dutt*(2) is material at present, because consistently with it, when the limitation applicable to the suit it authorizes was considered in *Kali Churn Dutt v. Jogesh Chunder Dutt*(4), it was held that time ran from the date of the superseding judgment under article 120, not from the erroneous receipt of the payment under article 62, and no provision relating to suspension was relied on. The decision in *Narayana v. Narayana*(5) proceeded on similar grounds; and both authorities exemplified the conclusion reached in connexion with the first class of cases already dealt with, that an accurate application of the third column of schedule 1, rather than reliance on suspension of the running of time, is the means by which apparent hardship to plaintiffs should be avoided.

In the foregoing, representative instances from each of the classes of cases referred to in argument have been dealt with:

(1) (1896) I.L.R., 23 Cal., 775 (P.C.).
(2) (1878) I.L.R., 3 Cal., 30 (F.B.). (3) (1865) 10 M.I.A., 203.
(4) (1878) 2 C.L.R., 354. (5) (1890) I.L.R., 18 Mad., 437.

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OLDFIELD, J. and the result is that none supports the general equitable principle, for which the respondents before us contend. It has been pointed out that section 14 of the Limitation Act is inapplicable to the case submitted to us and no other positive provision has been relied on. I would therefore answer the question referred in the negative, that in the circumstances stated, if time has begun to run, its running is not suspended.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The question referred to the Full Bench is whether the existence of the cause of action for an application for delivery to which article 180 of schedule 1 of the Limitation Act applies, is suspended during the pendency of the proceedings for the setting aside of the sale.

The relevant dates are as follows :—

- (a) the Court auction sale took place in March 1913;
- (b) the sale was confirmed on 26th April 1913;
- (c) application to set aside the sale was made on 3rd January 1914;
- (d) the sale was set aside as regards the interest of some of the judgment-debtors, and it was upheld as regards the others on 25th June 1915;
- (e) the application for possession of the interests of the judgment-debtors, the sale of whose interests was finally confirmed on 25th June 1915, was made on 19th February 1917.

If the time between 3rd January 1914 (when the application to set aside the whole sale was made) and 25th June 1915 (when the final order confirming part of the sale was made) is deducted, the application of 19th February 1917 is within the period of three years from the date when the sale became absolute, which is the date mentioned in column 3 of article 180.

The matter in controversy was argued from two aspects on behalf of the decree-holder-purchaser: (1) that even if the cause of action for the application for possession as made arose when the sale of the interests of all the judgment-debtors was confirmed on 26th April 1913, in other words, that even if the application for possession, dated 19th February 1917, is based on the cause of action for possession of the entire interests which arose on 26th April 1913 (the date when the first order of confirmation was made) or to put it again differently, even if the

time of three years began to run from 26th April 1913 itself, notwithstanding that the application was for possession of a fraction of the interests sold on that date, the running of time was suspended between 3rd January 1914 and 25th June 1915; (2) that a new cause of action arose on 25th June 1915 when the final order confirming the sale of the interests of some only of the judgment-debtors was made and that the time for calculation of the period of limitation for the application of 19th February 1917 arose only on 25th June 1915.

Section 9 of the Limitation Act says :

“Where once time has begun to run, no subsequent disability or inability to sue stops it.”

Though this section, in terms, relates only to a suit and not to an application, in *Jivraj v. Babaji*(1), and in *Bhagwant Ramchandra v. Kaji Muhamad Abas*(2), the words ‘to sue’ have been taken as including ‘to apply in execution.’ Further, the Court auction-purchaser who has made the application for possession can hardly be said to rely on any ‘subsequent disability or inability’ (that is, subsequent to the date of sale) to make the application as ‘disability’ and ‘inability to sue’ are not the same as ‘inconvenience’ or ‘futility’ of suing; one of the two branches of his contention is that his right to apply for possession of those interests whose sale was finally confirmed, arose only on the date of that final confirmation and that as the original confirmation of 1913 was modified by the final confirmation of 25th June 1915, he obtained a new cause of action for making the application in conformity with that final order. In *Bajinath Sahai v. Ramgut Singh*(3) their Lordships of the Privy Council held that a suit for setting aside a sale made on 25th September 1882 by the District Collector and confirmed by the Commissioner on 25th January 1884, though brought in July 1887 (more than one year from the date of such confirmation), was not barred by article 12 of Act XV of 1877, because the Board of Revenue, whether with or without jurisdiction, had set aside the Commissioner’s order, though it afterwards discharged its own order on 21st August 1886. Their Lordships held that limitation for the suit commenced only from the final

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(1) (1905) I.L.R., 29 Bom., 68. (2) (1913) I.L.R., 36 Bom., 498.
(3) (1896) I.L.R., 23 Calc., 775 (P.C.).

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order of the Board, dated 21st August 1886, because there was no "conclusive and definitive order" confirming the sale while the question whether the sale should be confirmed was under litigation, and until the order of the Commissioner on 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on 21st August 1886; in other words, that *for the purposes of the law of limitation, there was no final or definitive confirmation of the sale until that date.* Their Lordships do not rely upon section 14 of the Limitation Act which relates to the exclusion of time during which proceedings in Court without jurisdiction are being prosecuted; but put it on the broad ground that the sale itself became 'confirmed' within the meaning of the expression in the third column of article 12 of the Limitation Act only on the date when the proceedings closed before the Board of Revenue, that is in August 1886, though there had been a confirmation by the Commissioner in 1884 itself. I think the present case is a stronger case for the purchaser than the case reported in *Baijnath Sahai v. Ramguts Singh*(1). Whereas article 12 uses the expression "when the sale is confirmed," article 180 uses the expression "when the sale becomes absolute." If, on an application made to set aside the sale, an order setting aside the sale in part is passed (as it has been passed in this case), the sale as made cannot be said to have become 'absolute,' though a formal confirmation after the expiry of 30 days had taken place. Further, whereas in *Baijnath Sahai v. Ramguts Singh*(1), the Commissioner's confirmation order of 1884 was ultimately upheld by the final order of the Board of Revenue in 1886, the confirmation order of 1913 in this case was modified ultimately by the final order of 1915. I think the principle underlying the decisions of their Lordships in both *Mussamut Ranees Surno Moyee v. Shooshee Mokhee Burmonia*(2) and *Baijnath Sahai v. Ramguts Singh*(1) might be invoked in favour of the applicant in this case. That principle (as I understand it) is that whenever proceedings are being conducted between the parties bona fide in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings, should be

(1) (1896) I.L.R., 23 Cal., 775 (P.O.).

(2) (1883) 12 M.I.A., 244.

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held to arise only on the date when those proceedings finally settle such rights and liabilities. (The case where the proceedings are by way of appeal is specially provided for by statute law and the decisions based on those special provisions are irrelevant and merely confuse the mind in its analysis of the relevant precedents.)

I shall refer to only one more authority. In *Nrityamoni Dassi v. Lakhan Chandra Sen*(1) their Lordships of the Privy Council confirmed the Full Bench decision of the Calcutta High Court in *Lakhan Chunder Sen v. Madhusudan Sen*(2). The judgment of their Lordships on the question of law involved begins by saying "Their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation." In the judgment in *Lakhan Chunder Sen v. Madhusudan Sen*(2) the learned Judges of the Calcutta High Court (the Appellate Court) not only do not rely upon section 14 of the Limitation Act, but expressly say, "We feel grave doubt whether the case falls within that section." But they rely upon the principle of the Privy Council decision in *Mussamut Ranees Surno Moyee v. Shooshee Mokhee Burmonia*(3) and hold that the right of the plaintiffs to bring an action to recover the property was suspended between 20th April 1903 and 22nd February 1904, because on 20th April 1903 they had, as defendants in a former suit, obtained a decree for the same relief as was claimed in their present action, which decree however was reversed (on the appeal filed by the plaintiffs of that suit) on 22nd April 1904. Thus the suspension was not by reason of section 14 of the Limitation Act, but by reason of the principle that a person is not bound to bring an unnecessary suit or to make futile and unnecessary applications during the course of other litigation proceedings in which he and his opponent had been bona fide engaged for the ascertainment and settlement of the same rights. The rule of law derivable from the decisions of their Lordships seems to have thus two applications according to circumstances: (a) creating a fresh cause of action under some circumstances, (b) suspending the running of time in other circumstances. In *Lakhan Chunder Sen v. Madhusudan Sen*(2) [affirmed by the Privy

(1) (1916) I.L.R., 43 Cal., 663 (P.O.).

(2) (1903) I.L.R., 35 Cal., 209.

(3) (1888) 12 M.I.A., 244.

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Council in *Nrityamoni Dassi v. Lakhan Chandra Sen*(1)] the 'suspension' principle was applied in the case of a suit also. Mr. Rustomji in his book on Limitation published in 1915 [after *Lakhan Chunder Sen v. Madhusudan Sen*(2) and before *Nrityamoni Dassi v. Lakhan Chandra Sen*(1)] remarks as follows at page 44 (under section 9) about the decision in *Lakhan Chunder Sen v. Madhusudan Sen*(2):—

"It is difficult to see under what provision of the Limitation Act the Court held that there was a suspension of the right of suit"

But as their Lordships of the Privy Council have confirmed *Lakhan Chunder Sen v. Madhusudan Sen*(2), approving generally the ratio of its decision, we must hold that notwithstanding section 9 of the Limitation Act, there are exceptional cases where such suspension, even as regards the running of time on the cause of action for a suit can take place. I think that, in either aspect (I am myself inclined to think that in the present case, a new cause of action for this special application for possession of the interests in respect of which alone the sale was finally confirmed arose in 1915), the application for possession in 1917 in this case is not barred by limitation.

SESHAGIRI AYYAR, J.—I had to consider the Privy Council decisions quoted before us on a number of occasions. I was therefore, at first disinclined to write a separate judgment in this case. But as in a case depending upon this judgment and which was posted before SADASIVA AYYAR and BURN, JJ., and myself the subject matter is of a value which will enable the parties to go before the Privy Council, and as I think that some of my observations in the previous judgments have been expressed more broadly than they need have been, I have resolved to give expression to my views on the present occasion. By common consent of both parties, notwithstanding the somewhat limited scope of the question referred, arguments were addressed to ascertain the exact scope of the pronouncements of the Judicial Committee on the point whether, in addition to the exceptions enumerated in the Limitation Act, it is open to Courts to import a new principle of equity regarding the articles in the first schedule to that Act.

(1) (1916) I.L.R., 43 Cal., 680 (P.C.). (2) (1908) I.L.R., 35 Cal., 209.

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Mr. Sitarama Rao contended that the decision in the case which led to the reference is governed by *Bajinath Sahai v. Ramgut Singh*(1). In my opinion this contention is right. But I base that conclusion not on the ground that there is a general principle of equity apart from the statute, but because in the present case, the construction to be placed on the third column of article 180 of the first schedule is concluded by that decision.

It was suggested in the course of the argument that the decisions of the Judicial Committee on this subject are not reconcilable with each other. After giving my best consideration to this argument, I do not think that this argument is well founded. Broadly speaking, the decisions of the Board fall under two heads. Under the first head come *Mussamut Ranees Surni Moyee v. Shooshee Mokhee Burmonia*(2), *Bassu Kuar v. Dhum Singh*(3), *Bajinath Sahai v. Ramgut Singh*(1), *Rangayya Appa Rao v. Bobba Sriramulu*(4), *Amma Bibi v. Udit Narain Misr*(5), *Nrityamoni Dassi v. Lakhan Chandra Sen*(6). Under the second, *Huro Pershad Roy v. Gopal Das Dutt*(7), *Soni Ram v. Kanhaiya Lal*(8), and *Mani Singh v. Mandhata Nawab Bahadur of Murshidabad*(9). It was argued, not without some plausibility, that the first class of cases recognizes the doctrine that where a party, in whose favour a cause of action has arisen, cannot usefully pursue a remedy at the time, his right of action is postponed to a subsequent date. It was next argued that the second class of cases takes a too literal view of the provisions of the Act, and ignores the above principle of equity. This ingenious suggestion of a conflict between law and equity is not borne out by a close examination of the authorities.

In the cases coming under the second head, the Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. They have drawn attention to sections 9 and 14 of the Act and have held that exemptions not covered by these and the other sections should not be imported by Courts to relieve a party from the

(1) (1886) I.L.R., 23 Cal., 775 (P.C.).
(2) (1868) 12 M.I.A., 244. (3) (1882) I.L.R., 11 All., 47 (P.C.).
(4) (1904) I.L.R., 27 Mad., 143 (P.C.).
(5) (1909) I.L.R., 31 All., 68 (P.C.). (6) (1916) I.L.R., 43 Cal., 660 (P.C.).
(7) (1883) I.L.R., 9 Cal., 255, 259. (8) (1918) I.L.R., 35 All., 227 (P.C.).
(9) (1919) I.L.R., 46 Cal., 694 (P.C.).

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bar of limitation.* I do not think in the first class of cases this principle is overlooked. What has been done is to put a liberal (rather in the language of OLDFIELD, J., an accurate) construction on the somewhat loosely expressed words in column 3 of the first schedule. The sections have been more clearly worded than the third column of the first schedule. In a case decided by five Judges of this Court, to which I was a party, almost every one of us pointed this out with reference to article 134 of the Limitation Act. There are other instances of a similar kind. The Judicial Committee have, therefore, placed a liberal construction upon the words in the third column to the schedule. Let us take for example *Baijnath Sahai v. Ramgut Singh*(1) and the present case. In that case the party through no fault of his found himself in this unfortunate position: the only authority which could confirm the revenue sale was the commissioner; no appeal is allowed from his decision. But an appeal was taken to the Board of Revenue against his order, and that body admittedly set aside the order though it had no jurisdiction to do so. Both parties were not aware of this defect of jurisdiction. Both of them submitted to the interference by the Board of Revenue. At a subsequent stage, the Board of Revenue confessed that their order was *ultra vires* and passed proceedings to the effect that the confirmation by the commissioner was right. In these circumstances the Judicial Committee pointed out that the cause of action arose only when the Board of Revenue vacated their former order and ruled that the order of the commissioner was valid. This decision does not ignore either section 9 of the Limitation Act or import a theory of suspension not sanctioned by section 14. In the view of the Judicial Committee, the cause of action should not be regarded as having arisen on a date when no step could be taken to obtain delivery, owing to the interference by the Board with the order of confirmation. That is to say, they held that the third column of the schedule should be construed as if it said that the cause of action arose only when a remedy based on it was available. I shall now examine the case before us. The decision in *Baijnath Sahai v. Ramgut Singh*(1) would apply word for word to the facts of the present case. Here, there was a

(1) (1896) I.L.R., 23 Cal., 775 (P.C.).

confirmation of sale. But the Civil Procedure Code has provided the procedure for that confirmation being challenged; it was in fact challenged; and although one might think that the challenge came after the time allowed by law, it was allowed to be agitated; the Court upheld the challenge to some extent. The third column of article 180 ignores these considerations and insists upon a party, if it is literally interpreted, filing a petition for delivery which, owing to the pendency of the petition challenging the confirmation, could not be granted. If this case were before the Judicial Committee, I make bold to say that they would hold that the cause of action really arose only when there was a final decision on the challenge. Similar explanation can be given with regard to every one of the cases which are catalogued under the first head. None of them contravenes the provisions of the Limitation Act as embodied in sections 4 to 31. All of them may be said to go to some extent, behind the actual words of the third column and to import into the decisions considerations based on the intention of the legislature; but none of them introduces a principle which adds to or subtracts from the statutory exemptions. That is my view of the decisions of the Judicial Committee. Therefore in my opinion, the true rule deducible from these various decisions of the Judicial Committee is this: that subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law. I would answer the reference as above leaving each case to be dealt with in the light of these observations.

BURN, J.—I agree with the conclusions come to by the learned Officiating Chief Justice in the judgment just pronounced.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Abdur Rahim, Kt., Offg. Chief Justice, Mr. Justice
Oldfield and Mr. Justice Seshagiri Ayyar.*

BEEJU BEE *alias* ZULAIKA BEE (SECOND DEFENDANT),
APPELLANT,

v.

SYED MOORTHYIA SAHEB AND EIGHT OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 3 TO 9), RESPONDENTS.*

*Muhammadian Law—Dower—Widow in lawful possession of her husband's property
—Right of widow to retain possession against husband's heirs till dower is
satisfied—Necessity for consent of or agreement with her husband or his heirs
—Sale by widow for payment of dower—Validity of sale—Right of vendee
to retain possession until dower is satisfied.*

A Muhammadan widow, whose dower remains unpaid, is entitled to retain possession of the properties of her husband which she obtained lawfully without force or fraud but without the consent of, or any agreement with, the husband or his heirs as to the payment of her dower; nor can such properties be divided among the heirs until the dower debt has been satisfied.

Hamira Bibi v. Zubaida Bibi, (1916) I.L.R., 39 All., 581 (P.C.), discussed.

Though the sale by such widow to satisfy the dower debt is not binding on the other heirs of her husband, the vendee is entitled to retain possession of the property sold to him against the other heirs until the dower debt is satisfied.

SECOND APPEAL against the decree of T. S. TYAGARAJA AYYAR, the Subordinate Judge of North Arcot, in Appeal No. 156 of 1916, preferred against the decree of A. P. P. SALDANHA, the Principal District Munsif of Vellore, in Original Suit No. 902 of 1914.

This is a suit by a Muhammadan sharer for partition of the properties of one Saiyid Amin Sahib who died leaving a widow, two sons and four daughters. One of the sons died before suit, and the plaintiff, who was the other son, and was a minor at the time of his father's death, filed this suit about fourteen years after his father died.

* Second Appeal No. 1799 of 1917.

The first defendant, the widow, who was in possession of the properties of her husband, sold in 1906 one item of the properties in her possession to the second defendant under a sale-deed which recited that the sale was made for the "mahar debt due to me from my husband according to the Muhammadan Law, for discharging other debts and for my family expenses." The widow also sold another item out of the properties to third defendant. Third defendant filed a written statement in which he alleged that the property was sold to discharge the debts of the deceased husband and those incurred for the marriages of the sons and daughters and to support the minor. The plaintiff impeached these sales as invalid. The Court of first instance held that the sales by the first defendant to the second and third defendants were not binding on plaintiff and passed a decree for partition of the suit properties. The second defendant alone preferred an appeal. The lower Appellate Court confirmed the decision of the original Court. She then preferred this Second Appeal.

At the hearing before PHILLIPS and KUMARSWAMI SASTRI, JJ., their Lordships called for a finding on the following issue, namely "Whether mahar was due to the first defendant on the date of her husband's death, and if so, what was its amount?" The Subordinate Judge found that the dower or mahar was due to the first defendant on the date of her husband's death and that it was 39 tolas of pure gold.

On receipt of this finding, the case was argued before PHILLIPS and KUMARSWAMI SASTRI, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

This Second Appeal raises two important questions of Muhammadan Law as to which there is a conflict of decisions.

One Saiyid Amin Sahib died about nineteen years ago leaving a widow, two sons (one of whom died before suit) and four daughters. The plaintiff, who is the surviving son of the deceased, was a minor when his father died and he filed this suit about fourteen years after his father's death for partition. Meantime the widow, who was in possession of the properties, sold one item of immoveable property left by her husband to the second defendant by a sale-deed, exhibit I, dated the 10th April

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1906, and the vendee has been in possession ever since. The sale-deed recites that the property was in the possession of the vendor and was sold for the dower debt due to her from her husband according to Muhammadan Law, for discharging other debts and for family expenses.

There is no dispute as to the right of the plaintiff to the share claimed. The second defendant claimed exclusive right to the property conveyed by the widow on the ground that the sale was binding on the plaintiff and the other heirs, but on Second Appeal this position was given up. It is argued on his behalf that on partition (which in this case has to be by sale under the Partition Act owing to the fractional share plaintiff is entitled to) the second defendant as purchaser will not only be entitled to the share of his vendor or widow but also to the dower due to her. It is contended for the plaintiff that the dower has become barred, that the widow has no lien on the estate for her dower as she did not take possession under any agreement with the heirs, that she was to be in possession as security for or in lieu of her dower, and that in any event her right as widow in possession could not be assigned or passed to the purchaser.

We accept the finding of the Subordinate Judge that the sum of Rs. 700 and odd was due to the first defendant at the date of her husband's death and still remains unpaid. There is no evidence nor was it the first defendant's case that on her husband's death she was put in possession of the property (sold by her) under any agreement between herself and other heirs as to her dower. All that appears is that she was entitled to be paid her dower, that she was in possession from the date of her husband's death till she sold the house, and that the sale-deed purports to be *inter alia* for the purpose of her paying herself the dower.

It has been held that a widow who lawfully and with the consent express or implied of the other heirs of her husband obtains possession of the whole or any part of his estate, in satisfaction of or as security for her dower, is entitled to retain such possession till her dower is paid. It is unnecessary to refer to the earlier authorities after the decision of the Privy Council in *Hamira Bibi v. Zubaida Bibi*(1).

(1) (1916) I.L.R., 38 All., 581 (P.O.).

When however there is no such agreement there has been a conflict of authorities. In *Amani Begam v. Muhammad Karim-ullah*(1), BURKITT, J., after referring to the decision of the Privy Council in *Mussumat Beebee Bachun v. Sheikh Hamid Hossein*(2), held that a Muhammadan widow to whom dower is due and who is in lawful possession of her husband's property is entitled against the co-heirs of her husband to retain possession of the property until the dower debt has been paid, it being immaterial whether this possession was obtained originally with or without the consent of the co-heirs. A similar view was taken by MOOKERJEE and TEUNON, JJ., in *Sahebjan Bewa v. Ansaruddin* (3), where the learned Judges, after a careful review of the authorities, observed :—

"It cannot be disputed that under the Muhammadan Law when a widow is in possession of the undistributed property of her deceased husband, such possession having been obtained lawfully and without force or fraud and her dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband to retain such possession until her dower debt is paid; but she must account to them for the profit received."

They dissent from the decisions in *Bibi Tashliman v. Bibi Kasiman*(4) and *Amanat-un-nissa v. Bashir-un-nissa*(5), which lay down that an agreement with the widow or the heirs was necessary. A similar view was taken in *Mirza Mohammad Sharafat Bahadur v. Shazadi Wahida Sultan Begum*(6).

A contrary view was taken in *Amanat-un-nissa v. Bashir-un-nissa*(5), and *Muhammad Karim-ullah Khan v. Amani Begam*(7) where it was held that a widow has no lien if she was not put in possession under an arrangement that she was to be in possession till her dower was paid. This decision in the latter case was an appeal from the judgment of BURKITT, J., in *Amani Begam v. Muhammad Karimullah*(1), already referred to. In *Amanat-un-nissa v. Bashir-un-nissa* (5), the learned Judges (EDGE, C.J., and BANERJI, J.) observe.

"So far as we are aware neither a Muhammadan widow nor any other creditors can give themselves a lien by taking possession without

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(1) (1894) I.L.R., 16 All., 225.
(2) (1871) 14 M.I.A., 377. (3) (1911) I.L.R., 38 Cal., 476.
(4) (1910) 12 C.L.J., 584. (5) (1895) I.L.R., 17 All., 77.
(6) (1914) 19 C.W.N., 502. (7) (1895) I.L.R., 17 All., 93.

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the consent or the authority of the persons entitled, of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled."

The above view which puts a very limited construction on the words

"property of which she has lawfully and without force or fraud obtained possession" in the judgment of the Privy Council in *Mussumat Beebee Bachun v. Sheikh Hamid Hossein*(1) has been criticised at some length by Sir Roland Wilson in his digest of Anglo-Muhammadan Law at pages 233 to 235. In *Ali Bakhsh v. Allahdad Khan*(2), the learned Judges were not in favour of the limited interpretation of the word 'lawfully.' Their Lordships of the Privy Council in *Hamira Bibi v. Zubaida Bibi*(3), while dealing with the nature of the "widow's right to dower" observe,

"Her right however is no greater, than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower and this is the only creditor's lien of the Musalman law which has received recognition in the British Indian Courts and at this Board."

The case proceeded on the finding that there was an agreement whereby the widow was allowed to be in possession by the other heirs to satisfy her claim and their Lordships were not dealing with a case where she was in possession without any express consent or arrangement. None of the decisions of the Indian Courts as to the nature and extent of the widow's right in respect of dower was referred to and it is doubtful if their Lordships intended in the above passage to lay down that there was no lien unless the widow's possession was in pursuance of an

(1) (1871) 14 M.L.A., 377.

(2) (1910) I.L.R., 32 All., 551.

(3) (1916) I.L.R., 38 All., 581 (P.O.).

arrangement with the husband, or on his death, of the other heirs. BREJU BEE v. SYED MOORTHYA SAHEB.

The next question is, as to the right of an alienee of the property from the widow to claim payment of dower due to her in cases when a widow in possession of her husband's property sells or mortgages it.

In *Muzaffar Ali Khan v. Parbati*(1), it was held, following *Hadi Ali v. Akbar Ali*(2) and *Ali Muhammad Khan v. Azizullah Khan*(3), that a Muhammadan widow in possession of immovable property of her deceased husband in lieu of her dower has no transferable interest in the property, her interest being nothing more than an interest in property restricted in its enjoyment to the owner personally, the transfer of which is prohibited by section 6, clause (d) of the Transfer of Property Act. In *Ali Bakhsh v. Allahdad Khan*(4) the right was however held to be heritable, entitling her heirs to remain in possession till the dower was paid. Referring to *Ali Muhammad Khan v. Azizullah Khan*(3) the learned Judges accepted the ruling as correct when the property is transferred and not merely the right to dower. In *Majidmian Banumian v. Bibisaheb Jan*(5) it was held that the widow entitled to dower and in possession with the consent of the heirs had a heritable right. If the right is not purely personal and can pass to her heirs, there seems to be no reason why an alienee of the property should not, on the sale being set aside at the instance of one of the heirs as being beyond her competence, stand in the widow's shoes at least to the extent of her claim for dower.

We have not been referred to any decision of the Madras High Court having any bearing on the questions above referred to. As the points raised are of considerable importance we refer the following questions to a Full Bench:—

(1) Is a Muhammadan widow entitled to be paid her dower who lawfully enters into or continues to be in possession of her husband's property after his death, but without any agreement with the other heirs as to her dower, entitled to be paid her dower before the property of which she is in possession is divided between her husband's heirs?

(1) (1907) I.L.R., 29 All., 640.

(2) (1898) I.L.R., 20 All., 262.

(3) (1883) I.L.R., 6 All., 50.

(4) (1910) I.L.R., 32 All., 551.

(5) (1916) I.L.R., 40 Bom., 84.

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(2) Has a vendee from her of such property the same right as the widow in respect of the dower due to her in cases where the widow has alienated the properties and the alienation is impeached by other heirs?

ON THIS REFERENCE

T. R. Venkatarama Sastri (with him *M. S. Vythinatha Ayyar*) for the appellant.—The widow of a deceased Muhammadan is entitled to retain possession of her husband's property if she came into possession lawfully without fraud or force; no agreement with her late husband or his heirs after his death is necessary. There is no conflict of rulings in this High Court. There is a slight difference of opinion in the Allahabad and Calcutta High Courts. The latest decision of the Privy Council in *Hamira Bibi v. Zubaida Bibi*(1) gives room for some little doubt. The case itself relates only to interest payable on dower. The passage in the judgment of their Lordships should be understood with reference to the facts stated at page 586. Some texts are referred to in Hamilton's *Hidaya* on this question. Under the Muhammadan Law the creditor is entitled to take possession of the property of his debtor, discharge his own debt and the remainder alone is to be divided among the heirs. Under the Muhammadan Law, according to the texts, a creditor can proceed against the goods of a Muhammadan debtor, who on his sick bed cannot dispose of more than one-third of his properties, the reason given being that the creditor has a right to the goods of his debtor for the discharge of his debts. See *Hidaya* under 'Acknowledgments' at pages 161 and 162. The Courts in British India would not enforce this right as regards ordinary creditors; but as to a widow's dower, it is part of the family law which should be enforced by such Courts. At pages 509 and 510 (*ib.*), (*Slaves*) it appears that until debts are discharged heirs do not become proprietors of the deceased's estate. Hence before debts have been discharged, no suit for partition can be brought by any sharer, but only a suit for the administration of the estate. See *Syed Imdad Hossein v. Musumat Hosseinee Baksh*(2), *Mussumat Meerun v. Mussumat Nageebun*(3). In *Hamira Bibi v. Zubaida*

(1) (1916) 38 All., 581 (P.C.).

(2) (1867) 2 N.W.P.H.C.R., 327.

(3) (1867) 2 N.W.P.H.C.R., 335.

Bibi(1) also, a suit for partition was originally brought and dismissed and then a suit for administration was brought. The cases of *Ameer-oon Nissa v. Moorad-oon Nissa*(2), *Mussumat Beebee Bachun v. Sheikh Hamid Hossein*(3) are cases of administrative suits by heirs. There are a series of decisions to the same effect from *Ahmed Hossein v. Mussumat Khodeja*(4) upwards.

'Lawfully' means peacefully getting into possession without force or fraud. 'Lawfully' must mean something different from possession under agreement, express or implied, e.g., by an order of Court as in *Mussumat Bebee Bashun v. Sheikh Hamid Hossein*(3). In *Ameer-oon Nissa v. Moorad-oon Nissa*(2), there was no consent by husband or his heirs; this was a dispute by the heirs as to the widow's right as a lawful wife of the deceased owner Ahmed Hossein. It shows the distinction between the Shiah and Sunni law. The former gives a right of sale to the widow for her dower, the latter gives only a right of possession or lien till dower is paid or satisfied. For a lien or possessory right, no consent is necessary, but if a widow wants to take the property in lieu of her dower there must be consent of the co-heirs. See *Mussamat Janee Khanum v. Mussamat Amatool Khanum*(5), *Woomatool Fatima Begum v. Meerannissa Khanum*(6), *Umatul Mehdi v. Kulsum*(7), *Sahebjan Bewa v. Ansaruddin*(8). This last case refers to *Amanat-un-nissa v. Bashir-un-nissa*(9) and *Bibi Tashliman v. Bibi Kasiman*(10) with disapproval. See also *Hamira Bibi v. Zubaida Bibi*(11); in the argument before the Privy Council *Sahebjan Bewa v. Ansaruddin*(12) has been referred to, as also *Woomatool Fatima Begum v. Meerunnissa Khanum*(6). See Roland Wilson's *Muhammadan Law* (fourth edition), pages 232 to 237, *Ali Bakhsh v. Allahdad Khan*(13), *Ramzan Ali Khan v. Asghari Begam*(14), *Amani Begam v. Muhammad Karim-ullah*(15), *Mirza Mohammad*

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(1) (1916) 38 All., 581 (P.C.).

(2) (1855) 6 M.I.A., 211.

(3) (1871) 14 M.I.A., 377.

(4) (1868) 10 W.R., 369.

(5) (1867) 8 W.R., 51.

(6) (1868) 9 W.R., 318.

(7) (1908) I.L.R., 35 Cal., 120.

(8) (1911) 38 Cal., 475, at p. 477.

(9) (1895) 17 All., 77.

(10) (1910) 12 O.L.J., 584.

(11) (1916) I.L.R., 38 All., 581 (P.C.).

(12) (1911) I.L.R., 38 Cal., 475 at p. 481.

(13) (1910) I.L.R., 32 All., 551.

(14) (1910) I.L.R., 32 All., 563.

(15) (1894) I.L.R., 16 All., 226.

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Sharafut Bahadur v. Shazadi Wahida Sultan Begum(1). Any possession which will not be taken away from the widow under section 9, Specific Relief Act, will be good enough for this purpose. The earlier Privy Council decisions of *Ameer-oon-Nissa v. Moorad-oon-Nissa*(2) and *Mussumat Beebe Bachun v. Sheikh Hamid Hossein*(3) are cases of possession not obtained with consent but against the wishes of the co-heirs, under compulsory orders of Courts. See also Ameer Ali's Muhammadan Law, Vol. II, Ch. XI, page 490 (third edition), MacNaughten's Precedents of Muhammadan Law, page 275.

On the second point, Sir Boland Wilson holds that the widow's right to possession is both heritable and transferable. See *Ali Bakhsh v. Allahdad Khan*(4), *Tahir-un-nissa Bibi v. Nawab Hasan*(5), *Basir Ali v. Hafiz Nazir Ali*(6), *Majidmian Banumian v. Bibisaheb Jan*(7), *Banoo Begum v. Mir Aun Ali*(8), *Nawab Mahomed Ameenodeen Khan v. Moozuffur Hossein Khan*(9), *Mussumat Kummuroolnissa Begum v. Muhomed Hussan*(10). A widow's lien is no worse than the possessory right of a trespasser, which has been held to be heritable and transferable. See *Asher v. Whitlock*(11); *Narayana Row v. Dharmachar*(12) and *Mustappa Saheb v. Antha Pillai*(13). The right of the widow in respect of dower under the Muhammadan Law is not a mere lien but a possessory right. It is not a mere possessory lien incapable of being transferred. The Privy Council has held as to possession in the case of dower that the widow in such possession can receive the profits towards the dower, which is more than a mere right to custody. The term 'lien' is not strictly applicable to the right in question. When the widow takes possession it becomes a usufructuary mortgage. It is a right of property and not a personal right. See *United States Steel Products Company v. Great Western Railway Company*(14), *Azizullah Khan v. Ahmad Ali Khan*(15). If the right to dower

(1) (1914) 19 C.W.N., 502.

(3) (1871) 14 M.I.A., 377.

(5) (1914) I.L.R., 36 All., 553.

(6) (1908) 13 C.W.N., 153.

(8) (1907) 9 Bom. L.R., 188.

(10) (1886) 1 Agra, 287.

(12) (1908) I.L.R., 26 Mad., 514.

(14) [1916] A.C., 189.

(2) (1855) 6 M.I.A., 211.

(4) (1910) I.L.R., 32 All., 551.

(7) (1916) I.L.R., 40 Bom., 34.

(9) (1870) 5 B.L.R., 570 (P.C.).

(11) (1865) L.R., 1 Q.B. 1.

(13) (1900) I.L.R., 23 Mad., 179.

(15) (1885) I.L.R., 7 All., 353.

is transferable, the right to possession, after it is obtained by the widow, should likewise be transferable.

T. Narasimha Ayyangar for respondent.—As to the nature of a widow's right to dower, the decision of the Privy Council in *Hamira Bibi v. Zubaida Bibi*(1) states the whole of the present law on the subject. It is a self-contained and exhaustive statement of the law. It defines the real scope and nature of the right. The lien cannot exist unless there is express or implied consent of the husband or his heirs. The widow ranks only along with other unsecured creditors. On the death of the owner, the property is vested in the heirs. If all of them consent, the widow will have a lien.

[ABDUE RAHIM, OFFG. C.J.—If the heirs consent, it is a contract and not a lien arising under the Muhammadan Law.]

The decision of the Privy Council is a considered dictum of the Privy Council on a point in which there is a conflict of rulings in the several High Courts.

[SESHAGIRI AYYAR, J.—The decisions in *Arumugham Chetty v. Muthu Koundan*(2), *Peda Venkanna v. Sreenivasa Deekshatulu*(3), *Abi Dhunimsa Bibi v. Muhammad Fathi Uddin*(4), show that *obiter dicta* are not binding as authorities.]

In *Ameer-oon-Nissa v. Moorad-oon-Nissa*(5) and *Mussumat Beebe Bachun v. Sheikh Hamid Hossein*(6) there was implied consent; in the latter case, the Privy Council themselves point out that there was no objection by the heirs' acquiescence by them.

Reference was made to :—

Amanat-un-nissa v. Bashir-un-nissa(7), *Mussumat Ameerun v. Mussumat Raheemun*(8).

On the second point, the following cases were relied on: *Ali Muhammad Khan v. Azizullah Khan*(9), *Hadi Ali v. Akbar Ali*(10), *Muzaffar Ali Khan v. Parbati*(11).

(1) (1916) I.L.R., 38 All., 581 (P.C.).

(2) (1919) 37 M.L.J., 166.

(4) (1918) I.L.R., 41 Mad., 1026.

(6) (1871) 14 M.I.A., 377.

(8) (1867) 2 Agra H.C.R. 362.

(10) (1898) I.L.R., 20 All., 262.

(3) (1913) I.L.R., 41 Mad., 136.

(5) (1855) 6 M.I.A., 211.

(7) (1894) I.L.R., 17 All., 77.

(9) (1883) I.L.R., 6 All., 50.

(11) (1898) I.L.R., 29 All., 640.

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ABDUR RAHIM, OFFG. C.J.—The first question asked by this reference is whether a Muhammadan widow, who is lawfully in possession of her husband's property after his death but not by virtue of any agreement with his other heirs, is entitled to retain such possession until the dower due to her has been paid or satisfied, before the property in her possession is divided among the heirs.

In the Allahabad and Calcutta High Courts there have been a long series of decisions, some of them conflicting with the others, on the subject of a Muhammadan widow's lien for dower, but in this Court the question is practically bare of authority. There are also four decisions of the Privy Council in this connexion, the latest being in the case of *Hamira Bibi v. Zubaida Bibi*(1). Our main task is to ascertain whether in the course of their judgment in the last case the Judicial Committee wanted to confirm the view of the law expounded by the Chief Justice, Sir JOHN EDGE, of the Allahabad High Court in *Amanat-un-nissa v. Bashir-un-nissa*(2), restricting the lien of the widow to cases where she had entered upon possession in order to satisfy her dower debt under an agreement with her husband or her husband's other heirs, or the view of the law expounded in *Amani Begam v. Muhammad Karim-ullah*(3), *Ramzan Ali Khan v. Asghari Begam*(4), *Sahebjan Bewa v. Ansaruddin*(5); where it was held that the lien of a widow in possession does not depend upon any such agreement but upon the fact of her being in possession of her husband's property for the satisfaction of her dower provided she obtained possession of the property in question lawfully and without force or fraud.

There is no difficulty as to the interpretation of what their Lordships of the Privy Council actually say in *Hamira Bibi v. Zubaida Bibi*(6). The passage runs thus:—

“Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with

other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board.”

In that case, however, the only question for determination before the Judicial Committee was whether the widow in possession was entitled to any interest or compensation in respect of her unpaid dower and the arguments on either side were concentrated on that point. So far as it appears, the widow's right to remain in possession until her dower was satisfied was not disputed, at any rate before the Privy Council, and the fact in that case was that she had been allowed by the other heirs to take or remain in possession of the whole estate to satisfy her claim for dower. *Ameer-oon-Nissa v. Moorad-oon-Nissa*(1), *Mussamat Beebee Bachun v. Sheikh Hamid Hossein*(2), *Sahebjan Bewa v. Ansaruddin*(3) and *Ramzan Ali Khan v. Asghari Begam*(4), were all cited, in connexion with the point under consideration of the Judicial Committee, as to the widow's right to interest or compensation in respect of her unpaid dower, and it seems to be clear from the report that their Lordships' attention was nowhere directed to any question relating to the circumstances under which the widow's right to remain in possession for satisfaction of the dower debt arose. Nor is there anything to show that they wanted to settle the controversy raised in India with respect to this question by the decision in *Amanat-un-nissa v. Bashir-un-nissa*(5). As I shall presently point out, there is a clear preponderance of decisions in India opposed to the view enunciated in this Allahabad case, but which finds prima facie support from the passage in the judgment of the Privy Council above cited, if we were to take it literally and without reference to the question which the Board

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(3) (1894) I.L.R., 16 All., 225. (4) (1910) I.L.R., 32 All., 563

(5) I.L.R., 38 Calc., 475.

(6) (1916) I.L.R., 38 All., 581 at p. 588.

(1) (1855) 6 M.I.A., 211.

(2) (1871) 14, M.I.A., 377.

(3) (1911) I.L.R., 38 Calc., 475.

(4) (1910) I.L.R., 32 All., 563.

(5) (1895) I.L.R., 17 All., 77.

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was actually called upon to decide. In the absence of anything in that judgment to indicate that their Lordships intended to determine the question whether a Muhammadan widow who obtained possession of her husband's estate lawfully and without force or fraud in lieu of her dower is not entitled to retain her possession until her claim is satisfied, unless she had obtained such possession with the consent of her husband or of his other heirs, we shall not be justified in fastening upon the literal language of their observations, if we found that the view was opposed to Muhammadan Law as expounded in the British Indian Courts in a chain of decisions ranging over half a century with one or two solitary exceptions, at least since the case of *Ameer-oon-nissa v. Moorad-oon-nissa*(1) which was decided by the Privy Council in 1855. In that case it was found that the husband did not charge the estate by the deed of dower; it was, nevertheless, held that the widow had a lien on her deceased husband's estate as being hypothecated for her dower and could either retain the property for the amount of her dower or alienate part of the estate in satisfaction of the claim. The parties in that case were Shiabs and, so far as the widow's right to alienate part of the estate in satisfaction of her claim to dower is concerned, the Shiah law differs to some extent from the Sunni law. But the case is of importance in so far as it appears that the heirs of the husband could not have consented to the widow obtaining possession or remaining in possession, as they denied her status altogether. Yet it was held that she was entitled to remain in possession of her husband's property for the satisfaction of her dower.

In *Mussamut Jance Khanum v. Mussamut Amatool Fatima Khanum*(2), which was a Sunni case, it was held that a widow in possession of her husband's property under a claim of dower, had a lien as against his other heirs; as regards money belonging to the estate of her husband she might appropriate it to her claim for dower and as regards other property she was entitled to a lien as security for the dower debt. In that case the widow had been deprived of her possession by a decree of Court in a suit by the heirs. It was, nevertheless, held that she still retained her lien. The next is a decision of Sir BARNES PEACOCK, C.J., and JACKSON and MACPHERSON, JJ., in

(1) (1855) 6 M.I.A., 211.

(2) (1867) 8 W.R., 51.

Woomatool Fatima Begum v. Meerunnissa Khanum(1), which is relied on by the Privy Council in *Hamira Bibi v. Zubaida Bibi*(2) in support of the proposition that the widow in possession is entitled to a reasonable interest on the dower debt or compensation if she is to render an account of the rents and profits. There it was laid down, after a consideration of the authorities on Muhammadan Law including the Serjyyah and Macnaghten's Precedents of Marriage, etc., Case XXIV and Macnaghten's Precedents of Debts and Securities, Case X, that the widow of a Mussalman in possession of her husband's estate, under a claim of dower, has a lien upon it, as against those entitled as heirs and is entitled to possession of it as against them until her claim for dower is satisfied. This right is not founded on any agreement with her co-heirs, or their consent, or the consent of her husband obtained in his life-time. This is made specially clear from Macnaghten's case XXIV cited in the judgment. The learned Judges also cite a number of decisions including the judgment of the Privy Council in *Ameer-oon-nissa v. Moorad-oon-nissa*(3), above referred to. They were quite conscious of the fact that that was a case between Shiabs, for they go on to point out that

"according to the Shiah doctrine, the creditor has power to sell landed property to an amount sufficient to satisfy the dower without recourse to the public authorities;"

but,

"according to the Sunni doctrine, the creditor has simply a lien on any land of the debtor, and cannot take them over so as to acquire an absolute title in satisfaction of the dower, without the consent of the heirs, or a decree of Court."

This statement of the law clearly negatives the proposition that the consent of the heirs is necessary to create a widow's lien for dower.

In *Ahmed Hossein v. Mussamut Khodeja*(4), Sir BARNES PEACOCK, C.J., held, again sitting with DWARKANATH MITTER, J., that the widow was entitled to a lien for whatever dower remained due to her and that the heirs could not recover the property so long as any portion of the dower remained unsatisfied.

(1) (1868) 9 W.R., 318.
(3) (1855) 6 M.I.A., 211 at 222.

(2) (1916) I.L.R., 38 All., 581 (P.C.).
(4) (1868) 10 W.R., 269.

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So far as one can gather he did not rest the widow's right on the fact of her being in possession. In any case that judgment does not in the least suggest that the widow, in order to acquire a valid lien, must have entered into possession with the consent of her husband's heirs. The same deduction is to be made from an earlier judgment of Sir BARNES PEACOCK reported on the margin of the above case, viz., *Syud Atahur Ali v. Altaf Fatima*(1). The case of *Mussamut Amanee v. Meer Meher Ally*(2) also recognized the Muhammadan widow's lien for dower over the property of which she was in possession in the sense, that the lien must be satisfied like that of any other creditor before the estate is distributed among the heirs, not that she was entitled to any preference over the other creditors.

In the Allahabad High Court the question was fully considered in *Syed Imdad Hossein v. Musumat Hosseinee Buksh*(3), printed as an appendix to *Balund Khan v. Musumat Janee*(4), and the learned Judges then followed the ruling of Sir BARNES PEACOCK in *Ahmed Hossein v. Mussamut Khodeja*(5) and also on an earlier decision of the Allahabad High Court.

The Judicial Committee considered this question in a case arising among Sunnis in *Mussumat Beebee Bachun v. Sheikh Hamid Hossein*(6). There, no agreement by the husband to pledge the property for dower was proved and the widow was put in possession of the husband's estate after his death by the Collector, in spite of the opposition of the other heirs. Their lordships did not find it necessary to state whether this right of the widow's lien for dower was a lien strictly so called, although it was so stated in the judgment of Sir BARNES PEACOCK above referred to, but they say that whatever the right may be called it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received. They did not say that it was necessary for the widow's right to arise that she should have obtained possession of the property with

(1) (1869) 10 W.R., 3691. Note.

(3) (1870) 2 N.W.P.H.C.R., 327.

(5) (1868) 10 W.R., 369.

(2) (1869) 11 W.R., 212.

(4) (1870) 2 N.W.P.H.C.R., 319.

(6) (1871) 14 M.I.A., 377.

the consent of or under an agreement with her deceased husband or his heirs; if that were a necessary condition her claim would not have been sustained upon the facts though the co-heirs did not for a long time after she obtained possession take any steps to dispossess her. It is also significant that they relied on their previous ruling in *Ameeroon Nissa v. Mooradoon Nissa*(1) in support of the law as they enunciated it.

Then reverting to the Allahabad High Court, in *Ali Muhammad Khan v. Azizullah Khan*(2), this lien was recognized although the learned Judges were of opinion that it was a personal right and did not pass to the purchaser of the estate from the widow. In *Azizullah Khan v. Ahmad Ali Khan*(3), MAHMOOD, J., held that a Muhammadan widow lawfully in possession of her husband's estate occupied a position analogous to that of a mortgagee, whose possession could not be disturbed until the dower debt had been satisfied and that on the widow's death if the dower remained unsatisfied her heirs were entitled to succeed her in the possession of the property. Mr. Justice MAHMOOD required as a condition of validity of the widow's right that she should be lawfully in possession, following in this connexion the rulings of the Privy Council and the Allahabad High Court and not that she should have obtained possession with the consent of her husband's heirs. This was in 1885. In *Amani Begam v. Muhammad Karim-ullah*(4), the law was enunciated to the same effect in a carefully considered judgment upon a review of the more important rulings.

The first clear note of dissent, so far as I can see, was expressed in *Amanat-un-nissa v. Bashir-un-nissa*(5), referred to above. EDGE, C.J., says:—

"So far as we are aware neither a Muhammadan widow, nor any other creditors can give themselves a lien by taking possession, without the consent or the authority of the persons entitled, of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to

(1) (1855) 6 M.I.A., 211.

(2) (1883) I.L.R., 6 All., 50.

(4) (1894) I.L.R., 16 All., 225.

(3) (1885) I.L.R., 7 All., 353.

(5) (1894) I.L.R., 17 All., 77.

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(4) (1870) 2 N.W.P.H.C.R., 819.

(6) (1871) 14 M.I.A., 377.

the consent of or under an agreement with her deceased husband or his heirs; if that were a necessary condition her claim would not have been sustained upon the facts though the co-heirs did not for a long time after she obtained possession take any steps to dispossess her. It is also significant that they relied on their previous ruling in *Ameeroon Nissa v. Mooradoon Nissa*(1) in support of the law as they enunciated it.

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(1) (1855) 8 M.I.A., 211.

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obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien."

In no other case could the widow's possession be said to have been lawfully obtained within the meaning of the judgment of the Privy Council in *Mussamat Beebee Bachun v. Sheikh Hamid Hossein*(1).

The learned Judges say that their conclusion is supported by the case of *Mussumat Wahidun-Nissa v. Mussumat Shubrat-tun*(2) [which was approved by their Lordships in *Syud Bazayet Hossein v. Dooli Chund*(3)], and also by the decisions of the Allahabad High Court in *Mussumat Meerun v. Mussumat Nageebun*(4) and *Ali Muhammad Khan v. Azizullah Khan*(5) and of the Calcutta High Court in *Bibi Mehrun v. Mussumat Kubeerun*(6). Of these cases, the decision in the last mentioned case to some extent bears out the learned Judges. What was actually decided in that case, however, was that according to Muhammadan law a simple contract for a money payment in lieu of dower did not necessarily give the wife a lien over her husband's property. But it is observed that

"if on the death of her husband the heirs allow her to get possession of any of his property, and to hold it in lieu of payment of what may be due to her under the contract, she will have a lien on that as against the heirs".

It does not appear that the case of a widow lawfully in possession of her husband's property without the consent of the heirs was specifically before them. The authority they refer to—the decision in *Mussamat Amanee v. Meer Meher Ally*(7),—only held that a widow having a lien was not entitled to any special charge on the estate or preference of any sort as against the other creditors and the learned Judges do not profess to lay down the conditions under which the widow's lien arises under the Muhammadan law. In *Mussumat Wahidun Nissa v. Mussumat Shubrat-tun*(2) the only point which was decided was

(1) (1871) 14 M.I.A., 377 at p. 384. (2) (1870) 6 B.L.R., 54.
(3) (1878) L.R., 5 I.A., 211. (4) (1867) 2 N.W.P. H.C.R., 335.
(5) (1883) I.L.R., 6 All., 50. (6) (1870) 13 W.R., 49.
(7) (1869) 11 W.R., 212.

that a Muhammadan widow had no lien on any specific property of her deceased husband so as to enable her to follow that property, as in the case of a mortgage, into the hands of a bona fide purchaser for value from one of the heirs of the husband. Sir CHARLES HOBHOUSE, J., who examined the previous decisions at some length stated their effect, in cases where the widow was in possession, in these words:

"They are, I think all of them cases in which dower being admitted to be due, the widow was or had been in possession of the whole estate, and in which the heirs sought to oust the widow without having previously paid the amount of the dower debt. Now it seems to me that in such a case under the Muhammadan Law, had it not been the case of a widow especially, but that of any other creditor, such creditor, equally with the widow, would have been entitled to hold over the estate of which he was in possession until his debt had been paid off".

Further on, no doubt he gives us his own opinion, founded on Macnaghten's statement of the Muhammadan Law as to Mortgages and Pawns, that the seizure of the property must be given by the owner and that the consent of the husband, or his heirs after his death, was necessary for the validity of a lien for dower where the widow is in possession. LOCHE, J., treating the question entirely from the Muhammadan point of view observes:—

"It may be here remarked that the decisions of this Court appear almost invariably to have treated the widow in possession of her husband's property in the light of a mortgagee or pawnee so far as her dower is concerned, and have held that she could not be deprived of possession till her claim for dower is satisfied."

He does not say that such possession must have been obtained with the consent of her husband or his heirs. In *Syud Bazayet Hossein v. Dooli Chund*(1) Sir BARNES PEACOCK delivering the judgment of the Judicial Committee approved of the ruling in *Mussamat Wahid-un-nissa v. Mussumat Shubrat-tun*(2) on the question for decision before them in these words:—

"Their Lordships entirely concur in the view of the law which was laid down in the case cited from the 6th Bengal Law Reports, and the other authorities cited, and are of opinion that a creditor of a deceased Muhammadan cannot follow his estate into

(1) (1878) L.R., 5 I.A., 211.

(2) (1870) 6 B.L.R., 54.

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the hands of a bona fide purchaser for value to whom it has been alienated by his heir-at-law".

One cannot presume that he wanted to endorse any statement that where a widow was lawfully in possession of her husband's estate she would not acquire a valid lien unless she had obtained such possession with the consent of her husband or his heirs, for, as I have shown, he was himself a party to more than one ruling in which, as Chief Justice of the Calcutta High Court, he had upheld the lien of a Muhammadan widow in possession without requiring that such possession should have been obtained with the consent of her husband or his heirs. The case of *Mussamut Meerun v. Mussumat Najeebun*(1) does contain a dictum which bears out the view expounded in *Amant-un-nissa v. Bashir-un-nissa*(2) but I do not find that either the previous decisions or the authorities on Muhammadan Law are discussed there and Case No. XXXVII of Macnaghten's Precedents of Marriage, etc., referred to in the judgment, only lays down that a widow cannot take possession of her husband's landed property on her own authority, by virtue of her claim for dower, without a judicial order.

The view of the law stated in *Amat-un-nissa v. Bashir-un-nissa*(2) was considered in that Court in *Ali Baksh v. Allahdad Khan*(3) and distinctly disapproved; so also the Calcutta decision in *Sahebjan Bewa v. Ansaruddin*(4) dissented from that ruling holding that it was sufficient if the widow entered into possession lawfully and without force or fraud and that it was not necessary that she should have done so under an agreement with her husband or his heirs; see also *Umatul Mehdi v. Kulsum*(5).

The only Arabic treatise on Muhammadan Law to which my attention is drawn as containing a direct dictum on the question is *Khazanat-ul-riwayah*, Chapter on dower; the passage is to this effect:—

"The woman is entitled to take the amount of her dower from the estate of her deceased husband without the consent of his heirs, if the estate consists of dirhams and dinars" (i.e., current

(1) (1867) 2 N.W.P.H.C.R. (Agra), 335. (2) (1894) I.L.R., 17 All., 77.
(3) (1910) I.L.R., 32 All., 551. (4) (1911) I.L.R., 38 Calc., 475.
(5) (1908) 35 Calc., 120.

coins); "but if it consists of property which needs be sold, so much will be sold as is necessary and her dower will be paid thereout, whether that property has been bequeathed by her husband or not, and she will take it," (i.e., her dower,) "without the consent of the heirs".

I am not aware that this book has been printed, but it seems to be in vogue in British India as it is relied on in *Majmuoo Futuawa of Muhammad Abdul Hye of Lucknow* on this very point; see page 86, 1882, Lucknow Edition. I would not have felt justified in basing my opinion solely on this treatise, but I cite the quotation to show that it is in support of the view taken by the Courts in the majority of the cases referred to and also in accord with the principles of Muhammadan Law on the subject.

All the authorities suggest that the Muhammadan widow's lien for dower on property of which she is in possession arises not by virtue of any agreement with her husband or his heirs but by the provisions of Muhammadan Law relating to the administration of a deceased person's estate. That is why it stands on the same footing as any other creditor's lien. If a widow or any other creditor of a deceased Muhammadan acquired the rights of a pledgee or pawnee by reason of being placed in possession of the deceased person's property by the consent of his heirs then she or he would have a preferential right relatively to the rights of other creditors of the deceased. If it is not as a pledgee, properly so-called, that a widow having a claim for dower has a lien over property in her possession then there can be no necessity under the Muhammadan law that she should have obtained possession with the consent of the heirs. What is called a widow's lien in this connexion is founded on the rule of Muhammadan law as to the administration of a deceased person's estate, viz., that a creditor who has obtained possession of the property of the deceased debtor should be allowed to continue in possession until the debt is satisfied. Supposing the estate is insolvent he is not entitled to ask that his debt should be paid in full before the estate is distributed *pro rata* among the other creditors. The right of a widow or of any other creditor similarly situated is no more than this, that the heirs are not entitled to recover the property in their possession until the debt is satisfied, because under the Muhammadan Law the

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distribution of the estate is postponed till after payment of all debts owing by the deceased including the dower due to his wife. This principle is laid down in every authoritative text book of Muhammadan Law. In the Serjyah it is stated

"There belong of the property of a person deceased, four successive duties to be performed by the Magistrate: First, funeral ceremony and burial, etc.; next, the discharge of his just debts from the whole of his remaining effects; then, the payment of his legacies out of a third of what remains after his debts are paid; and, lastly, the distribution of the residue amongst his successors, etc."

See also Macnaghten's Principles of Muhammadan Law, Chapter 1, section 1, paragraph 5. It is upon that principle that Case No. X in Macnaghten's Precedents of Debts and Securities is based. There, the question is put:

"A man dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower in preference to the other heirs?"

"Answer: If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a *prior claim, on account of her dower*, on the property left by her husband, whether real or personal. The residue, after her claim is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance."

And in Macnaghten's Precedents of Marriage, etc., Case No. XXIV, it is said that

"there is distinction between money and other property in cases of dower, viz, that the widow is at liberty to take the former description of property over which she has absolute power: but, as to the other property, she is entitled to a lien on it as security for the debt, and it does not become her property absolutely without the consent of the heirs or a judicial decree. Where the debt is large and the property is small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate."

[See *Woomatool Fatima Begum v. Meerun-nissa Khanum*(1).]
The ruling of the Judicial Committee in *Mussumat Beebee*

(1) (1868) 9 W.R., 320.

Bachun v. Sheikh Hamid Hossein(1), however, requires, following a number of rulings of the Indian Courts on this point, that the widow's possession will be only recognized if she obtained it lawfully and without force or fraud. If one may say so, I can quite understand such a limitation, for it is against the policy of the law that possession obtained unlawfully or by use of force or fraud should be recognized by the Courts, although the limitation is not laid down in so many words in the texts on Muhammadan law. But to go further and to say that the possession must be taken with the consent of the heirs would be entirely to ignore the principle on which the right of the widow in possession is based. She is also one of the heirs under the Muhammadan law in addition to her being a creditor to the extent of the dower which remains unpaid. If she peaceably enters into possession such possession would undoubtedly be lawful by virtue of her possession as an heir, if not also as a creditor. Suppose, on the other hand, she entered into possession under a false claim or gift or purchase, that possession might not justify her in claiming a lien for her unpaid dower any more than if she had obtained possession by force.

My answer, therefore, to the first question will be that a Muhammadan widow who is lawfully, and without force or fraud, in possession of her husband's property is entitled to retain possession of such property as against his other heirs until her dower is satisfied even though such possession was not obtained with the consent (express or implied) of or under an agreement with, her husband or his other heirs, and that such property would not be divided among the heirs until the dower debt is satisfied.

In order that the second question, whether a vendee from a Muhammadan widow of the property of which she is in possession in lieu of dower has the same power as she had in respect of the dower due to her, may be answered, we have to consider whether the right of the widow in possession of her husband's property in lieu of her dower to retain such possession until her dower is satisfied is transferable at all or whether it is a purely personal right. There is no express text of Muhammadan law so far as one can see dealing with the point. Macnaghten in the passage already cited speaks of such a right

(1) (1871) 14 M.I.A., 377.

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as a security for payment of the dower debt. The rulings of the Courts are almost equally divided. In *Azizullah Khan v. Ahmad Ali Khan*(1) MAHMOOD, J., describes the position of the widow as analagous to that of a mortgagee, while in *Ali Muhammad Khan v. Azizullah Khan*(2) it was treated as a personal right and did not pass to a purchaser of the estate from the widow. In the more recent rulings in that Court, Chief Justice EDGE in *Hadi Ali v. Akbar Ali*(3) calls it a purely personal right which did not survive to her heirs; it is also so described in *Muzaffar Ali Khan v. Parbati*(4), where they say that such a right is not transferable and is nothing more than an interest in property restricted in its enjoyment to the owner personally. In *Wahid Ali Khan v. Tori Ram*(5), it was held to be a heritable right and one capable of being transferred. The same appears to be the view taken in *Tahir-un-nissa Bibi v. Nawab Hasan*(6). In *Ghulam Ali v. Sagir-ul-nissa Bibi*(7), it was ruled that the widow's right, though analagous to that of a mortgagee, was not in all respects that of a usufructuary mortgagee so as to preclude her from suing for her dower. In Bombay the view that prevailed is that it is not a mere personal right; it is a substantive right which is heritable and transferable; see *Majidmian Banumian v. Bibisahab Jan*(8). In this Court, the only question that arose in this connexion at all was, whether the widow's lien for dower would give her any right as against a purchaser in execution of a decree for sale passed on a mortgage executed by the husband, and it was answered in the negative, the learned Judges holding that the lien did not stand on the same footing as that arising from a mortgage. [See *Ameer Ammal v. Sankaranarayanan Chetty*(9).] In *Nawab Mahomed Ameenodeen Khan v. Moosuffur Hossein Khan*(10), which was a case from Calcutta, their Lordships of the Privy Council upheld the decree of the High Court which was to the effect that the heirs of the widow in possession who had succeeded her on her death could not be ousted from possession unless the dower was paid. It must be noted

(1) (1885) I.L.R., 7 All., 353.

(3) (1898) I.L.R., 20 All., 262.

(5) (1913) I.L.R., 35 All., 551.

(7) (1901) I.L.R., 23 All., 432.

(9) (1902) I.L.R., 25 Mad., 553.

(2) (1883) I.L.R., 6 All., 50.

(4) (1907) I.L.R., 29 All., 640.

(6) (1914) I.L.R., 36 All., 558.

(8) (1915) I.L.R., 40 Bom., 34.

(10) (1870) 5 B. L.R., 570 (P.C.).

however that no objection was taken before the Privy Council to this part of the decree on principle. The right of the widow to retain possession till the satisfaction of her dower debt must, in my opinion, be held, as against the claims of the heirs, to be a right capable of descending to her heirs and of being transferred by her along with the right to dower. The law gives her right not because she is the widow of her deceased husband but in her capacity as one of his creditors. When the widow dies all her rights of the nature of or in connexion with property descend under the Muhammadan law to her heirs and there seems to be no reason to make an exception to the rule with respect to this right of heirs which it may be mentioned would often be a very valuable right. Take the case where the widow has been in possession for more than three years and dies before the dower debt is satisfied, the heirs would not be able to recover the unsatisfied portion of the dower if the right to retain possession did not descend to them. Similarly, the widow can transfer a dower debt and I can conceive of no good reason why she should not be able to transfer her right to remain in possession of the property of which she has obtained possession as a means of realizing that debt. It may well be that she does not acquire all the rights of a mortgagee properly so called by virtue of this lien. For instance, she may not be entitled to sue for the sale of the property to realize the debt—see *Ghulam Ali v. Sagir-ul-nissa*(1)—or to claim preference as against an auction-purchaser in execution of a decree passed on a mortgage executed by her husband *Ameer Ammal v. Sankaranarayanan Chetty*(2). But to the limited extent that this right is recognized as security for payment of the dower debt there is no reason why it could not be passed to a transferee of the dower debt or transmitted to her heirs. It is well settled law—see *Asher v. Whitlock*(3), the judgment of the Privy Council in *Sundar v. Parbati*(4) and *Narayana Row v. Dharmachar*(5)—that a person in peaceable possession of land, as against every one but the true owner, has an interest capable of being inherited, devised or conveyed.

(1) (1901) I.L.R., 23 All., 432.

(2) (1902) I.L.R., 25 Mad., 558.

(3) (1865) L.R., 1 Q.B., 1 at p. 6.

(4) (1890) I.L.R., 12 All., 51 (P.C.).

(5) (1903) I.L.R., 26 Mad., 514.

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Then the next question is:—Has a vendee from a Muhammadan widow in possession of her husband's property for payment of her dower the same right as the widow in respect of the dower due to her in cases where the widow has alienated the property and the alienation is impeached by the other heirs. As pointed out above, the widow has no power to sell the property in her possession and therefore, the sale itself will not bind her husband's heirs. She, however, could transfer her right to possession along with the dower debt and in my opinion the alienation must be upheld to that extent. The principle of law in this connexion which is based on justice, equity and good conscience is well established and is recognized in section 43 of the Transfer of Property Act in these terms:—

“Where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists”.

I would, therefore, answer the second question in the affirmative; that is to say, the purchaser, to the extent of the unpaid portion of the widow's dower is entitled to retain possession of the property sold to him, as against the heirs until the dower debt is satisfied but that the sale itself is invalid and not binding on heirs.

OLDFIELD, J.

OLDFIELD, J.—I agree.

SESHAGIRI
ATTYAR, J.

SESHAGIRI AYYAR, J.—It has been argued that the two questions submitted for the consideration of the Full Bench have been too broadly worded and that the facts of the case do not demand answers for both these questions. That is a matter which need not be discussed. We have to answer the questions which apparently in the opinion of the referring judges arise for consideration. Upon the first question the position is this. There is a large body of opinion in Calcutta and in Allahabad to the effect that a widow of a deceased Muhammadan who takes peaceful possession of his property is entitled to retain it until her dower is paid. These early cases only impose two conditions. The possession must be lawful, and it should not have been acquired by fraud or by force. The few non-judicial authorities

to which Mr. Venkatarama Sastri drew our attention seem to support this view. Sir Ronald Wilson in his Muhammadan law strongly advocates it. Mr. Macnaghten in his precedents takes the same view. In *Ameer-oon-Nissa v. Moorad-oon-Nissa*(1), although the question was not directly decided, the decree suggested by the Judicial Committee is not quite consistent with the view that possession should be obtained with the consent of the heirs. At page 219 of the volume, the opinion of the Mulvi is quoted, which is to the effect that a Muhammadan lady can without recourse to Courts transfer the property which she has taken in lieu of dower. This decision was considered by the Judicial Committee in *Mussumat Beebee Bachun v. Sheikh Hamid Hossein*(2). In that case possession was given to the widow by the Collector. Certainly, it was not a case in which possession commenced with the consent of the heirs. Here again, there is no limitation in the judgment to the effect that unless possession is taken with the consent of the heirs, the widow will not be entitled to retain it. The last Privy Council case, *Hamira Bibi v. Zubaida Bibi*(3), for the first time as far as the Judicial Committee is concerned, stated that possession should be obtained not only lawfully and without fraud or force, but should have been *with the consent of the heirs of the deceased*. It was suggested that this reservation about consent was altogether unnecessary for the decision of the case before the Board. On the face of it, it looks as if this contention is right. It is necessary to consider, therefore, whether it is a deliberate pronouncement by the Judicial Committee on the question. For that purpose, I shall to some extent examine the case law in Bengal and Allahabad. In Calcutta, the first reported case brought to our notice is *Mussamut Janee Khanum v. Mussamut Amatool Fatima Khanum*(4). That was a case in which it was sought to distinguish between the Shia and the Sunni doctrine as regards the right supervening on taking possession. Consent is not mentioned as a factor to be taken into account in *Ahmed Hossein v. Mussamat Khodeja*(5) and in the case at page 370 of that volume which is appended as a footnote, there could not have

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(1) (1855) 6 M.I.A., 211.

(2) (1871) 14 M.I.A., 377.

(4) (1867) 8 W.R., 61.

(3) (1916) I.L.R., 39 All., 581 (P.O.).

(5) (1868) 10 W.R., 369.

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been any question of consent. *Bibee Tajim v. Syud Wahed Ali*(1) also does not speak of consent. *Umatul Mehdi v. Kulsum*(2) is another decision to the same effect. In *Sahebjan Bewa v. Ansaruddin*(3), Mr. Justice MOOKERJEE very elaborately examined this theory of the necessity for the consent of the heirs. He criticises adversely the view of Sir JOHN EDGE in *Amanat-un-nissa v. Bashir-un-nissa*(4) and points out that it would be meaningless to import the idea of a consent, where possession has been taken peacefully and without fraud. In *Mirza Mohammad Sharafat Bahadur v. Shazadi Wahida Sultan Begum*(5), that view was upheld. On the other hand *Bibi Tashli-man v. Bibi Kasiman*(6) adopted the view enunciated in *Amanat-un-nissa v. Bashir-un-nissa*(4). These are all the Calcutta cases. As regards Allahabad, in *Mussumat Meerun v. Mussumut Najeibun*(7), it was held that possession taken without fraud would suffice to enable the widow to retain possession and to get her dower paid out of the income. In *Amani Begam v. Muhammad Karim-ullah* (8), which defines what lawful possession is, there is no suggestion that it should have been obtained with the consent of the heirs. Sir JOHN EDGE in *Amanat-un-nissa v. Bashir-un-nissa*(4), stated the law thus :—

"If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs of property to the possession of which they and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien."

In later cases in Allahabad this view was not followed. In *Ali Bakhsh v. Allahdad Khan*(9), the learned Judges distinctly differed from *Amanat-un-nissa v. Bashir-un-nissa*(4). It is with reference to these authorities that we have to deal with the dictum of the Judicial Committee. Sir JOHN EDGE was one of

(1) (1874) 22 W.R., 118.

(3) (1911) I.L.R., 33 Cal., 475.

(5) (1914) 19 C.W.N., 502.

(7) (1887) 2 N.W.P. H.C.R., 335.

(2) (1908) I.L.R., 35 Cal., 120.

(4) (1895) I.L.R., 17 All., 77.

(6) (1910) 12 C.L.J., 584.

(8) (1894) I.L.R., 16 All., 225.

(9) (1910) I.L.R., 32 All., 551.

the members of the Board who heard *Hamira Bibi v. Zubaida Bibi*(1). The Right Hon'ble Mr. AMBER ALI was another member. *Sahebjan Bewa v. Ansaruddin*(2), in which the view of Sir JOHN EDGE in *Amanat-un-nissa v. Bashir-un-nissa*(3) has been criticised, was quoted at the Bar. Under these circumstances, having regard to the constitution of the Bench and having regard to the fact that the view opposed to *Amanat-un-nissa v. Bashir-un-nissa*(3) was placed before the Judicial Committee, is it open to us to say that the statement of the law in *Hamira Bibi v. Zubaida Bibi*(1), is an obiter dictum which is not binding on Indian Courts? So far as Madras is concerned, there is no course of decisions on the question. In Calcutta and in Allahabad this dictum may affect vested rights and may lead to some unsettlement. There is one thing to be said in favour of the dictum of the Privy Council. By taking possession for dower, the dower debt is placed in a higher category than ordinary debts. It really amounts to giving preference to one creditor over others. It may not be unreasonable under these circumstances, that the law should insist that the consent of the other heirs should be obtained for such an exceptional treatment of a debt. There is another consideration which Mr. NARASIMHA AYYANGAR pressed before us. Supposing the dower debt had become barred by limitation, and the widow takes possession more than three years after it had become due. If she enters into possession, she would be stipulating for the payment of a barred debt in preference to the payment of running debts. In these circumstances it may be unreasonable to lay down that without the consent of the other heirs, such a preference should be obtained. On the other side it was argued that the object of the law in permitting the wife to take and retain possession of her husband's property is to put a check on the tendency to divorce the wife without proper reasons. This would be defeated if consent were predicated as a condition precedent. Further, in most cases, the amount of the dower will be disputed by the other heirs and they are not likely to permit the widow to assume possession. None of these considerations have been discussed

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(1) (1911) I.L.R., 33 All., 581 (P.C.); (2) (1911) I.L.R., 33 Cal., 475.

(3) (1895) I.L.R., 17 All., 77.

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in *Hamira Bibi v. Zubaida Bibi*(1), and I am therefore not prepared to differ from the Officiating Chief Justice, whose view in such matters is entitled to great respect, in holding that the Judicial Committee did not intend to decide definitely that possession taken without consent will not give the widow the right to retain it until the dower debt is discharged.

Now I go to the second question. I feel no doubt on this point that our answer should be in the affirmative. Assuming that the widow has taken possession with the consent of the heirs and lawfully, I fail to see why her remedies should not be transferred. There is considerable authority for the proposition that it can be inherited *Mussumat Kummuroolnissa Begum v. Muhomed Hussain*(2), *Panchanan Bose v. Gurudas Roy*(3), *Majidmian Banumian v. Bibi Sahib Jan*(4), *Ali Baksh v. Allahdad Khan*(5), *Tahirunnissa Bibi v. Nawab Hasan*(6) and *Basir Ali v. Hafiz Ali*(7). Against these, there are: *Ali Muhammad Khan v. Azizullah Khan*(8), *Hadi Ali v. Akbar Ali*(9) and *Muzaffar Ali Khan v. Parbati*(10). The Muhammadan text book writers including Magnaghten and Sir Arthur Wilson, seem to incline to the view that the right can be transferred and inherited. No doubt under the English Law, ordinarily speaking, a lien is not transferable. See 19 Halsbury, page 2. But that is because a lien has been regarded as a personal privilege. Even in England there are exceptions in favour of certain classes of lien-holders. But I do not think that the right to retain possession and to pay herself out of the proceeds, which a Muhammadan widow acquires, is of the same kind as the lien considered in English cases. It is more in the nature of a charge on the property, because as I said before the right to pay herself out of the income is incident to the possession taken by a widow. *Maina Bibi v. Wasi Ahmad*(11), on which Mr. NARASIMHA AYYANGAR strongly relied, does not really decide the question. That was a case in which a decree was obtained by

(1) (1916) I.L.R., 38 All. 581 (P.C.).

(3) (1872) 9 B.L.R., 187.

(5) (1910) I.L.R., 32 All., 551.

(7) (1908) 13 C.W.N., 153.

(9) (1898) I.L.R., 20 All., 262.

(2) (1866) 1 Agra H.C.R., 288.

(4) (1916) I.L.R., 40 Bom., 34.

(6) (1911) I.L.R., 36 All., 558.

(8) (1888) I.L.R., 6 All., 50.

(10) (1907) I.L.R., 29 All., 640.

(11) (1919) 17 All. L.J., 629.

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 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. Anna 1 p. 9. (Anna 1.)
 Act XIX of 1850 (Apprentices), as modified up to 1st May 1905. As. 3 p. 6. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. Anna 1 p. 6. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. As. 2 p. 6. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. As. 11. (Anna 1.)
 Act VIII of 1851 (Indian Tolls), as modified up to 1st June 1897. As. 2 p. 6. (Anna 1.)
 Act VIII of 1852 (Sheriffs' Fees), with footnotes. Anna 1 p. 6. (Anna 1.)
 Act XXX of 1852 (Indian Naturalization), as modified up to 30th April 1908. As. 2. (Anna 1.)
 Act II of 1853 (Landholders' Public Charges and Duties), with footnotes. Anna 1 p. 6. (Anna 1.)
 Act XX of 1853 (Legal Practitioners), as modified up to 1st September 1907. Anna 1 p. 9. (Anna 1.)
 Act XXIV of 1854 (Malabar War-Knives), with footnotes. Anna 1 p. 3. (Anna 1.)
 Act XXXI of 1854 (Conveyance of Land), as modified up to 1st June 1910. As. 2 p. 3. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. Anna 1. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. As. 2. (Anna 1.)
 Act XXIII of 1855 (Administration of Mortgaged Estates), as modified up to 1st October 1908. Anna 1 p. 3. (Anna 1.)
 Act XXIV of 1855 (Penal Servitude), as modified up to 1st January 1909. As. 2. (Anna 1.)
 Act XXVIII of 1855 (Usury Laws Repeal), as modified up to 1st December 1903. Anna 1 p. 6. (Anna 1.)
 Act XV of 1856 (Hindu Widows' Re-marriage), with footnotes. As. 2. (Anna 1.)
 Act XVIII of 1856 (Calcutta Land Revenue), as modified up to 15th July 1908. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. As. 7. (Anna 1.)
 Act II of 1857 (Calcutta University), as modified up to 1st June 1910. As. 2. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act IV of 1857 [Tobacco (Bombay Town)], as modified up to 1st December 1906. As. 3 p. 9. (Anna 1.)
- Act X of 1857 (Sonthal Parganas), as modified up to 1st August 1909. Anna 1. (Anna 1.)
- Act XIII of 1857 (Opium), as modified up to 1st August 1908. As. 4 p. 3. (Anna 1.)
- Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st June 1905. As. 4. (Anna 1.)
- Act XXVII of 1857 (Madras University), as modified up to 1st July 1909. As. 2 p. 9. (Anna 1.)
- Act III of 1858 (State Prisoners), as modified up to 1st August 1897. As. 2. (Anna 1.)
- Act XXXI of 1858 (Alluvial), as modified up to 15th February 1908. Pies 6. (Anna 1.)
- Act I of 1859 (Indian Merchant Shipping), as modified up to 30th June 1905. As. 13. (As. 2.)
- Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. Anna 1 p. 9. (Anna 1.)
- Act XI of 1859 (Bengal Land Revenue Sales), as modified up to 1st August 1906. As. 4. (Anna 1.)
- Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. Anna 1 p. 6. (Anna 1.)
- Act XXIV of 1859 (Madras District Police), as modified up to 1st November 1907. As. 3 p. 6. (As. 2.)
- Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. Anna 1 p. 6. (Anna 1.)
- Act XXI of 1860 (Societies Registration), as modified up to 1st December 1904. As. 2 p. 9. (Anna 1.)
- Act XLV of 1860 (Indian Penal Code), as modified up to 1st June 1913, with an Index. Rs. 2 As. 8. (As. 5.)
- Act V of 1861 (Police), as modified up to 7th March 1903. As. 7 p. 6. (Anna 1 p. 6.)
- Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. As. 3 p. 6. (Anna 1.)
- Act XVI of 1863 (Excise Duty on Spirits), as modified up to 1st October 1908. As. 2. (Anna 1.)
- Act XXIII of 1863 (Claims to Waste-lands), as modified up to 1st December 1896. As. 4 p. 9. (Anna 1.)
- Act XXXI of 1863 (Gazette of India), with footnotes. Anna 1 p. 3. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. As. 3 p. 6. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. Anna 1 p. 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. As. 3. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. Re. 1 as. 8. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. As. 4. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1906. As. 4. (Anna 1.)
- Act XXII of 1867 (Sarais and Parags), as modified up to 1st August 1906. As. 2. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. As. 5. (Anna 1.)
- Act IV of 1869 (Indian Divorce), as modified up to 1st January 1911. As. 12. (As. 2.)
- Act XX of 1869 (Indian Volunteers), as modified up to 1st May 1896. As. 4 p. 9. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. Anna 1. (Anna 1.)
- Act VII of 1870 (Court Fees), as modified up to 1st February 1909. Re. 1 as. 2. (As. 2.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. As. 6. (Anna 1.)
- Act V of 1871 (Prisoners), as modified up to 1st May 1894. As. 15 p. 6. (Anna 1.)
- Act XXI of 1871 (Dehra Dun), as modified up to 1st October 1913. Anna 1 p. 8. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. As. 2 p. 3. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st July 1911. Re. 1. (As. 2.)
- Act III of 1872 (Special Marriages), as modified up to 1st November 1906. As. 4 p. 6. (Anna 1.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st August 1909. As. 7. (Anna 1.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. Re. 1 as. 4. (As. 2.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. As. 10. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. As. 3 p. 6. (Anna 1.)
- Act X of 1873 (Oaths), as modified up to 1st February 1903. As. 3 p. 9. (Anna 1.)
- Act IX of 1874 (European Vagrancy), as modified up to 1st September 1909. As. 6 p. 6. (Anna 1.)
- Act XIV of 1874 (Scheduled Districts), as modified up to 1st October 1895. As. 6. (Anna 1.)
- Act XV of 1874 (Laws Local Extent), as modified up to 1st October 1895. As. 7. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. As. 2. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. As. 11. (As. 2.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. As. 11. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st July 1910. As. 5 p. 6. (Anna 1.)
- Act VI of 1878 (Indian Treasure Trove), as modified by Act XII of 1891, as reprinted on the 14th February 1908. As. 2 p. 9. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. As. 10. (As. 2.)
- Act XI of 1878 (Indian Arms), as modified up to 1st March 1910. As. 5 p. 6. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. As. 6. (Anna 1 p. 6.)
- Act XVI of 1879 (Transport of Salt), as modified up to 1st October 1907. Anna 1 p. 6. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XVII of 1879 (Dekkhan Agriculturists Relief), as modified up to 1st June 1905. As. 10. (Anna 2.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st July 1911. As. 6 p. 6. (Anna 1.)
- Act VII of 1880 (Indian Merchant Shipping), as modified up to 15th October 1891. As. 10. (As. 2.)
- Act XII of 1880 (Kazis), with footnotes. Anna 1 p. 6. (Anna 1.)
- Act XIII of 1880 (Vaccination), as modified up to 1st September 1909. As. 4 p. 9. (Anna 1.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. As. 12. (As. 2.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st March 1909. Re. 1 as. 2. (As. 3.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. As. 10. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. As. 10. (Anna 1.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st December 1905. As. 15. (As. 2.)
- Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891). As. 8. (Anna 1.)
- Act XII of 1882 (Indian Sakt), as modified up to 1st August 1909. As. 7. (As. 2.)
- Act XV of 1882 (Presidency Small Cause Courts), as modified up to 1st June 1906. As. 10. (As. 2.)
- Act V of 1883 (Indian Merchant Shipping), as modified up to 1st September 1909. As. 6. (Anna 1.)
- Act VIII of 1883 (Little Cocos and Preparis Islands Laws), as modified up to 1st October 1902. Anna 1 p. 3. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. As. 2 p. 6. (Anna 1.)
- Act IV of 1884 (Explosives), as modified up to 1st October 1911. As. 4 p. 9. (Anna 1.)
- Act VII of 1884 (Indian Steamships), as modified up to 1st July 1890. As. 6. (Anna 1.)
- Act IX of 1884 (Legal Practitioners), as modified up to 30th June 1909. Anna 1 p. 6. (Anna 1.)
- Act XII of 1884 (Agriculturists Loans), as modified up to 1st February 1903. As. 2. (Anna 1.)
- Act VII of 1885 (Panch Mahal Laws), as modified up to 1st June 1915. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. As. 5. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st May 1911. As. 6. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. As. 9. (As. 2.)
- Act XIII of 1886 (Indian Securities), as amended by Act XII of 1891. As. 2 p. 9. (Anna 1.)
- Act VII of 1887 (Suits Valuation), as modified up to 1st November 1904. Anna 1 p. 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1906. As. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 8. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act III of 1888 (Police), as modified up to 1st January 1909. Anna 1 p. 9. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. Anna 1 p. 9. (Anna 1.)
- Act II of 1889 (Measures of Length), with footnotes. Anna 1 p. 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908. As. 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. As. 2 p. 9. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. As. 5 p. 6. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. As. 3. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. As. 2 p. 6. (Anna 1.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1909. Re. 1 as. 2. (As. 2.)
- Act X of 1890 (Press and Registration of Books), as modified up to 1st December 1903. As. 2 p. 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals), with footnotes. As. 2. (Anna 1.)
- Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October 1908. Anna 1 p. 6. (Anna 1.)
- Act X of 1891 (Indian Criminal Law Amendment), as modified up to 1st August 1909. Anna 1. (Anna 1.)
- Act XII of 1891 (Amending Act), showing the Schedules as modified up to 31st May 1902. As. 12. (Anna 1 p. 6.)
- Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897. Anna 1 p. 3. (Anna 1.)
- Act I of 1894 (Land Acquisition), with footnotes. As. 7. (Anna 1.)
- Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. As. 9. (As. 2.)
- Act IX of 1894. (Prisons), as amended by the Burma Laws Act, 1898. As. 8. (Anna 1 p. 6.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. As. 8. (As. 2.)
- Act XX of 1896 (Sindh Incumbered Estates), as modified up to 1st June 1906. As. 4. (Anna 1.)
- Act IV of 1897 (Indian Fisheries), with footnotes. Anna 1 p. 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. As. 2 p. 9. (Anna 1.)
- Act X of 1897 (General Clauses), as modified up to 1st February 1910. As. 5 p. 6. (Anna 1 p. 6.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. As. 4. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. Re. 8 as. 10. (As. 8.)
- Act II of 1899 (Indian Stamp), as modified up to 1st March 1907. Re. 1. (As. 2.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st July 1911. As. 7 p. 6. (Anna 1 p. 6.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. As. 2 p. 9. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XVI of 1899 (Northern India Canal and Drainage), with footnotes. Anna 1. (Anna 1.)
 Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900. Anna 1. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st July 1910. As. 6 p. 6. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration), as modified up to 1st July 1910. Re. 1 as. 4. (As. 2.)
 Act II of 1902 [Cantonments (House-accommodation)], as modified up to 1st June 1910. As. 6 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. As. 5 p. 6. (Anna 1.)
 Act I of 1904 (Poisons), with footnotes. As. 2 p. 9. (Anna 1.)
 Act I of 1910 (Indian Press), with footnotes. As. 3 p. 6. (Anna 1.)
 Regulation III of 1818 (Bengal State Prisoners), as modified up to 1st August 1909. As. 2 p. 9. (Anna 1.)
 Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
 Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903. Anna 1 p. 9. (Anna 1.)
 Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894. As. 13. (As. 2.)
 Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911. As. 15. (As. 2.)
 Regulation VI of 1886 (Ajmer Rural Boards), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899. As. 4 p. 9. (Anna 1.)
 Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April 1902. As. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Nagri. Pies 6. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Nagri. Pies 3. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Urdu. Pies 6. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Urdu. Pies 2. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Urdu. Pies 6. (Anna 1.)
 Act XXX of 1852 (Naturalization), as modified up to 1st December 1902. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Urdu. Pies 6. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903. In Urdu. Pies 3. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1903. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Urdu. Pies 6. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Nagri. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. In Nagri. As. 2 p. 6. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Nagri. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Nagri. Pies 3. (Anna 1.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1908. In Urdu. Re. 1 as. 5. (As. 5.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1908. In Nagri. Re. 1 as. 5. (As. 5.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Urdu. As. 2 p. 9. (Anna 1.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Nagri. As. 2 p. 9. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XXXI of 1863 (Official Gazettes), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XXXI of 1863 (Official Gazettes), with footnotes. In Nagri. Pies 3. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Urdu. Anna 1. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Nagri. Anna 1. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Urdu. Pies 3. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Nagri. Pies 3. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Urdu. Pies 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Urdu. As. 11 p. 3. (As. 2.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Nagri. As. 11 p. 3. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Urdu. Pies 9. (Anna 1.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Nagri. Pies 9. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st December 1896. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. In Urdu. Anna 1. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Nagri. Pies 6. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Urdu. As. 5 p. 9. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Nagri. As. 5 p. 6. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Nagri. Anna 1 p. 9. (Anna 1.)
- Act V of 1871 (Prisoners), as modified up to 1st May 1894. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Urdu. Pies 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Nagri. Pies 9. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Nagri. As. 8. (As. 2.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st November 1904. In Urdu. As. 2 p. 6. (Anna 1 p. 6.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Urdu. As. 9 p. 9. (As. 3.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Nagri. As. 9 p. 9. (As. 3.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Urdu. As. 3. (Pies 9.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Nagri. As. 4. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1873 (Agra Village and Road Police). In Urdu. Anna 1. (Anna 1.)
- Act IX of 1874 (European Vagrancy). In Urdu. As. 2. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Nagri. Pies 3. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Urdu. As. 3 p. 9. (Anna 1 p. 6.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1876 (Oudh Laws). In Urdu. As. 2. (Anna 1.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Nagri. As. 4. (Anna 1 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Urdu. As. 2. (Anna 1.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Nagri. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Nagri. As. 2. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Nagri. As. 2 p. 6. (Anna 1.)
- Act XII of 1880 (Kazis), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1880 (Vaccination). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Urdu. As. 9. (Anna 1 p. 6.)
- Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Nagri. As. 9. (Anna 1 p. 6.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Urdu. As. 4. (Anna 1.)
- Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Nagri. As. 4. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Urdu. As. 3 p. 6. (Anna 1.)
- Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Nagri. As. 3 p. 6. (Anna 1.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Urdu. As. 6 p. 9. (As. 2.)
- Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Nagri. As. 6 p. 9. (As. 2.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Urdu. Anna 1. (Anna 1.)
- Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Nagri. Anna 1. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Urdu. Pies 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Nagri. Pies 6. (Anna 1.)
- Act II of 1885 [Negotiable Instruments (Amendment)]. In Urdu. Pies 9. (Anna 1.)
- Act III of 1885 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act X of 1885 [Oudh Estates (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXI of 1885 [Madras Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1886 [Indian Contract (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Urdu. As. 3 p. 3. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Nagri. As. 3 p. 3. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Urdu. Pies 9. (Anna 1.)
- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Nagri. Pies 9. (Anna 1.)
- Act VII of 1887 (Suits' Valuation). In Urdu. Pies 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Nagri. As. 2 p. 3. (Anna 1.)
- Act X of 1887 (Native Passenger Ships). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Nagri. Anna 1 p. 3. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Urdu. As. 3 p. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Nagri. As. 3 p. 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1887 (Burma Military Police). In Nagri. Pies 9. (Anna 1.)
- Act XVIII of 1887 (Allahabad University). In Urdu. Anna 1. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Urdu. Pies 3. (Anna 1.)
- Act III of 1888 (Police), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1888 (Indian Reserve Forces), as passed. In Nagri. Pies 3. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Urdu. Pies 6. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Nagri. Pies 6. (Anna 1.)
- Act II of 1889 (Measures of Length). In Urdu. Pies 3. (Anna 1.)
- Act II of 1889 (Measures of Length). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Nagri. As. 2. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Urdu. Pies 9. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1889 (Central Provinces Land Revenue). In Urdu. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XVI of 1889 (Central Provinces Land Revenue). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act XX of 1889 [Indian Lunatic Asylums (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1890 (Revenue Recovery). In Urdu. Pies 3. (Anna 1.)
- Act II of 1890 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
- Act V of 1890 (Forest). In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1890 (Guardians and Wards). In Urdu. As. 2 p. 3. (Anna 1 p. 9.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1905. In Urdu. As. 8. (As. 2.)
- Act IX of 1890 (Indian Railways), as modified up to 1st May 1896. In Nagri. As. 8. (As. 2.)
- Act X of 1890 [Press and Registration of Books (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals). In Urdu. Pies 6. (Anna 1.)
- Act XX of 1890 (United Provinces). In Urdu. Anna 1. (Anna 1.)
- Act X of 1891 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1891 (Oudh Courts). In Urdu. Pies 6. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts of 1893 and XII of 1900. In Urdu. Pies 3. (Anna 1.)
- Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Nagri. Pies 6. (Anna 1.)
- Act II of 1892 (Marriages Validation). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1892 [Bengal Court of Wards (Amendment)]. In Urdu. Pies 6. (Anna 1.)
- Act IV of 1893 (Partition). In Urdu. Pies 3. (Anna 1.)
- Act I of 1894 (Land Acquisition). In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
- Act I of 1894 (Land Acquisition). In Nagri. Anna 1 p. 6. (Anna 1 p. 6.)
- Act III of 1894 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Urdu. As. 2 p. 9. (Anna 1.)
- Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Nagri. As. 2 p. 6. (Anna 1.)
- Act IX of 1894 (Prisons). In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1894 (Prisons). In Nagri. As. 2 p. 3. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Urdu. Pies 8. (Anna 1.)
- Act VII of 1895 [Punjab Laws Act (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1895 (Pilgrim Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act II of 1896 (Cotton-duties). In Nagri. Anna 1. (Anna 1.)
- Act VI of 1896 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1896 (Inland Bonded Warehouses). In Urdu. Pies (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act VIII of 1896 (Inland Bonded Warehouses). In Nagri. Pies 3. (Anna 1.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu. As. 2 p. 9. (As. 2.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Nagri. As. 3 p. 3. (As. 2.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1897 [Public Servants (Inquiries) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Urdu. Pies 3. (Anna 1.)
- Act III of 1897 (Epidemic Diseases). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1897 (Fisheries). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1897 [Negotiable Instruments (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Urdu. Anna 1 p. 3. (Anna 1.)
- Act VIII of 1897 (Reformatory Schools). In Nagri. Pies 6. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1897 (General Clauses). In Urdu. Anna 1. (Anna 1.)
- Act X of 1897 (General Clauses). In Nagri. Anna 1. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Urdu. Pies 6. (Anna 1.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. In Nagri. Pies 6. (Anna 1.)
- Act IV of 1898 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Urdu. Re. 1 as. 4. (As. 8.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Nagri. Re. 1 as. 6. (As. 8.)
- Act VI of 1898 (Indian Post Office). In Urdu. As. 3 p. 3. (Anna 1.)
- Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Urdu. Pies 3. (Anna 1.)
- Act IX of 1898 (Live-stock Importation). In Nagri. Pies 3. (Anna 1.)
- Act X of 1898 (Indian Insolvency Rules). In Urdu. Pies 3. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Urdu. Pies 6. (Anna 1.)
- Act I of 1899 [Indian Marine Act (1887) Amendment]. In Nagri. Pies 3. (Anna 1.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Urdu. As. 7 p. 6. (Anna 1 p. 6.)
- Act II of 1899 (Stamps), as modified up to 1st March 1907. In Nagri. As. 7 p. 6. (Anna 1 p. 6.)
- Act IV of 1899 (Government Buildings). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1899 (Government Buildings). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Urdu. Anna 1 p. 6. (Anna 1.)
 Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Nagri. Anna 1 p. 6. (Anna 1.)
 Act IX of 1899 (Indian Arbitration). In Urdu. Pies 9. (Anna 1.)
 Act IX of 1899 (Indian Arbitration). In Nagri. Pies 9. (Anna 1.)
 Act XI of 1899 [Court-fees (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act XI of 1899 [Court-fees (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1899 (Currency Notes Forgery). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1899 (Currency Notes Forgery). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Nagri. Pies 9. (Anna 1.)
 Act XIV of 1899 [Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1899 [Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XX of 1899 (Presidency Banks). In Urdu. Pies 3. (Anna 1.)
 Act XX of 1899 (Presidency Banks). In Nagri. Pies 3. (Anna 1.)
 Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Urdu. As. 2 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Nagri. As. 2 p. 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Urdu. Pies 6. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Nagri. Pies 9. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration). In Urdu. As. 5. (As. 2.)
 Act VI of 1901 (Assam Labour and Emigration). In Nagri. As. 5. (As. 2.)
 Act VII of 1901 (Native Christian Administration of Estates). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1901 (Native Christian Administration of Estates). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Urdu. Anna 1. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Nagri. Anna 1. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act X of 1901 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1902 [Cantonments (House-accommodation)]. In Urdu. Anna 1. (Anna 1.)
 Act II of 1902 [Cantonments (House-accommodation)]. In Nagri. Anna 1. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1902 [United Provinces (Designation)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Nagri. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Nagri. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Urdu. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Nagri. Anna 1 p. 6. (Anna 1.)
 Act I of 1904 (Poisons). In Urdu. Pies 6. (Anna 1.)
 Act I of 1904 (Poisons). In Nagri. Pies 6. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Urdu. Pies 9. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Nagri. Pies 9. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Nagri. Anna 1 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS ETC.—cont.

- Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Nagri. Pies 3. (Anna 1.)
- Act XV of 1904 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XV of 1904 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1905 (Indian Railway Board). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Urdu. Pies 9. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Nagri. Pies 9. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Nagri. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1908 [Indian Trusts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1908 (Code of Civil Procedure). In Urdu. Re. 1 as. 2. (As. 6.)
- Act V of 1908 (Code of Civil Procedure). In Nagri. Re. 1 as. 2. (As. 6.)
- Act VI of 1908 (Explosive Substances). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1908 (Explosive Substances). In Nagri. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Nagri. Pies 3. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Urdu. As. 2. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Nagri. As. 2. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Urdu. Pies 3. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XVI of 1908 (Indian Registration). In Urdu. As. 2. (As. 2.)
- Act XVI of 1908 (Indian Registration). In Nagri. As. 2. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Urdu. As. 2 p. 3. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Nagri. As. 2 p. 3. (As. 2.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS ETC.—cont.

- Act I of 1909 [Indian Steamships Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Nagri. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1909 (Anand Marriage). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1909 (Anand Marriage). In Nagri. Pies 3. (Anna 1.)
- Act I of 1910 (Indian Press). In Urdu. Pies 6. (Anna 1.)
- Act I of 1910 (Indian Press). In Nagri. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Urdu. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Nagri. Pies 6. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Urdu. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XV of 1910 (Cantonments). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1910 (Cantonments). In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Urdu. Pies 3. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Nagri. Pies 3. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Urdu. Pies 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Nagri. Pies 9. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Nagri. Pies 3. (Anna 1.)
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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 35, O. XXII—*Abatement of suit—*
Dismissal of suit—Costs against estate of plaintiff, whether can be awarded
to defendant—Pleader's fee—Only one-half to be allowed.] If on the death of
a sole plaintiff the right to sue does not survive and the suit is dismissed
in consequence, the Court has power under section 35, Civil Procedure
Code, to make an order granting the costs of the defendants out of the
estate of the deceased. If the suit abates after the framing of issues, only
one-half of the pleader's fee should be awarded.

Chenchayya v. Balayya (1920) I.L.R., 43 Mad., 294

SEC. 135, O. XXXVIII, R. 3—*Surety for appearance*
of defendant—Defendant present in Court to conduct his case—Application
by surety to be released from obligation—voluntary surrender—Consent decree
without assent of surety—Contract Act (Indian) (IX of 1872), section 135.]
 A surety, for the appearance of a defendant who had been arrested before
 judgment, is not entitled to be discharged from his obligation under Order
 XXXVIII, rule 3, when the defendant appears in Court to conduct his case,
 as such appearance is not a voluntary surrender within the meaning of
 the rule, nor is he entitled to such discharge because the defendant
 submitted to a consent decree without his assent. Section 135 of the Indian
 Contract Act does not apply.

Appunni Nair v. Isack Mackadan (1920) I.L.R., 43 Mad., 272

CONTRACT ACT (INDIAN) (IX OF 1872), SEC. 135:—See CIVIL PROCEDURE CODE
 (ACT V OF 1908), SEC. 135, O. XXXVIII, R. 3 272
 HIGH COURT RULES 35, 36, 38:—See PRACTICE 283

HINDU LAW—Endowment—Religious institution—Property of mutt, right to possession of—Custom and usage of mutt—Adverse possession—Limitation.
This appeal arose from a suit brought by the respondent "to declare that the defendants" (appellants) "have no right to the village of Patharakudi, and that the plaintiff as head of the mutt is entitled to the possession of the village, and to receive the income of the same from the hands of the receiver." The village was part of the property of the mutt, and had been for a long time in the possession of, and under administration by, the defendants, who were Nagara Chetties, as hukdars, trustees and managers, though the head of the mutt appointed in 1867 was the plaintiff, who made his claim by virtue of that office, and alleged that the defendants held the position of trustees as his agents. The defence was that the defendants and their predecessors, who had held the village for about 80 years, not for their own advantage but for the benefit of the mutt, were entitled to be continued in possession and management of it; and that the suit was barred by limitation. The respondent proved no management by the defendants as his agents. On the contrary, there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management. *Held*, that the plaintiff was not entitled to the village in suit. On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents; nor was his right to possession supported by the history of the land. The general state of the law with regard to religious institutions in India is that the nature of the ownership is an ownership in trust for the institution itself. The settled rule of administration is that it must be not for personal use but entirely for and on behalf of the interests of the mutt; and that while the ownership is generally with the spiritual head of the institution, such property may be held by the usage and custom of the mutt by the trustees and managers, and that by the usage and custom in this case as disclosed by the evidence the ownership of the village was in the defendants. *Ram Parkash Das v. Anand Das*, (1916) I.L.R., 48 Calo., 707 (P.C.); L.R., 48 I.A., 73; *Sethuramaswamiar v. Menuswamiar*, (1918) I.L.R., 41 Mad., 296 (P.C.); L.R., 45 I.A., 1; and *Sammantha Pandara v. Sellappa Chetti*, (1879) I.L.R., 2 Mad., 175, approved. *Held*, further, that the possession of the defendants therefore in their own right was adverse to the plaintiff, and the suit was consequently barred by limitation. *Balwant Rao v. Purnam Mal*, (1888) I.L.R., 6 All., 1; L.R., 10 I.A., 20, referred to. As to the surplus income is the duty of a trustee to refrain from personal enjoyment of it, and to add it to the capital of the estate administered; and this law applies also to the property of a mutt or asthal, whether the title is in the gurukkal as spiritual head, or in the trustees according to the custom and usage of the institution.
Arunachellam Chetty v. Venkatachalapathi Guruswamiar (1920) I.L.R., 48 Mad., (P.C.), 25

LAND ACQUISITION ACT (I OF 1894), ss. 9 (8) AND 45—Notice of award—Want of notice of acquisition proceedings.] The Collector's failure to serve notice of the intended acquisition on the occupier or owner, as required by

sections 9 (8) and 45 of the Land Acquisition Act, does not make the subsequent proceedings, such as the award, void so as to entitle the owner or occupier to resist a suit in ejectment. *Ganga Ram Marwahi v. Secretary of State for India* (1908) I.L.R., 30 Calo., 576, followed.
Kanayya Pillai v. Municipal Council, Erode ... (1920) I.L.R., 48 Mad., 280
LIMITATION ACT (IX OF 1908), SCH. I, ART. 144:—See LIMITATION ... 244
LIMITATION ACT (XV OF 1877), ART. 144:—See REGISTRATION ACT (INDIAN) (III OF 1877), ss. 17 AND 49 ... 238
LIMITATION—Adverse possession—Gift, invalidity of, as not following the requirements of sec. 123 of the Transfer of Property Act (IV of 1882)—Evidence as to possession only under it, not of the gift—Joint ownership following intended gift—Limitation Act (IX of 1908), sch. I, art. 144—Ouster.] The suit from which this appeal arose was brought to establish the title of the appellants to a moiety of a mitta or estate, consisting of two villages which belonged at one time to the ancestor of the parties, and eventually became vested in G and P, his two younger sons. On the death of G in 1879 his share vested in his widow R and he left also a daughter D. P died in 1887 leaving a will which the High Court held gave an absolute interest in the moiety to his widow A and their Lordships of the Judicial Committee upheld that construction. On 10th October 1895, R and A, who were then the registered owners of the two moieties of the mitta, presented to the Collector a petition, which after reciting that they had on 8th October given the two villages of which the mitta consisted to D, prayed that an order be made transferring the villages into her name. On the same date (10th October) D presented a similar petition to the Collector reciting the gift of the villages to her, and asked for the transfer of them to her on the register, and the Collector thereupon, on 8th May 1896 registered the two villages (being the whole mitta) in the name of D, "to hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc.", and from that date D retained possession until her death in 1911, after which the mitta descended to the respondent as her successor. *Held*, that the gift was invalid as not being made by a registered deed as required by section 123 of the Transfer of Property Act (IV of 1882), that the recitals in the petitions could not be used as evidence of a gift, but might be referred to as explaining the nature and character of the possession thenceforth held by D, and that the evidence proved that she in fact took possession of the mitta in her own right when it was transferred into her name, and retained such possession with receipt of the rents until her death, when the plaintiff's claim was barred by more than 12 years' adverse possession. Even if the rule of English law, that the possession of one of several co-parceners, joint tenants, or tenants-in-common, is the possession of the others so as to prevent limitation affecting them, was applicable to sharers in an unpartitioned agricultural village in India not holding as members of a joint family, which is doubtful, it had on the facts of the case, no application. *Held* therefore that during the life of R the possession of D was adverse to both the co-owners R and A, and this being so, when on R's death she became legally entitled to a moiety of the mitta, the character of her possession of the other

moiety as against A was not changed. There having been an ouster of A before B's death this ouster continued after her death, and the possession of D was adverse to A throughout.

Varada Pillai v. Jeevarathnammal ... (1920) I.L.R., 48 Mad. (P.C.), 244

PRACTICE—Probate and Administration proceedings—Appeals—Rules of the High Court, 35, 36, 38—Fees payable to legal practitioners.] In appeals from orders granting or refusing probate or letters of administration, the fee allowable to a legal practitioner is regulated by rule 38 and not by rules 35 and 36 of the Appellate Side Rules of the High Court.

Siddha Chetty v. Venkataraya Chetty ... (1920) I.L.R., 48 Mad., 282

REGISTRATION (INDIAN) ACT (III OF 1877), ss. 17 AND 49—Deed of authority to adopt, executed in Nizam's Dominions by a domiciled subject of that State, necessity for registration of—Adoption on such authority—Right of adopted son to succeed to his adoptive mother's father's properties situated in British India—Tenants-in-common—Adverse possession by the heir of one for more than twelve years—Article 144 of the Limitation Act (XV of 1877).] The Indian Registration Act (III of 1877) does not apply to authorities to adopt executed in Native States by domiciled subjects of those States; such documents are valid and are admissible in evidence in British India without registration. A person adopted in pursuance of such an authority acquires the status of an adopted son capable of inheriting the separate properties of his adoptive mother's father situated in British India. If on the death of A, a Hindu, who held an estate on behalf of himself and other tenants-in-common, the estate is held exclusively by his widow or daughter as his heir, claiming it as his separate property, adversely to the other tenants-in-common, for more than twelve years, the rights of the latter to recover the estate as tenants-in-common are barred under article 144, Limitation Act. Article 127 does not apply. On the death of the widow or daughter the estate will descend to the heirs of A as his separate property.

Venkatarayappa v. Venkata Ranga Row ... (1920) I.L.R., 48 Mad., 288

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 123:—See LIMITATION .. 244

the heirs against the widow for possession of the property which she had taken in lieu of dower. The decree provided that on payment to the widow of the amount due, she should deliver possession and that in default of payment within a particular time her right to the property should become absolute. The amount was not paid in time. Thus, under the decree she became the absolute owner. Thereafter she made a gift of the property to her daughters. The question was considered whether this deed of gift, which was otherwise unenforceable, conveyed to the daughters a right to the dower. It was held that as the right to the dower and the right to retain possession were not specifically transferred, the donees were not entitled to stand in the shoes of the donor in that behalf. One thing is clear from that judgment, namely, that the dower debt was placed in the same category as a mortgage debt. It is also clear that by the failure to pay money in time, the widow acquired a right to the property by virtue of the decree and not by virtue of the right she had to retain possession for dower. It is further clear that by the deed of gift there was not and could not have been any transfer of the right to the dower. These considerations do not affect the present case. I have looked into exhibit I and I find that the widow transferred the property for her dower debt. The principle of subrogation is well recognized in India, and the principle of equity, which compels a plaintiff to discharge a lawful debt before recovering possession, has been recognized in cases of sales by widows, by managers and by co-tenants. I fail to see why that principle is not applicable to the case of a sale by a widow. The sale-proceeds were applied to pay the dower debt. Therefore the vendee stood in the shoes of the vendor to the extent of the rights she had in the property sold. I am therefore of opinion that the right which the widow had to remain in possession for her dower is capable of being transferred.

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MOORTHYA
SAHEB.
—
FESHAGIRI
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K.R.

PRIVY COUNCIL.*

1919,
May 12, 13,
June 20.

VARADA PILLAI AND ANOTHER (PLAINTIFFS),

v.

JEEVARATHNAMMAL (DEFENDANT).

[On Appeal from the High Court of Judicature at
Madras.]

Limitation—Adverse possession—Gift, invalidity of, as not following the requirements of sec. 123 of the Transfer of Property Act (IV of 1882)—Evidence as to possession only under it, not of the gift—Joint ownership following intended gift—Limitation Act (IX of 1908), Sch. I, art. 144—Ouster.

The suit from which this appeal arose was brought to establish the title of the appellants to a moiety of a mitta or estate, consisting of two villages which belonged at one time to the ancestor of the parties, and eventually became vested in G and P, his two younger sons. On the death of G in 1879 his share vested in his widow R and he left also a daughter D. P died in 1867 leaving a will which the High Court held gave an absolute interest in the moiety to his widow A and their Lordships of the Judicial Committee upheld that construction. On 10th October 1895, R and A who were then the registered owners of the two moieties of the mitta, presented to the Collector a petition, which after reciting that they had on 8th October given the two villages of which the mitta consisted to D, prayed that an order be made transferring the villages into her name. On the same date (10th October) D presented a similar petition to the Collector reciting the gift of the villages to her, and asked for the transfer of them to her on the register, and the Collector thereupon, on 8th May 1896 registered the two villages (being the whole mitta) in the name of D, "to hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc.", and from that date D retained possession until her death in 1911, after which the mitta descended to the respondent as her successor.

Held, that the gift was invalid as not being made by a registered deed as required by section 123 of the Transfer of Property Act (IV of 1882); that the recitals in the petitions could not be used as evidence of a gift, but might be referred to as explaining the nature and character of the possession thenceforth held by D; and that the evidence proved that she in fact took possession of the mitta in her own right when it was transferred into her name, and retained such possession with receipt of the rents until her death, when the plaintiffs' claim was barred by more than 12 years' adverse possession.

Even if the rule of English law, that the possession of one of several co-parceners, joint tenants, or tenants in common, is the possession of the others so as to prevent limitation affecting them, was applicable to sharers in an unpartitioned agricultural village in India not holding as members of a joint family, which is doubtful, it had on the facts of the case, no application.

* Present:—Viscount CAVE, Lord PHILLIMORE, Sir J. EDGE, and Mr. AMEEB A.

Held therefore, that during the life of R the possession of D was adverse to both the co-owners R and A, and this being so, when on R's death she became legally entitled to a moiety of the mitta, the character of her possession of the other moiety as against A was not changed. There having been an ouster of A before R's death this ouster continued after her death, and the possession of D was adverse to A throughout.

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APPEAL No. 194 of 1917 from a decree (19th November 1915) of the High Court of Madras, which reversed a decree (11th August 1913) of the District Court of Chingleput and dismissed the suit of the appellants with costs.

The suit was brought in October 1912 for, among other reliefs, a declaration of the appellants' title to, and for possession of, a moiety of a mitta called Kariamangalani, consisting of two villages about 30 miles from Madras which prior to 1845 belonged to one Varada Pillai, the grandfather of the appellants, and his two brothers Gopalakrishna Pillai and Parthasarathi Pillai equally. In 1845 partition took place between them, under which Varada Pillai took no share in the mitta. The appellants claimed as heirs-at-law of their deceased grand-uncle Parthasarathi Pillai, and his widow Alangarammal (*alias* Thayarammal). The respondent, Jeevarathnammal, on the other hand, maintained that she is the owner of the property in suit on the following grounds. Parthasarathi Pillai died without issue in 1867, and bequeathed his share of the mitta to his widow Alangarammal. She, on 10th October 1895, applied to the Collector of Chingleput to transfer the portion so bequeathed to Duraisani Ammal her niece as stridhanam. At the same time, Rajammal, the mother of Duraisani Ammal, who owned the other moiety of the mitta, made a similar application regarding her portion: and the Collector on 8th May 1896 ordered the name of Duraisani Ammal to be registered as owner. On the death of Duraisani, on 31st December 1911, the respondent as her only child succeeded to the mitta, and had since enjoyed the same.

The appellants challenged the respondent's title on the grounds: (a) that the will of Parthasarathi Pillai in favour of his widow conferred on her only a life estate for her maintenance, and that the remainder of his portion of the mitta was undisposed of by him, and had become vested in them as his heirs, (b) that consequently Alangarammal had no power to give away her

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portion of the mitta to Duraisani, (c) that the gift to Duraisani, the mother of the respondent, was not valid, the requirements of the Registration Act not having been observed and (d) that in any event Duraisani's possession of the mitta since 1896 was not adverse to, but permissive and representative on behalf of her mother and aunt who remained owners thereof.

The respondent replied that the Registration Act was absolute in its terms, that Duraisani's title was protected by the Limitation Act, and that her mother's possession after 1896 was adverse to that of the transferors in 1896, and exclusive of them.

The District Judge decided in favour of the appellants, giving them a decree for a moiety of the mitta in suit with mesne profits and costs.

The appeal of the respondent to the High Court was heard by SANKARAN NAIR and COUTTS TROTTER, JJ., who differed, the former being in favour of upholding the judgment of the District Judge, and the latter in favour of reversing it. They accordingly made a reference of the case to a Full Bench for their opinion on the following question: Whether the petition of 10th October 1895 (Exhibit XII) though inadmissible to prove the gift, is admissible to prove the nature of the subsequent possession of Duraisani's? SANKARAN NAIR, J., was of opinion that it could not be given in evidence to show the nature of Duraisani's possession after 1896, and that independent of the petitions there was no evidence whatever admissible to support the alleged gift to Duraisani as stridhanam. COUTTS TROTTER, J., on the other hand, thought that the petition was admissible, not for the purpose of proving a gift by the widows to Duraisani, but in order to disprove the suggestion that her possession of the mitta after 1896 was permissive of and not adverse to the widows.

The case was heard by a Full Bench (Sir J. WALLIS, C.J., ABDUL RAHIM and SESHAGIRI AYYAR, JJ.) who gave the following opinion:

"We think the petition is not a document requiring registration under section 17 of the Registration Act. It refers to a gift on 8th October, some days previously, and in spite of the concluding passage, cannot in our opinion be considered as declaring the right of the parties within the meaning of section 17: see *Sakharam*

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Krishnaji v. Madan Krishnaji (1). It is therefore not rendered inadmissible by the terms of section 49 of the Registration Act."

The Appellate High Court (COUTTS TROTTER and SRINIVASA AYYANGAR, JJ.), gave judgment and in accordance with the above opinion allowed the appeal and dismissed the suit with costs.

ON THIS APPEAL

De Gruyther, K.C., and *Kenworthy Brown*, for the appellants, contended that on the proper construction of the will of Parthasarathi Pillai his widow did not take an absolute heritable interest, and no gift by her and no long possession adverse to her could be a bar to the appellants' title as heirs of Parthasarathi on her death. If she did take an absolute estate, no proof of the gift alleged to have been made by her was admissible, as the gift had not been made by a registered document, according to the requirements of the Transfer of Property Act, section 123. As to adverse possession, neither the respondent nor her mother derived title under a gift or devise from Parthasarathi's widow, whose title to a moiety of the mitta remained in her until her death, and neither the respondent nor her mother was in possession of the moiety adversely, nor at all. There was no ouster of the widow, and whatever intention and expectation her co-owners had, limitation did not run in their favour. The alleged copies of the petition of 10th October 1895 were not admissible in evidence to prove a gift or possession under a gift, or adverse possession in the character of donee. From 1901 when Duraisani succeeded under Rajammal's will to the other moiety of the mitta, and she and Alangarammal became joint owners of the mitta, there was no adverse possession against the latter. Reference was made to *Corea v. Appuhamy* (2); and *Muttunayagam v. Brito* (3).

C. R. Christie, K.C., and *W. Ingram*, for the respondent (called upon only as to the last contention). The possession of the mitta by Duraisani, from 1896 until her death, was in accordance with her title, and was wholly in her own right, and not merely permissive or representative. When Duraisani and Alangarammal became together owners, each in her own right, of

(1) (1881) I.L.R., 5 Bom., 232.

(2) [1912] A.C., 230.

(3) [1918] A.C., 895.

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the whole mitta, limitation did not cease to run. The possession of Duraisani being adverse to her mother and her aunt, when she succeeded to a moiety in her own right her possession was adverse to Alangarammal.

VISCOUNT
CAVE.

The JUDGMENT of their Lordships was delivered by VISCOUNT CAVE.—This is an appeal by the plaintiffs from a decree of the High Court of Madras, dated 19th November 1915, reversing a decree of the District Court of Chingleput, dated 11th August 1913, and dismissing the suit.

The suit was brought to establish the title of the plaintiffs to a moiety of a *mitta* or estate situated about thirty miles from Madras and known as the *mitta* of Kariamangalani. The *mitta* at one time belonged to Narayanaswami Pillai, an ancestor of the parties, and on his death it passed to his three sons as members of a joint family. In the year 1845 a partition took place, under the terms of which the eldest son relinquished all interest in the *mitta*, which thereupon became vested in the two younger sons, Gopala Krishna Pillai and Parthasarathi Pillai, in equal shares. No question arises as to the share of Gopala Krishna; but it is material to state that, on his death in the year 1879 his share became vested in his widow, Rajammal, and that he left issue one child only, a daughter named Duraisani.

Parthasarathi died in the year 1867, having made a will upon which a question of construction arises. Clause 3 of the will was in the following terms:—

"I have given my half share in Kariamangalani mitta to my wife, Nayar Alangarammal *alias* Thayarammal, on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc."

By clause 4 of the will the testator gave his property (in general terms) to the two infant sons of his eldest brother, who are now represented by their sons, the plaintiffs. The plaintiffs contend that the effect of the will was to vest the moiety in question in the testator's wife, Alangarammal, for her life only, and that on her death (which occurred in the year 1912) it passed under clause 4 to the plaintiffs; but it was held both in the District Court and in the High Court that clause 3 gave an absolute interest in the moiety to the testator's wife, and that the fourth clause operated upon the remaining property only. There-

Lordships agree with this construction of the will; and they accordingly hold that, on the death of Parthasarathi, his moiety of the *mitta* vested in his widow, Alangarammal, absolutely.

But the plaintiffs have an alternative claim. It appears that they were the persons entitled to succeed on the death of Alangarammal to her property not disposed of during her lifetime or by her will, and they contend that the moiety in question was in fact undisposed of at the death of Alangarammal, and accordingly vested in them as her heirs. The defendant, on the other hand, contends that, in consequence of certain events which happened during the lifetime of Alangarammal, the moiety in question passed to Duraisani, and through her to her daughter the defendant, and accordingly that the plaintiffs have no right thereto. These events must now be stated.

On 10th October 1895, Rajammal and Alangarammal, who were then the registered owners of the two moieties of the *mitta*, presented a petition to the Collector, whereby, after reciting that they had, on 8th October 1895, given away the two villages constituting the *mitta* as *stridhanam* to Duraisani *alias* Alamelu, they prayed that orders might be passed for transferring the villages into her name. The petition concluded: "The said Alamelu Ammal shall hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc." Duraisani on the same date also presented a petition to the Collector reciting the gift of the villages to her on 8th October 1895, and requesting that they should be transferred into her name. The Collector accordingly, on 8th May 1896, registered the *mitta* in the name of Duraisani.

It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisani; for such a gift must, under section 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to section 91 of the Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made. But the defendant's case is that Duraisani, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December 1911, after which date it passed to the defendant as her

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successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention; and their Lordships, after considering the evidence, have arrived at the same conclusion.

There was a considerable body of evidence showing that Duraisani was in possession or receipt of the rents and profits of the *mitta* during the period above referred to. At or about the date of the attempted gift, Duraisani, who until then had lived with her husband in Madras, came to live with her mother and her aunt, Alangarammal, in the neighbourhood of the *mitta*, and thenceforward spent the greater part of the year with them. From the same date, all *pattas* were granted and *muchilkas* taken in the name of Duraisani alone; and the property was managed by agents appointed by her, who accounted to her for the rents. It was contended on behalf of the plaintiffs that, assuming Duraisani to have been in actual possession of the land, she held such possession, not in her own right, but as trustee or manager only for her mother and aunt, and accordingly that her possession was not such adverse possession as to give a title under the Limitation Act; and in support of this contention the plaintiffs relied upon the evidence of a former *manigar* of the estate, who stated that during the life of Rajammal (who died in 1901) he "used to pay collections to her". But the witness in question prefaced his evidence above referred to by the statement that Duraisani "had confidence in Rajammal"; and he stated emphatically that Duraisani was Zamindarni from 1896. Having regard to these statements and to the remainder of the evidence in the case, the proper inference appears to be that, if any rents were in fact paid to Rajammal after 1896, they were so paid by the direction of her daughter Duraisani (who lived with her) and in order that they might be applied to the joint household expenses.

The plaintiffs also relied upon the will of Rajammal, dated 2nd April 1901. By this will the testatrix referred expressly to the petition of 10th October 1895, and the subsequent transfer of the two villages into the name of Duraisani, and added: "and the above two villages are being enjoyed by the said Duraisani Ammal." The will then proceeded as follows:—

"My daughter, the said Alamelu Ammal, *alias* Duraisani Ammal, shall take the above two villages and shall either amicably or

through Court recover and take all the following arrears, jewels, etc., due to me, viz., the Zamin Circar arrears due to me in the said villages up to past fasli 1305, upon account from the tenants of the said villages, etc."

It was held by the District Judge that these words amounted to a devise of the two villages to Duraisani, and accordingly that they afforded evidence that in the view of the testatrix no beneficial gift had been previously made to her, but the High Court held that there was in fact no devise of the villages. In the absence of the original text of the will, which was no doubt seen by the Judges in India, their Lordships are unable to say which construction is correct. But even if the devise included the testatrix' interest in the two villages, it would appear to be reasonably clear that the gift was by way of confirmation only, and affords no evidence that Duraisani was a trustee of the property. In any case the recitals contained in the will are strong evidence of the possession of the property by Duraisani.

The plaintiffs also relied upon a draft will which was prepared for Alangarammal just before her death in 1912, but which has been held by the Courts in India not to have been adopted by her as her will. This draft will contained recitals similar to those contained in the will of Rajammal, and these recitals were followed by a gift of the villages to the defendant, who had then succeeded to the estate of Duraisani. It may be doubted whether any valid argument can be founded upon a draft will not signed or adopted by the person for whom it was prepared, but in any case the observations which have been made concerning the will of Rajammal apply to this draft will also.

It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani. In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt.

Lastly, the plaintiffs put forward the contention that on the death of Rajammal in 1901 Duraisani became entitled either

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under her will or by succession to her moiety of the *mitta*, and accordingly that as from that date possession of the villages must be deemed to have been held by her as part owner, and not adversely. This contention was founded upon the English rule of law, which was abrogated by the statute 3 & 4 Wm. IV., c. 27, section 12, that the possession of one of several co-parceners, joint tenants or tenants in common, is the possession of the others so as to prevent the statutes of limitation from affecting them. Whether this rule is applicable to sharers in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purposes of the present case to decide; for upon the facts of the case the rule has no application. The limits of the rule were defined in *Culley v. Deo*(1) as follows:—

“Generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant in common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster: . . . and, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety.”

In the present case, it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both co-owners; and this being so, there is no reason for holding that when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangarammal was changed. There having been an ouster of Alangarammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangarammal throughout. This contention therefore also fails.

For the above reasons and upon a review of the whole of the evidence their Lordships have arrived at the conclusion that

(1) (1840) 11 Ad. & E. 1008.

the decision of the High Court is right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants: *Chapman, Walker and Shephard.*

Solicitor for the respondent: *D. Graham Pole, S.S.C.*

J.V.W.

PRIVY COUNCIL.*

ARUNACHELLAM CHETTY AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

VENKATACHALAPATHI GURUSWAMIGAL (PLAINTIFF),
RESPONDENT.

[On appeal from the High Court of Judicature at
Madras.]

Hindu law—Endowment—Religious institution—Property of mutt, right to possession of—Custom and usage of mutt—Adverse possession—Limitation.

This appeal arose from a suit brought by the respondent “to declare that the defendants” (appellants) “have no right to the village of Patharakudi, and that the plaintiff as head of the mutt is entitled to the possession of the village, and to receive the income of the same from the hands of the receiver.” The village was part of the property of the mutt, and had been for a long time in the possession of, and under administration, by the defendants, who were Nagara Chetties, as hukdars, trustees and managers, though the head of the mutt appointed in 1867 was the plaintiff, who made his claim by virtue of that office, and alleged that the defendants held the position of trustees as his agents. The defence was that the defendants and their predecessors, who had held the village for about 80 years, not for their own advantage but for the benefit of the mutt, were entitled to be continued in possession and management of it; and that the suit was barred by limitation. The respondent proved no management by the defendants as his agents. On the contrary, there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management.

Held, that the plaintiff was not entitled to the village in suit. On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents; nor was his right to possession supported by the history of the land.

* *Present*:—Viscount CAVE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE and Mr. AMER ALI.

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—
VISCOUNT
CAVE.

1910,
May 1, 2, 5,
6, 8 and
June 26.

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The general state of the law with regard to religious institutions in India is that the nature of the ownership is an ownership in trust for the institution itself. The settled rule of administration is that it must be not for personal use but entirely for and on behalf of the interests of the mutt; and that while the ownership is generally with the spiritual head of the institution, such property may be held by the usage and custom of the mutt by the trustees and managers, and that by the usage and custom in this case as disclosed by the evidence the ownership of the village was in the defendants.

Ram Parkash Das v. Anand Das, (1916) I.L.R., 43 Cal., 707 (P.C.); L.R., 43 I.A., 76; *Sethuramaswamiar v. Meruswamiar*, (1918) I.L.R., 41 Mad., 296 (P.C.); L.R., 45 I.A., 1; and *Sammantha Pandara v. Sellappa Chetti*, (1879) I.L.R., 2 Mad., 175, approved.

Held, further, that the possession of the defendants therefore in their own right was adverse to the plaintiff, and the suit was consequently barred by limitation.

Balwant Rao v. Puran Mal, (1883) I.L.R., 6 All., 1; L.R., 10, I.A., 20, referred to.

As to the surplus income it is the duty of a trustee to refrain from personal enjoyment of it, and to add it to the capital of the estate administered; and this law applies also to the property of a mutt or asthal, whether the title is in the gurunikal as spiritual head, or in the trustees according to the custom and usage of the institution.

APPEAL No. 151 of 1917 from a judgment and decree (10th August 1914) of the High Court at Madras which partly affirmed and partly reversed a judgment and two decrees (19th October 1908) of the Court of the Subordinate Judge of Madura.

The main question for determination on this appeal is whether the plaintiff (respondent) who is the head of a mutt has precluded himself from obtaining sole possession and management of the properties in suit appertaining to the mutt. On this appeal he submitted that it was concluded by the concurrent findings of fact of the Courts below.

The plaintiff claimed in the two suits (Nos. 50 and 51 of 1906) that as head of the mutt at Patharakudi, he was entitled to hold and to manage the properties of the mutt, and that the defendants (appellants) had no title whatever to remain in possession of those properties. He therefore claimed to recover from the defendants possession of the properties with their income and mesne profits.

The plaintiff alleged that the defendants were some of his lay disciples who were permitted by him to assist him in the management of the properties of the mutt, and that they denied the plaintiff's title on unfounded allegations, and

set up a title in themselves as the representatives of the entire caste of Chetties living in India, Burma and elsewhere. In their written statement they pleaded, that there was no mutt in the sense of a monastic institution at Patharakudi; that if there were such a mutt the plaintiff was not its head or trustee; that the properties in suit were never in the possession and enjoyment of the successive heads of the mutt, and that the head of the mutt had no right to nominate or appoint his successor. The defendants further pleaded that the so-called mutt at Patharakudi was an institution belonging to the entire body of the Chetty community; that the plaintiff was the paid servant of that community, appointed for the purpose of giving religious instruction to the members of the Chetty caste; that the properties in dispute were originally granted by the Pandiyan Kings of Madura to the Chetties for the maintenance of their priests; that the properties were settled with them by the Inam Commissioner in 1864; and that ever since the date of the endowment of the properties in suit the representatives of the Chetty community had been acting as trustees and managers of the endowed properties. Their case was that the plaintiff had been dismissed from service by the Chetties, and that he had no title to the properties in suits.

Both the Lower Courts found on the evidence that all the pleas put forward by the defendants were without any foundation and that the plaintiff's case was true.

The result of the findings of the Subordinate Judge was that as the plaintiff had not interfered with or had acquiesced in the joint management of the mutt properties by the Chetties, the defendants were entitled to manage the properties together with the plaintiff. The Subordinate Judge therefore made decrees declaring that the plaintiff as head of the mutt was entitled to be a trustee, and manage conjointly with the Chetties, and to possession and management of the properties in suit together with the defendants representing the Chetty community; and that the plaintiff as head of the mutt was entitled to the entire beneficial enjoyment of the income of the properties; and he dismissed the plaintiff's claim to exclusive possession, and trusteeship, and mesne profits.

From that decree both parties preferred appeals to the High Court which were heard by Sir JOHN WALLIS, Offg. C.J.,

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and KUMARASWAMI SASTRI, J., who delivering separate judgments, reversed the finding of the Subordinate Judge so far as it was based on the alleged acquiescence of the plaintiff and affirmed all his other findings. They concurrently held that the defendants had failed to establish that the Chetties or any of them had ever held possession of or managed the endowed properties of the mutt adversely to the plaintiff.

The evidence and findings of the lower Courts are commented on in detail and discussed in the judgment of the Judicial Committee.

The decree of the High Court was

"that the plaintiff, as head of the Patharakudi mutt, is entitled solely to the possession and enjoyment of the plaint village of Patharakudi, being item 1 in the schedule annexed to the decree of the lower Court, and that the said plaintiff as head of the said mutt is entitled to draw the surplus income realized by the receiver and deposited by him to the credit of the suit, and also to receive from the receiver any further surplus income which may have been realized by him subsequently; and that the defendants have no right to the said village of Patharakudi."

ON THIS APPEAL—

Romer, K.C., and Kenworthy Brown, for the appellants, contended that the matam or mutt was a charitable and religious institution of the Nagara Chetties, and entirely managed by that community and its representatives, and the Nagara gurukkal was the priest of that community appointed by it, and subject to its control. It was not a regular monastic institution; and should not have been so treated by the High Court. The decisions as to the right and powers of mahants were not applicable to the present case. The appellants and their predecessors are and have been hukdars, trustees, and rightful managers of the institution and its endowments as alleged by them. The High Court was wrong in holding, contrary to the finding of the Trial Judge, that the appellants acted as hukdars, trustees and managers by virtue of any permission of the respondent or as his agents, and not in their own right. The rights in this case depended on the custom and usage of the institutions. Reference was made to *Ram Parkash*

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Das v. Anand Das(1). In ascertaining the constitution of the trust, the High Court had failed to give due effect to the appellants' long discharge of the duties of hukdars, trustees and managers of the mutt, and the evidence of such long usage, and the official records show that the constitution is as alleged by the appellants. Further, the respondent has failed to prove that the constitution of the mutt is as he alleges, and in particular he has not proved that he has the right to nominate his successor, or that he was appointed by the sect of Brahmans. The evidence, in any view, did not prove that the respondent was either the 'proprietor,' or the 'sole beneficiary,' or otherwise entitled to the income and enjoyment of the assets of the institutions which, it is submitted, constitute its endowment and are trust properties. Reference was made to Madras Regulation VII of 1817 under which the superintendence of endowments was vested in the Revenue Board, and of which sections 10 and 17 provided for the appointment of a manager. The evidence furnished by petitions filed under that Regulation showed that the Patharakudi village belonged in 1832 to the Nagara Chetties, and the Inam Commissioner in his findings and report in 1864 had conclusively established that statement. Even if the respondent were the 'sole beneficiary,' he was only in that position as a trustee of the property, and the suit might have been dismissed for that reason: see *Ram Parkash Das v. Anand Das*(1). It was also contended that the suit was barred by limitation. Reference was made to *Balwant Rao v. Puran Mal*(2), *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*(3), "Thurston's Castes and Tribes of Southern India" (1909), Volume V, pages 260 and 264; and the Standing Orders of the Board of Revenue, Order 116, page 211, were also referred to.

DeGruyther, K.C., and *B. Dube*, for the respondent, contended that there were concurrent findings of fact by the Courts below as to the character of the institution, and the position of the respondent in relation to it; and that he was by his position entitled to possession and management of all the endowed

(1) (1916) I.L.R., 43 Calo., 707 (P.C.); L.R., 43 I.A., 73.
(2) (1884) I.L.R., 1 All., 1 (P.C.); L.R., 10 I.A., 80.
(3) (1904) I.L.R., 27 Mad., 435.

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properties which included the village of Patharakudi. Reference was made to *Jagadindra Nath Roy v. Hemanta Kumari Debi*(1), and *Sethuramaswamiar v. Meruswamiar*(2). The findings of the Inam Commissioner were not inconsistent with the respondent's contention. There was no head of the mutt when those proceedings took place, and they were properly taken by the parties interested in the mutt. Before the appointment of the respondent the title was recognized as being in the head of the mutt, and it had not been shown that the Chetties made any claim adverse to the head of the mutt. The Inam Commissioner granted it to the Dharmakarta of Patharakudi mutt, a position later held by the respondent who did not claim the assets in the receiver's hands for his own personal use, but on behalf of the mutt as being its head. The allegations of the appellants as to the nature of the mutt and the position of the respondent in relation to them were found against them by both the Courts below; and there was nothing to show that they had ever been appointed trustees of the property of the mutt. The appeal, it was submitted, should be dismissed.

Romer, K.C., replied.

THE JUDGMENT of their Lordships was delivered by

LORD SHAW.

Lord SHAW—This is an appeal from a judgment of the High Court of Judicature at Madras, dated 10th August 1914, which varied a decree of the Subordinate Judge of Madura, dated 19th October 1908. The exact terms of these judgments will be afterwards referred to. It is necessary, however, in order to understand them to keep clearly in view the form and nature of the suit as brought.

The suit was brought by the present respondent "to declare that the defendants have no right to the village of Patharakudi, and that the plaintiff, as head of the mutt, is entitled to the possession of the village . . . and to receive the income of the same from the hands of the Receiver"

The village is part of the property of a mutt. It has been long administered by the appellants, who are Nagara Chetties.

(1) (1905) I.L.R., 32 Cal., 129 (P.C.); L.R., 31 I.A., 203.

(2) (1918) I.L.R., 41 Mad., 296 (P.C.); L.R., 45 I.A., 1.

Broadly speaking, the contest in the case—and for the purpose of stating this contest colourless terms are employed—is between the head of the mutt on the one hand, who claims in virtue of his office to be entitled to the management and possession of the entire property of the mutt, while, on the other hand, the appellants claim that they are entitled as trustees or managers of the part of the property of the institution which is in suit, to be continued in the possession and management thereof. The form of the action brought in these circumstances is a suit for possession instituted by the head of the mutt, who does not have that possession, against the trustees or managers, who and whose predecessors for very many years have had it.

In such circumstances there naturally arises a subsidiary question of limitation, but their Lordships are unwilling to have the suit disposed of merely on the latter ground, and the case was argued before the Board with much fulness on its merits. In the Courts below this appears also to have been done, and in those Courts judgments of much elaboration were pronounced. Again, however, it must be stated that the suit is one the substantial aim of which is the eviction of the present possessors at the instance of the respondent, with the substitution in lieu thereof of possession and enjoyment by the respondent of the property in question, and of its entire income.

In the village of Patharakudi there are —

(1) A temple of the god specially revered by the Nagara community, of which the appellants are members and have acted as representatives. This community forms a sub-caste of the Chetties;

(2) A residence for the Nagara priest or *gurukkal*;

(3) A shelter house or *matam* for the use of Nagarathars when they resort to the place for religious exercises;

(4) A *choultry*, where food is distributed to Brahmans; and

(5) A street of houses forming part of a great endowment made in recent times by the Chetties, that is, by the appellants and their predecessors. This street of houses is an *Agraharam*. It is said to be the usual adjunct of a Hindu temple, and to be for the accommodation of Brahmans or Brahmanical worshippers; while

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(6) There is the village itself and the lands belonging to it, the income of which falls into the general revenue of the mutt as an institution.

In consequence of a certain assumption throughout the evidence of the knowledge of distinctions between these various parts of the property, there is a lack of clearness on that subject notwithstanding the voluminous evidence; but, speaking generally, their Lordships may assume that the temple or place of worship, together with the residence of the respondent as spiritual head of the institution, the shelter house, and the *choultry*, or place for the feeding of Brahmans, stand on one side, while on the other stands the remainder of the property.

The latter is now in the hands of the Receiver, and has been so for some years. Their Lordships are relieved of difficulty in regard to the distinctions referred to by this fact of a Receiver-ship. The suit has reference, and reference alone, to the property which is in the Receiver's hands. His management has not interfered with the purely spiritual functions of the *gurukkal* and with those parts of the property, like the place of worship and his own residence, which naturally attach to the performance of such functions by him.

In the plaint the respondent treats the other parts of the property under the general term 'village,' and this is quite a convenient term. His position on the pleading is that he, the *mahant*, was all along in the possession and enjoyment of the village. In the course of the case, however, no substantial denial could be offered to the fact, which was notorious, that the actual possessors were the Chetties. The averment is that "the Chetties were managing the affairs of the mutt only as agents under the plaintiff and under his supervision, and were at no time in possession of the village of Patharakudi, the same having all along remained in the possession and enjoyment of the plaintiff." This is the case attempted to be set up by the respondent and by certain witnesses whom he produced, but they were disbelieved.

The respondent was appointed head of the mutt in the year 1867. There seems little reason to doubt that a decree in the terms sought by him would, to say the least, involve a very considerable subversion of the mode of occupation, possession

and management which have obtained during his entire term of office. Under a decree in terms of his plaint he could dismiss the Chetties from office, and assume possession and management himself or by his nominees. Of course, if he had hitherto been, as is alleged in his suit, in possession and management himself, the demand made in the plaint would have been the natural relief sought. It is, therefore, important to see how the facts on this point stand.

Their Lordships have very carefully considered the evidence; and they see no reason to doubt the soundness of the conclusion thereon arrived at by the learned Subordinate Judge in that part of his pronouncement which is now cited. It is as follows:—

"Except the vague and meagre oral evidence, there is not much evidence, on the plaintiff's side in this period, while considerable documentary evidence, consisting of accounts, receipts, official correspondence and other papers, has been adduced on the defendants' side to prove their management as trustees and *hukdars*. I may at once state here that the general effect of the entire evidence of this period is to show, beyond all doubt, the full and complete management, control and supervision of the endowments and their income by some Chetties or others to the knowledge of the plaintiff, who appears to have all through acquiesced in the same and not to have interfered with the Chetties in such management. The plaintiff has virtually conceded this state of things, not only in the present case, but has also done so in his previous depositions (Exhibits IV, VI and VIa), in all of which he has unequivocally admitted the management of the Chetties, and the fact of the accounts, etc., being kept, checked and controlled by them. His explanation for this state of things, which his witnesses also try to make out, and which, he contends, is corroborated by a few documents on his side, is that the Chetties did all that business only under his orders, and that their management was never independent and exclusive of his rights as the proprietor and head of the mutt and its sole beneficiary entitled to appropriate the income as he wished. . . .

"The Chetties constructed the houses and the new *matam*, etc. (Exhibits VI, XVI, XXI, VII, VIIIa, VIIIb, XXVIIIa, and the defendant's first, seventh and tenth witnesses), repaired tanks, etc., paid road-cess, etc., and in fact did everything which an owner or manager or trustee must do for the management and administration of the property. It is also shown by the same evidence that money

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and paddy payable to the plaintiff's house and to the plaintiff for *poofah* were treated as amounts standing to their credits and were paid accordingly; that moneys for the plaintiff's expenses for his trips to Chidambaram immediately after the installation, for his visit to Sringeri Swamigal at Kunnakudy, and for his Benares trip on pilgrimage, were all paid after correspondence between the servants and the Kariakkar Chetties.

"The Revenue and Zamin officers also seem to have recognized the Chetties as *hukdars* and issued the road-cess *pattas* and notices, etc., sometimes generally, to *hukdars* or managers without names, and sometimes to Nachiyappa Chetty, one of the eight persons already referred to as *hukdar*."

Other portions of the learned Judge's opinion deal with the case attempted to be made by the plaintiff that all this possession and management by the *hukdars* was as his agents. He brings that matter to a point by saying,

"In this case the Chetties were in management in their own right as *hukdars* before the plaintiff's appointment, and continued as such afterwards also. The plaintiff does not prove his case of their management as his agents, or the commencement of their management with his or his predecessors' permission."

It might, in the view of the Board, have been open upon the evidence to make upon the allegation of agency a much more emphatic pronouncement in the negative, but it is not necessary for their Lordships to go into that; they are in agreement with the learned Subordinate Judge that the case of agency is not made out, and that accordingly the attempt of the plaintiff either to ground or to fortify his right on possession either by himself or by others has entirely failed. They see no reason to differ from the view of the Judge, who holds that the evidence of the plaintiff and his witnesses upon this topic cannot be believed.

The period of time over which the possession referred to extends covers more than half a century. But the documents in this case are of an important public character, and carry the record of this mutt much further back. As already stated, the plaintiff's appointment to the headship took place in the year, 1867. But the *Inam* Register for the year 1864 has been produced, and to it their Lordships attach importance. It is true that the making of this register was for the ultimate purpose

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of determining whether or not the lands were tax free. But it must not be forgotten that the preparation of this register was a great act of state, and its preparation and contents were the subject of much consideration under elaborately-detailed reports and minutes. It is to be remembered that the *Inam* Commissioners through their officials made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property the Government was put in possession not only of the conclusion come to as to whether the land was tax free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases, yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the *Inam* Register.

From that it appears as follows:—

"Villages of Variyanendal, Surakudi, Kanjiram Kurohi Yendal and Hamlet Padattanendal.

"I. These are the four villages in the Zamindary of Sivaganga. These were granted by Savundara Pandiyan King in column 11 for the support of a *matam* in Patharakudi village. This has no *patta*. This is an ancient grant. It appears by the tradition that the object of the grant is to keep the *matam* which is presided over by the Priest of Yalayattangudi Nattukottai Chetties efficiently by feeding Brahmans in a *chatram* situated close to the *matam*, by worshipping the Swami in Palambady Nadar Kovil situated close to the *matam*, and by maintaining the dignity of the priest or *guru*. Now the object of the grant is efficiently kept up by doing all the above things. The Chetties, who are very rich, spend considerable sums annually for feeding Brahmans, etc. The priest of the *matam* died about fifteen months ago. The Chetties are in contemplation in electing a priest for the *matam*. It appears that when the priest was alive, some of the principal Chetties, whose names are given in column 16, were managing the affairs of the *matam* and of the villages attached to it. The managers or trustees are elected by the Chetty community itself. Thus, the grant falls under Rule III, clause 1. Tax free.

"This is a hereditary grant. This is in uninterrupted possession of its holders since the date of the grant. The village is entered as

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Patharakudi *matam* village in all the accounts in column 12. The persons in column 16 are now trustees of the *matam*. They are managing the affairs thereof."

In further observations made by the Deputy Collector who signs the Register it is stated that

"the trustees in column 16 added 126½ acres of wet and 280 acres of dry to the area entered in the account" and in another note it is added,

"The *matam* is under the management of the trustees with their villages."

Further, a matter of not inconsiderable importance is contained in these words:—"The Zamindar has no objection to registering the names of the trustees here." The names of the trustees are duly set forth in the column headed "Particulars regarding present owner"; and these particulars are headed "Patharakudi *Matam* Trustees." Eight trustees who are Chetties, beginning with Natchiyappa Chetty, are then mentioned the name and age of each Chetty being given. As to the title to the property, that is set forth in a further column as "To be confirmed under Rule III, clause 1. Tax free."

This makes it of importance to consider the rule thus referred to. It is one of the "Rules for the adjudication and settlement of the *inam* lands of the Madras Presidency," being part of Order 116 printed at page 211 of the Standing Orders of the Board of Revenue. It is in these terms:—

"If the *inam* was given for religious or charitable objects, such as for the support of temples, mosques, colleges, *choultries*, and other public buildings or institutions, or for services therein, whether held in the names of the institutions or of the persons rendering the services, it will be continued to the present holders and their successors, and will not be subject to further interference, so long as the buildings or institutions are maintained in an efficient state, and the services continue to be performed according to the conditions of the grant."

It thus appears to their Lordships to be quite clear that the eight Chetties named, who are stated to be trustees, were in 1864 confirmed, after enquiry and in terms of the Rule, as holders of the village. And unless the rule was to be departed from, the *inam* "will be continued to the present holders and their successors and will not be subject to further interference" so long as two things happen, namely, the buildings are efficiently

maintained and the services are continued. Both of these things have happened, and accordingly the adjudication stands: the Chetties were the holders, they were continued as such, and they were not to be interfered with.

Two points may be mentioned in connexion with this adjudication. In the first place, the most important person, apart from the institution itself, was the Zamindar, from whose predecessors undoubtedly the original title to the lands had flowed; and it will be noted that the Zamindar had no objection to the registration of the trustees as proposed. In the next place, it is a mistake to treat the transactions of 1864 as merely bearing upon that year. They form, in their Lordships' judgment, a record of an anterior state of matters, from which record of possession, etc., a conclusion is formed by the Commissioner as to what was the real state of the title.

Following the report, a title-deed was granted by the *Inam* Commissioner, on the 3rd June 1864, to the Dharmakarta of Patharakudi Mutt, that is to say, to the trustee or manager of the charity, and in this title-deed it is stated, first:—

"On behalf of the Governor in Council of Madras I acknowledge your title to a religious endowment *matam* or *inam*, situated in . . . held for the support of the pagoda called . . . in that village . . .

"This *inam* is confirmed to you and your successors, subject to the existing quit-rent of Rs. 132-11-1 per annum, to be held without interference so long as the conditions of the grant are duly fulfilled."

But at least one further section of the earlier history of this mutt can be found. Their Lordships attach weight to the transactions of the year 1832. On the 30th of April of that year a petition was presented by the Zamindar, narrating that the Nagara Chetties originally came from the Tanjore division and settled long ago in his zamindari and that their family deities are in that jurisdiction. He stated that

"on account of the performance of those charities the said Chetties have been paying the *poruppu* due to the Sircar in respect of the villages in our zamindari jurisdiction, managing the said temples, *matam*, etc., and by spending certain moneys out of their own pocket in addition to the income . . . are conducting in the said temples, *matams*, etc.," the worship, and that

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"they have constructed tanks and have been performing the feeding charity and other charities."

He then sets forth that the Chetties had reported to him that the *Amildar* had contrary to practice appointed *Monigars* and *Samprathis* and called for accounts. Then follows the petition in these terms:—

"We therefore beg to submit that orders may be issued to the Head Tahsildar to the effect that *poruppu* amount in respect of the said *Devastanams*, *matams*, etc., may be collected as was being done up to last year, that the *Monigars* and *Samprathis* now newly appointed therefor may be recalled, and that no trouble be caused by calling for any account whatsoever, so that the Chetties may, day by day, do on a grand scale the established *pooja*, *annadanam* (feeding charity), etc., in the said temples and *matams*." The Board again notes the significant fact that the Zamindar is himself the petitioner.

On 25th June of the same year a petition was presented on behalf of the Nagarathars by Venkatachallam Chetty to the Principal Collector of the Madura district, which narrated that

"We ourselves have been managing the said temples, *matams*, etc., from the days of our ancestors up to date, spending large sum of money from our private funds,"

and it prayed that orders might be passed

"to the effect that, in accordance with the provisions of Regulation VII of 1817, we alone should without violating the *mamul* (practice) have claim over the said charities and conduct them, and that the *Monigars* and *Samprathis* now newly appointed by the said *Amildar* be recalled."

It is important to observe what was the regulation founded upon. It was that of 30th September 1817, passed by the Governor in Council of Fort St. George "for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindu temples and colleges, or other public purposes; for the maintenance and repair of bridges, *choultries* or *chatrams*, and other public buildings." Under the tenth head of the regulation it was provided that the local agents should ascertain and report

"the names of the present trustees, managers or superintendents of the several institutions, foundations or establishments above described, together with other particulars respecting them, and by whom and under what authority they have been appointed or elected."

Then follows the thirteenth branch of the Regulation, which is in the following terms:—

"On the receipt of the report and information required by the preceding clause, the Board of Revenue shall either appoint the person or persons nominated for their approval, or shall make such other provision for the trust, management or superintendence, as may to them seem right and fit, with reference to the nature and conditions of the endowment, having previously called for any further information from the local agents that may appear to them to be requisite."

The Regulation of 1817 seems to have been complied with in terms. The language of the petitions by the Zamindar and the Chetties was adopted in the decree issued, namely, that the Chetties should be left in their possession and that they would perform the charities according to *mamul*. The operative words were these:

"Let orders be issued to the effect that, in accordance with *mamul*, the temples, *matams*, etc., and their villages mentioned above, belonging to the said Nagara Chetties, be delivered over to them alone, without *Monigars* and others being appointed thereto."

This is the most remote period to which the authentic history of this mutt can be said to reach. From the fact that it was a mutt it follows that it must have had a Head as such, with all that that implies, as hereinafter to be referred to. But with regard to the village which is now under receivership, and which is a part of the endowment of the mutt, the management and possession thereof were in the hands of the Nagara Chetties at least for a period of about eighty years prior to the institution of this suit, and their dispossession and the substitution for such management and possession of that of the plaintiff would, as already said, be a subversion of the history of the property. Such subversion may be a necessity of the case on account of the nature of the institution; and this, which is an important point, will be dealt with. Apart from that point, the right of the plaintiff either to the eviction of the Chetties or to possession for himself is not supported by the history of the lands.

No question arises in this case of misappropriation by the defendants; such a thing is not suggested against them. On the other hand, they admit that their administration must be, not for their personal ends, but entirely for and on behalf of

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and in the interests of the mutt itself. This is the settled rule of administration with regard to such institutions under the law of India.

In the circumstances above set forth the demand made in the plaint does not appear to their Lordships to be warranted by law. It may be difficult to trace the origin of the property under receivership in the sense of ascribing its acquisition either to gifts from the Chettis out of their own private resources, or to offerings of worshippers, or to accumulations of income; but however that may be, the case of possession by the Chetties in their own right, and not as agents for the *gurukkal*, appears to be made out and is not indeed challenged in the Courts below. The difficulty on this head which the learned Judges in the Courts below have experienced arises from two causes, which will now be dealt with: first, in regard to the rights of the *gurukkal* or *mahant*, which are construed as necessarily equivalent by law to the ownership of the village; and second, in regard to the possession itself, which, although protracted and undoubted, is treated, particularly in the judgment of the High Court, as being ineffective because it was not, according to the view that Court takes, adverse possession.

With reference to the first point, the Board has recently had occasion to deal with the position and rights of a *mahant* of an *asthal*, or, as in this case, of the *gurukkal* of a mutt, in the two cases of *Ram Parkash Das v. Anand Das*(1), and *Sethuramaswamiar v. Meruswamiar*(2). In the former of these cases the body of authority upon this subject was dealt with. Two propositions may be cited as now expressing the general state of the law with regard to these institutions. In the first place, the nature of the ownership is an ownership in trust for the institution itself. Secondly, while it may no doubt be true that the ownership in the general case is with the spiritual head of the institution, still, to use the language of Sir CHARLES TURNER in *Sammantha Pandara v. Sellappa Chetti*(3),

"We do not, of course, mean to lay it down that . . . the property may not in some cases be held on different conditions and subject to different incidents."

(1) (1916) I.L.R., 43 Cal., 707 (P.C.); L.R., 43 I.A., 78.

(2) (1918) I.L.R., 41 Mad., 296 (P.C.); L.R., 45 I.A., 1.

(3) (1879) I.L.R., 2 Mad., 175 (179).

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As pointed out in *Ram Parkash Das*' case(1), there are varieties of circumstances and tenure, and in respect to these the usage and custom of the mutt falls to be determined. Once that usage and custom are clear they form the law of the mutt.

In the opinion of their Lordships, it would be a contravention of the usage and custom of this mutt, as disclosed by the evidence during the long course of its history, to affirm that the ownership of the village in suit was in the *gurukkal*. It is in the Chetties, whose title has been officially and apparently quite properly recognized as the 'holders.' But even this latter proposition is not in truth necessary for the determination of the case, for if the plaintiff's own title as owner fails, and the Board is clearly of opinion that it does, the suit as laid by him cannot be maintained.

With regard to the second point mentioned, namely, that the possession by the Chetties has not been adverse to the *gurukkal*, their Lordships fail to understand on what the difficulty of the Court below rests. Here was possession, not as in right of the *gurukkal*, but as in the Chetties' own right, with all the incidents of possession, namely, the purchase of lands, the borrowing on lands, the erection of buildings, the letting of holdings, the making payments to the priest for his support and spiritual services, the keeping of the village accounts. The *mahant* was presumably aware of these transactions, extending now in his own time for over half a century, yet the first real challenge thereof appears to be the institution of this suit itself. This is a very ordinary case of possession *nec vi nec clam nec precario*. The person now claiming to be owner has stood by while others continued to possess not by any derivative title but in practical contravention of his alleged rights. The law does not require that the claimant to ownership must, in such circumstances, be shown to have protested that his rights were being violated, and that the possession went on adversely to his protests. In short, their Lordships cannot agree with the legal view upon this subject of possession adopted by the Court below.

In these circumstances there seems to the Board no reason why the law of limitation should not apply. In *Balwant Rao*

(1) (1916) I.L.R., 43 Cal., 707 (P.C.); L.R., 43 I.A., 78.

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v. *Purun Mal*(1) it was held that limitation applied to cases where the defendant admitted he was a trustee, and the plaintiff, without proving misapplication, brought a suit more than twelve years after the cause of action arose, the object of the suit being to obtain control of the management. As Lord (then Sir Arthur) HOBHOUSE observed, in words which are applicable to the present case :—

“Here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a trustee and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage, or in some way to control the management of, the endowment.”

The present case is still stronger for the application of the rule of limitation, as the assertion is made not only of the right to management, but of the right of beneficial ownership. But while, in their Lordships' opinion, the suit would be excluded by the twelve years' limitation, they have, on the ground already stated, thought it right to deal with the whole breadth of the argument presented.

Their Lordships desire in conclusion to say that no objection was made out to the *personnel* of the defendants as true successors of the Chetties to whom the rights of ownership for the benefit of the mutt were confirmed as already narrated; and no challenge is made of the substantial accuracy of the narrative on that subject contained in the evidence of Annamalai Chetti, the son of Nachiyappa Chetty, on page 703 of the Record.

By the judgment of the Subordinate Judge it was declared that the plaintiff, as the *gurukkal* and head of the institution, and “consequently as a trustee and manager of the same conjointly with” the Chetties, was entitled to the possession and management along with them,

“without prejudice to the rights of the latter to continue in actual possession and direct management of the same as they have been holding and managing them till now from 1863.”

Underlying this part of the judgment it is plain that the learned Judge desired to make clear the propriety of continuing the Chetties' possession, but the decree given does not appear to be in workable form. A further objection thereto arises from the latter portion thereof, under which it is declared that the *gurukkal*

“is further entitled to the entire beneficial enjoyment of the income of the said villages during his life and continuance as the spiritual head of the institution, subject only to maintenance of the said institution,” etc.

A ready test of the application of this is with regard to the accumulated income, amounting to Rs. 20,000 or thereby, now in the hands of the Receiver. Under the decree quoted the *gurukkal* would be entitled to instant possession and entire beneficial enjoyment of that sum. If the present purposes of the mutt did not consume it, he could employ it for his personal use quite apart from the dignity of his office. It is plain to their Lordships that this would be not only a subversion of the usage and custom of the mutt, but would be a violation of the law applicable to such institutions. A fair test to be applied in such cases is to demand what is the true principle or nature of the administration of surplus income. It is, of course, the duty of a trustee to refrain from the personal enjoyment of such surplus and to add the same to the capital of the estate to be administered; and this law also applies to the property of a mutt or asthal, and that whether the title to the same is in the *gurukkal* as spiritual head of the institution—which is an ordinary case—or is in trustees like the Chetties according to the usage and custom of the institution, as in the present case. This law appears to have been complied with by the defendants and their predecessors during the past history of this institution, and should be continued. This would not be done by an affirmance of the decree of either of the Courts below.

The view of the High Court on this topic was even stronger than that of the Subordinate Judge. The plaintiff was declared to be entitled solely to possession and enjoyment of the village, and as head of the mutt to be

“entitled to draw the surplus income realized by the Receiver and deposited by him to the credit of the suit, and also to receive

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from the Receiver any further surplus income which may have been realized by him subsequently."

In their Lordships' opinion this declaration cannot be made.

Their Lordships will accordingly humbly advise His Majesty to recall both of the decrees of the Courts below and to dismiss the suit, the appellants being entitled to a decree for costs of the suit and of this appeal against the respondent, and failing payment thereof, to be entitled to charge the same against the funds and property now in the hands of the Receiver.

Appeal allowed.

Douglas Grant, Solicitor for the appellant.

Barrow Rogers and Nevill, Solicitors for the respondent.

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Burn.

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July, 28, 29
and
August, 1.

ODAYAMANGALATH APPUNNI NAIR (PLAINTIFF, PETITIONER),
APPELLANT,

v.

ISACK MACKADAN, RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 135, O. XXXVIII, r. 3—Surety for appearance of defendant—Defendant present in Court to conduct his case—Application by surety to be released from obligation—Voluntary surrender—Consent decree without assent of surety—Contract Act (Indian) (IX of 1872), sec. 135.

A surety for the appearance of a defendant who had been arrested before judgment is not entitled to be discharged from his obligation, under Order XXXVIII, rule 3, when the defendant appears in Court to conduct his case, as such appearance is not a voluntary surrender within the meaning of the rule, nor is he entitled to such discharge because the defendant submitted to a consent decree without his assent. Section 135 of the Indian Contract Act does not apply.

APPEAL and petition against the orders of the District Court of South Malabar in Civil Miscellaneous Appeals Nos. 28 and 29 of 1918, respectively, preferred against the orders of the Court of the Additional District Munsif of Calicut in Execution Petition

* Appeal against Appellate Order No. 94 of 1918 and Civil Revision Petition No. 1226 of 1918.

No. 2518 of 1917, and Miscellaneous Petition No. 3426 of 1917, respectively, in Original Suit No. 325 of 1917 on the file of that Court.

The plaintiff instituted a suit against one Cleveland Fuller, and, when an application was made for his arrest, the respondent, Isack Mackadan, signed and executed a surety-bond on 31st December 1915 to produce the defendant at the time and place ordered by the Court and in case of failure he agreed to hold his properties liable for the amount payable to plaintiff. The suit was posted for hearing to 15th November 1917. Defendant was present in Court, a compromise was entered into and a decree passed in accordance therewith. On the same date the surety applied to the Court to release him from his obligation by taking the defendant into custody. The District Munsif declined to do so, as he considered defendant exempt from arrest, on the ground that he was a party attending Court to conduct his case. On 10th April 1918, the District Munsif passed an order that 'the surety will produce the judgment-debtor on 3rd June 1918.' As he was not produced the plaintiff was granted permission to proceed in execution against the surety. These orders were reversed by the District Judge. The decree-holder thereupon filed this Civil Miscellaneous Second Appeal and a Civil Revision Petition.

C. Madhavan Nayar for appellant.

K. P. M. Menon for respondent.

SESHAGIRI AYYAR, J.—The original suit was instituted against one C. W. Fuller. In the course of the suit an application was made for his arrest. When he was brought before the Court the respondent before us agreed to stand surety for him. Thereupon, Fuller was released from custody. I shall refer to the terms of the bond and its legal effect later on. Subsequent to this, the surety asked the Court, at a time when Fuller was before it to conduct his case, that he should be relieved from his obligation to produce the defendant. The District Munsif did not apparently agree to this course. Thereafter, the plaintiff and the defendant agreed to a consent decree which has now been put in execution. The surety, whose bond was not in terms discharged, now pleads that, by his producing the defendant before the Court and praying to be relieved from

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responsibility, the liability which he undertook under the bond was put an end to. There is a further contention that, as the parties to the suit instead of going to trial agreed to a decree by consent, the surety was discharged under section 135 of the Indian Contract Act. The District Munsif rejected these contentions and ordered execution. On appeal the District Judge has reversed that order. A Civil Miscellaneous Second Appeal against the order refusing execution against the surety, and a Civil Revision Petition against the order discharging the surety from liability, have been filed in this Court.

Mr. Menon, for the respondent, raised a preliminary objection that, as the District Judge in the exercise of his appellate powers released the surety from liability and as his decision on law does not affect his jurisdiction, the Civil Revision Petition is incompetent. As regards the Civil Miscellaneous Second Appeal, his contention is that, if the Civil Revision Petition goes, the ground of appeal in the Civil Miscellaneous Second Appeal fails and should be dismissed. It may be, that for the hearing of the Civil Revision Petition the preliminary objection has some force. But as the same order has been passed in the appeal from which the Civil Miscellaneous Second Appeal has been presented, we are entitled in Second Appeal to scrutinize the correctness of that order. I must overrule the objection so far as it relates to the Civil Miscellaneous Second Appeal.

Now to the merits. Mr. Madhavan Nayar, at the outset, referred us to the terms of the bond which ought to have been taken by Civil Court under Order XXXVIII. Form No. 2 in Appendix F of the Code of Civil Procedure, is far more comprehensive than the bond which has been taken in the present case. The attention of the District Judge should be drawn to the incompleteness and inaccurate language of the bond now before us. It is desirable that in taking bonds of this description, the provisions of the Code should be strictly complied with. None the less, we are not concerned now with what might have been the terms of the bond but only with the interpretation of the actual agreement that was signed. We must therefore deal with the liability of the surety with reference to the bond which he actually executed. By that bond, which is Exhibit A in the case, the surety undertook

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"to produce the defendant at the time and place ordered by the Court. If I fail to do so I and my properties are liable for the amount payable to the plaintiff."

The question for consideration is, did he produce the defendant at the time and place ordered by the Court? The procedure to be adopted on an application by the surety, for discharge from liability, is contained in Order XXXVIII, rule 3. Two contingencies are contemplated in that rule. The first is an application by the surety for discharge, whereupon the Court decides either to summon the defendant or to issue a warrant for his arrest. Clause (3) of that rule which provides for the discharge of the surety runs thus :—

"on the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security."

It is conceded that there was no summons or warrant against the defendant. He was in Court for the purpose of conducting the suit. The next point is, did he surrender himself on that occasion? The District Munsif says :

"He also expressed his unwillingness to surrender that day. I declined to arrest him on the spot as he, being a party attending a Court for the purpose of conducting his case, is exempt from arrest." In order to satisfy the requirements of a surrender, it is not enough that a party is before the Court, but he should submit himself to be dealt with by the Court as directed by Order XXXVIII. The sentence from the Munsif's judgment which I quoted, makes it clear that the defendant did not surrender.

Learned arguments were addressed to us upon the question whether it is necessary that the defendant must be in a position to be arrested in order that the requirements of production by the surety may be satisfied. The two provisions of the Code which have a bearing on this question are Order XXXVIII, rule 1 and section 135. Under Order XXXVIII, the Court is empowered, at any stage of the suit, to issue a warrant to arrest the defendant and to bring him before the Court. At first sight it may appear as if the defendant is liable to be arrested while he is engaged in the conduct of his suit. But turning to section 135, the meaning of the legislature seems to be clear. The first clause of section 135 provides for immunity of Judicial officers from

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arrest, while discharging their judicial functions. By clause (2) the parties to the suit, pleaders and witnesses are exempted from arrest. The latter portion of clause (2) says that in cases in which the party before the Court is guilty of contempt, the exemption would not apply to him. Clause (3) provides for a further exception and enables a decree-holder to apply for the arrest of the judgment-debtor immediately after decree. These are the only two exceptions which the law has recognized, and it seems to me that notwithstanding obvious inconveniences in requiring that an application should be made for the arrest of a judgment-debtor while allowing him to get away from Court, the Code leaves us no room for doubt on the matter. The principle enunciated in section 135 has long been recognized in England and in India. It is not necessary to consider the vexed question whether the rule has been enacted in favour of parties or to safeguard the rights of the Court. I am inclined to the view which has found favour with some eminent Judges, both in this country and in England, that the intention of the legislature is to enable the Court to render justice as between party and party by not subjecting a person, who is expected to assist it in the discharge of its duties, to the disability of a possible arrest. However that may be, the principle of exemption has been well stated in *Appasamy Pattar v. P. E. Govinen Nambiar*(1), in these terms:—

“The well established rule of English Law that a witness or party to a civil suit, whose attendance is required on a trial by a Judicial Tribunal, is protected from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from, the place of trial, rests on a principle which applies with full force here, namely, that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice.” That case is also an authority for the proposition that a party who comes to Court to give evidence, should not be arrested while he is before the Court. The principle of this decision was followed in a later decision in *Zainab Bee v. The Official Assignee of Madras*(2). In that case, the learned Chief Justice and Mr. Justice OLDFIELD, held that while a person appeared in Court to prosecute an insolvency petition, he should not be arrested for

(1) (1868) 4 Mad. H.C.R., 145.

(2) (1914) 24 I.C., 513.

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claims arising under the petition for insolvency. *John v. Carter*(1) also contains observations to the same effect. Mr. Menon strenuously contended that it would be a meaningless procedure to demand that a fresh process should issue for bringing a person to Court without taking steps to detain him in custody while he is already actually before it. As I said before, the rule of exemption of a party appearing to conduct a case is a principle founded on a well recognized theory of jurisprudence, which we are not at liberty to ignore. I am therefore unable to agree with the view of the District Judge that the presence of the defendant in Court, albeit it was for conducting his suit, at the time when the surety asked the Court to discharge him from obligation, was a compliance with Order XXXVIII, rule 3.

There is one other contention of Mr. Menon's which must be referred to. He argued that, as his client undertook the liability only for any decrees that may be passed on trial, and as the ultimate decision of the Court was based on a compromise, the bond spent itself out. Mr. Madhavan Nayar furnished two answers to this contention and I think both of them are right. The first is that the surety bond does not say that the liability is to be only for a decree that may be passed on contest. There is nothing unreasonable in a surety agreeing to be bound by a decree which may be passed either after trial or with the consent of parties; in the absence of a special stipulation in that behalf, there is no ground for limiting the liability only to a decree passed after contest. If there has been collusion between the plaintiff and the defendant in obtaining the decree, the surety is not without remedy. Secondly, section 135 of the Indian Contract Act contemplates contractual obligation between the parties. Under the Code of Civil Procedure the bond is given to the Court and any infringement of the terms of the bond is a violation of the obligations to the Court, and therefore the agreement between the parties which resulted in a compromise decree has not the effect of discharging his liability to the Court. For all these reasons I think the order of the District Judge should be reversed and that of the District Munsif restored with costs here and in the Court below. The civil revision petition is dismissed without costs.

(1) (1869) 4 B.L.R. (O.C.J.), 90.

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BURN, J.—Action was taken against the first defendant in Original Suit No. 325 of 1917 (Calicut Additional District Munsif's Court) under Order XXXVIII, rule 1 of the Code of Civil Procedure. Security was furnished and the surety is the respondent in the civil miscellaneous second appeal and civil revision petition. The bond which he executed does not follow the wording of the form given in the appendix to the Code of Civil Procedure, but the variation does not appear to me to be material for the disposal of the present matter. The liability, with which the surety has been saddled by the Court of first instance, is clearly within the terms of the bond. The surety can escape only by showing that his liability has been terminated. The bond was executed on 31st December 1915 and the suit was disposed of on 15th November 1917 when a decree was passed in favour of the plaintiff in accordance with the terms of a compromise entered into between him and the defendants. On the same day the surety applied to the Court to be released from his obligation on the ground that business engagements would prevent him from producing the defendant before the Court in future. The first defendant was present in Court and the Court was asked to take him into custody. The District Munsif declined to do so, holding that the first defendant was exempt from arrest because he was attending the Court as a party for the purpose of conducting his own case. The first defendant was allowed to leave the Court and summons was issued for his appearance (Order XXXVIII, rule 3). He did not appear and steps to effect arrest were not taken as the surety failed to pay the required batta. The respondent's application for discharge was dismissed on 5th June 1918 and the decree-holder was permitted to proceed in execution against the respondent; but these orders were reversed by the District Judge.

The decree-holder has therefore preferred the present civil miscellaneous second appeal and civil revision petition. The appeals before him (District Judge) were disposed of simultaneously and there is in effect only one judgment. I think the whole matter is open for consideration.

The District Judge was of opinion that, by the mere fact of the first defendant's appearance in Court, the obligation of the surety was discharged. In this, I think, he was wrong. The procedure

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provided by Order XXXVIII, rule 3, had to be adopted before the Court could grant the discharge. The issue of a warrant is in any event discretionary and I am inclined to agree with the District Munsif that in the present instance, the first defendant was protected against arrest in Court by the provisions of section 135 of the Code of Civil Procedure. It is immaterial that his presence was in connexion with the suit in which security had been required (vide *Appasamy Pattar v. P. E. Govinen Nambiar* (1) and *Zainab Bee v. Official Assignee of Madras* (2)). Order XXXVIII, rule 3, contemplates that the application of a surety should be disposed of after the defendant has been brought before the Court for the purpose of the application, or has surrendered to the Court for this purpose. These conditions were not complied with in this case.

For the respondent the principle underlying section 135 of the Contract Act has been referred to and it has been contended that as the first defendant entered into a compromise with the plaintiff without the assent of the surety, the latter is discharged from his obligation under the security bond. This provision is not in my opinion applicable. The respondent had made himself liable for the amount that might be adjudged against the defendant. This adjudication might follow a compromise which the Court considers lawful, and the liability of the surety is not limited to cases where there has been a contest to the finish. The liability of the surety is neither greater than, nor different from, that which he undertook.

I agree that the orders of the District Judge should be set aside and those of the District Munsif restored with costs of civil miscellaneous second appeal.

K.R.

(1) (1868) 4 Mad. H.C.R., 145.

(2) (1914) 24 I.C., 513.

APPELLATE CIVIL.

Before Mr. Justice' *Bakerwell* and Mr. Justice *Odgers*.

KASTURI PILLAI (DEFENDANT), APPELLANT,

v.

MUNICIPAL COUNCIL, ERODE (PLAINTIFF), RESPONDENT.*

Land Acquisition Act (I of 1894), ss. 9 (3) and 45—Notice of award—Want of notice of acquisition proceedings.

The Collector's failure to serve notice of the intended acquisition on the occupier or owner, as required by sections 9 (3) and 45 of the Land Acquisition Act, does not make the subsequent proceedings, such as the award, void so as to entitle the owner or occupier to resist a suit in ejectment. *Ganga Ram Marwari v. Secretary of State for India* (1903) I.L.R., 30 Cal., 578, followed.

SECOND APPEAL against the decree of D. G. WALLER, the District Judge of Coimbatore, in Appeal Suit No. 69 of 1918 preferred against the decree of C. GOVINDAN NAYAR, the Principal District Munsif of Erode, in Original Suit No. 2250 of 1916.

This was a suit by the Municipal Council of Erode to recover a piece of land, acquired for it by the Government under the Land Acquisition Act on the ground that it was acquired for a burial-ground for Muhammadans and that the defendant trespassed on it after acquisition and after possession had been taken by the Government. The defendant pleaded *inter alia* that the purpose for which the land was acquired had failed, as the land was declared unfit to be a burial-ground, that he was not given any notice of the preliminary proceedings to acquire the land under section 9 of the Act, which requires the Collector to give public notice that Government intends to take possession of the land and that claims to compensation should be made to him and that such notice should be served on the occupier and other persons interested, that the subsequent award and the acquisition were therefore void and not binding on him, and that he was never dispossessed of his land by the Government. Both the lower Courts found that though notice of the acquisition proceedings was not served on the defendant personally, it was affixed to his residence owing to his absence and the absence of any adult male member therein, that he was dispossessed by

* Second Appeal No. 67 of 1919.

the Government, that an award was made by the Collector and communicated to the defendant and that he trespassed on the land. Hence, they allowed the suit. The defendant appealed.

T. M. Krishnaswami Ayyar for the appellant.

S. Duraiswami Ayyar for the respondent.

The JUDGMENT of the Court was delivered by

BAKEWELL, J.—Under section 16 of the Land Acquisition Act, Act I of 1894, the making of an award and taking possession of land vest the property absolutely in the Government. It has been argued that, if notice on the occupier had not been served in accordance with section 9 (3) and section 45, the subsequent proceedings and the award are void.

Assuming that such service has not been sufficiently proved in the present case, section 12 provides that the award shall be final and conclusive, whether the persons interested have appeared or not, as to the question which can be dealt with by the Collector under section 11, subject to the right of the party to require a reference to the Court under section 18. The declaration made by the Government under section 6 is conclusive evidence that the land is needed for the purposes sanctioned by the Act. All that the parties interested can urge before the Collector is that the area of the land is not properly stated, the compensation proposed is insufficient and the amount has been wrongly divided amongst them. The defendant had notice of the award under section 12 and his remedy was therefore to apply for a reference under section 18, and no other remedy is provided by the Act.

We think that the decisions cited by the learned vakil for appellant have no bearing on the point. *Rameswar Singh v. Secretary of State for India*(1) does not relate to the acquisition of land, but merely decides that the owner of a franchise can sue for damages when land necessary to the exercise of his rights has been acquired without notice to him. It does not deal with the validity of the award and the vesting of the land thereunder. That reported in *Balkrishna Rao v. The Secretary of State for India*(2) decides that a Forest officer exercising judicial functions

(1) (1907) I.L.R., 34 Cal., 470.

(2) (1916) I.L.R., 39 Mad., 494.

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COUNCIL,
ERODE.

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BAKRWELL, J.

does not acquire jurisdiction until notice of his proceedings has been given to the party interested. The Collector in making his award is not acting judicially. In any case, the award must be regarded as passing title to the property under section 16 until it has been set aside, and we think that it cannot be treated as void in a suit in ejectment.

The case in *Ganga Ram Marwari v. Secretary of State for India*(1) is precisely in point and we respectfully agree with that decision.

The Second Appeal is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

KONDA SIDHIA CHETTY (PETITIONER),

v.

M. VENKATAROYA CHETTY AND ANOTHER (RESPONDENTS).*

Practice—Probate and Administration proceedings—Appeals—Rules of the High Court, 35, 36, 38—Fees payable to Legal Practitioners.

In appeals from orders granting or refusing Probate or Letters of Administration, the fee allowable to a legal practitioner is regulated by Rule 38 and not by Rules 35 and 36 of the Appellate Side Rules of the High Court.

CIVIL MISCELLANEOUS PETITION in Civil Miscellaneous Appeal No. 125 of 1918 on the file of the High Court.

N. Chandrasekhara Ayyar for petitioner.

N. C. Vijayaraghava Acharya for respondents.

The ORDER of the Court was delivered by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—Mr. Chandrasekhara Ayyar has raised an interesting question as to the fee payable to practitioners, in appeals from orders granting or refusing Probate or Letters of Administration. The Taxing Officer has informed us that there is no settled practice in this Court on the subject. Sometimes, he fixes a reasonable fee. Sometimes ad valorem fee as in a regular appeal is fixed. In Bombay, according to a long standing

(1) (1903) I.L.R., 30 Cal., 576.

* Civil Miscellaneous Petition No. 832 of 1919 in Civil Miscellaneous Appeal No. 125 of 1918.

practice, only a fee of Rs. 30 is decreed; see *Sundrabai v. Collector of Belgaum*(1). In Calcutta, sometimes, the Judges fix the fee at the hearing. If that is not done, the Taxing Officer fixes Rs. 80 as the fee. See *Bajinath Prosad Singh v. Sham Sundar Kuar*(2). It is not denied that in the mufassal the pleader's fee is on the ad valorem scale as in a suit. In the original side of our High Court also, the same practice is alleged to exist. In this state of the authorities we have been asked to settle the rule of practice. Mr. Chandrasekhara Ayyar contended that Rule 36 of the Appellate Side Rules read with Rule 35 should govern these matters. Although in section 19-A and E and in the Table to the Court Fees Act, the duty payable on a grant of Probate or Letters is referred to as court-fee, that expression has reference to the machinery which collects the fee and to nothing else. In essence, it is a duty which the Crown levies on the party who benefits by the testator's property. Therefore in our opinion, the graduated scale of fee paid on the amount for which probate is granted cannot come under the expression ad valorem fee used in Rules 35 and 36. It was pointed out in *Rodrigues v. Mathias*(3) that the right in dispute in Probate proceedings is not so much a right to property as it is a right to manage and administer the estate by the person applying. It is that right that the Court adjudicates on before granting probate. That right may refer to any extent of property, large or small. But that is not what the Court has to consider. It is only the personal right. Consequently it seems to us that the subject-matter of a Probate Appeal is not capable of valuation and the proper rule applicable is Rule 38. In this view, the order of the Taxing Officer is right.

N.R.

(1) (1909) I.L.R., 33 Bom., 256.

(2) (1914) I.L.R., 41 Cal., 637.

(3) (1911) 21 M.L.J., 481.

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v.
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CHETTY.
SESHAGIRI
AYYAR, J.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

1919,
August 8,
and 13.

DONTA PEDDA CHENCHAYYA (SECOND DEFENDANT),
APPELLANT

v.

MALLAM BALAYYA AND ANOTHER (EXECUTORS OF PLAINTIFFS' ESTATE), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 35, O. XXII—Abatement of suit—Dismissal of suit—Costs against estate of plaintiff, whether can be awarded to defendant—Pleader's fee—Only one-half to be allowed.

If on the death of a sole plaintiff the right to sue does not survive and the suit is dismissed in consequence, the Court has power under section 35, Civil Procedure Code, to make an order granting the costs of the defendants out of the estate of the deceased.

If the suit abates after the framing of issues, only one-half of the pleader's fee should be awarded.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Cuddapah, in Appeal Suit No. 261 of 1917, preferred against the decree of M. VENKATARAMAYYA, the District Munsif of Proddatūr, in Original Suit No. 721 of 1916.

Plaintiff brought a suit for maintenance and died after issues had been framed in the suit but before it came on for trial. The suit abated as the right to sue did not survive. The District Munsif passed an order in these terms:—"The suit abates and the defendants shall recover their costs from the estate of the deceased plaintiff." The District Munsif relied on Order XXII, rule 3, clause (2) of the Civil Procedure Code, and on the rulings in *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1) and *Josiam Tiruvengadachariar v. Sawmi Iyengar*(2).

The executors of the deceased plaintiff preferred an appeal to the District Court against the order awarding costs to the defendants out of the estate of the deceased plaintiff. The learned District Judge reversed the order awarding costs to the

* Second Appeal No. 1801 of 1918.

(1) (1904) I.L.R., 27 Mad., 588. (2) (1911) I.L.R., 34 Mad., 76.

defendants, holding that it was not open to the Court to award costs to the defendants when the suit abated and the right to sue did not survive on the plaintiff's death. The defendant preferred a second appeal as well as a civil revision petition to the High Court against the order of the District Judge.

M. O. Parthasarathi Ayyangar and M. O. Tirumala Achariyar for the appellant.

C. V. Subrahmanya Ayyar for the respondents.

JUDGMENT.

KRISHNAN, J.—In this second appeal and the civil revision petition two questions have been raised for our decision, namely, (1) whether when a suit abates on account of the death of a sole plaintiff the right to sue not surviving, and it is dismissed in consequence, the Court has power to make an order granting defendant's costs out of the estate of the deceased and (2) when such an order is made by the District Munsif an appeal lies against it to the District Judge at the instance of the deceased's legal representatives.

On the first question the learned District Judge held that the Court had no such power. No doubt, as pointed out by him the case before us is not one to which Order XXII, rule 3 of the Code of Civil Procedure, applies, for that order does not seem to refer to a case where the right to sue does not survive on the death of the sole plaintiff. Sub-rule (2) of rule 3 which in terms authorizes the Court to grant costs to the defendant against the estate of the deceased plaintiff applies only where no application is made within time under sub-rule (1) for adding the legal representative of the deceased as a party and not to a case where no such application can be made at all. There is no reference in the whole of Order XXII to a case where on the death of a sole plaintiff the right to sue does not survive. Order XXII therefore cannot be relied on to support the order as to costs in the case before us. This was conceded by the learned Advocate for the appellant.

He relies however on section 35 of the Code itself. Under that section, the "costs of and incident to all suits" are in the discretion of the Court, and the Court is given full power to decide by whom and out of what property and to what extent such costs are to be paid. This power exists even where the

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KRISHNAN, J.

CHENCHAYYA v. BALAYYA. KRISHNAN, J. Court has no jurisdiction over a particular suit. The language of the section is clearly wide enough to cover the present case. It is however argued that we should limit the scope of that section to cases where both parties are on the record, as otherwise the provision as to costs in Order XXII, rule 3, clause (2) will be rendered redundant. I do not think the redundancy pointed out is a proper ground for cutting down the scope of the section when there is nothing in its language to justify such limitation. As no separate suit lies between parties to a suit to recover the costs as damages, it stands to reason that a Court should have wide powers in awarding costs, in all matters brought before it by parties, and we should not therefore limit its powers unless it is clear that the legislature meant to do so in any particular case. I am not therefore prepared to limit the scope of section 35 by any implication derivable from the existence of the provision as to costs in Order XXII, rule 3, clause (2). So far as I am aware the power to grant costs against the estate in cases like the present has never been challenged and the practice has been to grant costs in suitable cases. One such example at any rate has been brought to our notice from the Law Reports. See *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1). It is true the failure of the suit when plaintiff dies without the right to sue surviving cannot be attributed to any default on the part of the plaintiff or of his legal representative. But on the other hand there may be no reason whatever for mulcting defendants in costs by making them bear their own costs. The question has to be judged in each case as to what would be the proper order as to costs and the Court must exercise a careful discretion in making its order. But to hold that the Court has no power to deal with costs in such a case in any circumstances will prevent the Court from granting costs to the defendant even in a case where it is clear to it that the plaintiff's suit is a vexatious and baseless one, the trial having advanced far enough, before the plaintiff's death to draw such an inference.

Being of opinion that the Court has a discretion to award costs to a defendant even in a case where a suit abates on the

cause of action not surviving the death of a plaintiff, I consider CHENCHAYYA the decree of the learned District Judge based entirely on his BALAYYA. view that no such discretion exists must be set aside.

KRISHNAN, J.

It was urged by the respondent's vakil that the District Munsif did not himself exercise any discretion in this case and that if he did it was not a proper one. It is clear from his judgment that though he thought he had power under Order XXII, rule 3, clause (2), to make the order as to costs, he did exercise a discretion in the matter; that rule also makes it discretionary for the Court to pass such an order. I do not think there is any valid ground for interfering with his discretion in this case. But it has been brought to our notice that in calculating the defendant's costs he has been awarded pleader's fee in full, as if the case had been tried and disposed of. It seems to me this case should be treated for the purpose of calculating pleader's fee as similar to one dismissed for default of prosecution after framing of issues. Only one-half of the full fee should have been awarded under the rules. With this modification the order of the Munsif as to cost must be confirmed.

In the view I am taking it is unnecessary to express an opinion on the second question raised by the learned Advocate for the appellant. I would allow the second appeal and set aside the decree of the District Judge, and restore that of the Munsif with the modification above stated and allow the appellant his costs in the lower Appellate Court and in the second appeal in this Court, from the estate of the deceased Subbamma as the respondents acted as executors of her estate in appealing to the District Court and in supporting the District Judge's decree in this Court. The civil revision petition is dismissed with costs.

SPENCER, J.—I agree.

SPENCER, J.

K.B.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Ayyar.

1919,
March 14, 17,
18, 19, 20, 21,
24, 25, 26,
27, 28, 31,
April 2, and
May 1.

RAJA KEESARA VENKATAPPAYYA AND FOUR OTHERS
(PLAINTIFFS NOS. 2, 3, 5 AND 6), APPELLANTS,

v.

RAJA NAYANI VENKATA RANGA ROW AND FOURTEEN OTHERS,
RESPONDENTS (DEFENDANTS NOS. 1, 2, 4, 6 TO 14, 17, 18 AND 20),

AND

RAJA KEESARA VENKATARAMA NARASIMHA ROW
AND TEN OTHERS, APPELLANTS (PLAINTIFFS NOS. 2, 3, 5, 8 TO 12, 14
AND 16),

v.

RAJA NAYANI VENKATA RANGA ROW AND THREE OTHERS
(DEFENDANTS NOS. 2 AND 4 TO 6), RESPONDENTS.*

Indian Registration Act (III of 1877), ss. 17 and 40—Deed of authority to adopt, executed in Nizam's Dominions by a domiciled subject of that State, necessity for registration of—Adoption on such authority—Right of adopted son to succeed to his adoptive mother's father's properties situated in British India—Tenants-in-common—Adverse possession by the heir of one for more than twelve years—Article 144 of the Limitation Act (XV of 1877).

The Indian Registration Act (III of 1877) does not apply to authorities to adopt executed in Native States by domiciled subjects of those States; such documents are valid and are admissible in evidence in British India without registration.

A person adopted in pursuance of such an authority acquires the status of an adopted son capable of inheriting the separate properties of his adoptive mother's father situated in British India.

If on the death of A, a Hindu, who held an estate on behalf of himself and other tenants-in-common, the estate is held exclusively by his widow or daughter as his heir, claiming it as his separate property, adversely to the other tenants-in-common, for more than twelve years, the rights of the latter to recover the estate as tenants-in-common are barred under article 144, Limitation Act. Article 127 does not apply. On the death of the widow or daughter the estate will descend to the heirs of A as his separate property.

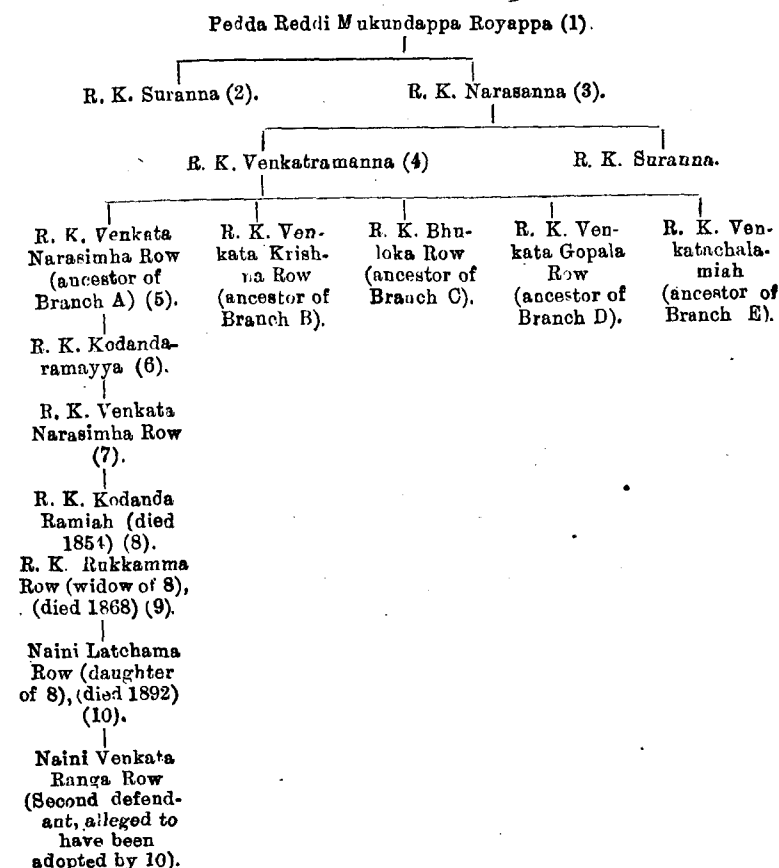
APPEALS against decrees of F. A. COLEBRIDGE, District Judge of Kistna, in Original Suits Nos. 56 and 45 of 1895.

* Appeals Nos. 426 and 427 of 1914.

These were appeals filed against two decrees dismissing two suits filed in 1893 and 1895 for the recovery of the zamindari of Munagala, situated in the Kistna district, from the second defendant who was in possession claiming to be the duly adopted son of the daughter of the last zamindar, who died in 1854 and who represented the eldest branch, marked A, in the geneological tree set out below. The plaintiffs were the representatives of branches B, C, D and E.

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Geneological Tree.



From the earliest times there were Reddi rulers in the Munagala Zamindari who were recognized as chiefs. On the death of Garlapati Desai, in 1693, he left a son's widow and she not being able to discharge the duties of a chief made over the

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estate that still remained to her brother Keesara Mukundappa, and he with his other brother purchased back the rest of the estate that had passed to a third party. The estate was thus reunited, and Mukundappa was apparently recognized as chief, for in 1725 he received an order to appear with his troops to help Aurengzeb's General to suppress a revolting chief. After his death the various persons marked (2), (3), (4), (5), (6), (7) and (8) in the geneological tree, were the successive holders of the zamindari. The eighth Zamindar, R. K. Kodanda Ramiah, died in 1854, leaving a widow, R. K. Rukkamma Row who from that date enjoyed the zamindari, as his heir, until her death in 1868. She left a daughter, Naini Latchama Row, who enjoyed the zamindari as the heir of her father from 1868 until her death in March 1892. On her death the present zamindar N. Venkata Ranga Row, the second defendant in these suits, who was Latchama's adopted son from the Nayani family of Hyderabad, succeeded and the Court of Wards held the estate for him till 1900.

The plaintiffs in the first suit filed in 1893, who were almost all the then living male descendants of the four junior branches B, C, D and E alleged that the zamindari was the undivided joint family property of all the five branches; that from the earliest times the zamindari was kept joint for the sake of convenience, e.g., for paying the heavy debts on the zamindari; that one member of the family, who was called the zamindar, was allowed to manage the estate on behalf of all and distribute the rents and profits thereof amongst the members of the various branches; that the second defendant's alleged adoption was neither true in fact, nor valid in law; that the alleged oral and written authorities to adopt were false; that the registration of the written authority was for various reasons invalid and illegal, and that on the death of Latchama Row, his alleged adoptive mother, the second defendant illegally trespassed on the zamindari. As regards the registration of the authority to adopt, the plaintiffs contended that it was brought into British India more than four months before the date of presentation for registration; that it was presented for registration by one legally incompetent to present it (viz., the natural father of the second defendant) and that it was registered mala fide by the Sub-Registrar in spite of the

objections of the plaintiffs and without giving them any opportunity to oppose the registration.

The second defendant pleaded *inter alia* that the zamindari was impartible; that it descended according to the custom of primogeniture; that every zamindar enjoyed it as absolute owner without recognizing any joint ownership of the members of the four junior branches; that the distribution of the rents and profits, if any, was not in recognition of any right of those branches to joint ownership, but was only in lieu of maintenance given to them as junior members; that even if the zamindari was partible before 1854, the claim of the plaintiffs was barred by limitation owing to its enjoyment for more than the statutory period by the widow and daughter of the eighth zamindar as his heirs and to the exclusion of the members of the four junior branches: and that he was entitled to the zamindari as the duly adopted son of the daughter of the eighth zamindar. As regards the authority to adopt, he pleaded that the oral authority was true, that the written authority, dated 1875, was genuine, that it was brought into British India within four months of the presentation for registration, that it was properly presented and registered, and that being executed in Nizam's Dominions by a domiciled subject of that State its registration was not necessary to validate his adoption. At a late stage of the suit, the plaintiffs filed an additional written statement claiming, not as members of an undivided family, but on the footing that the joint family had become divided in status and that in law all the family properties including the zamindari had been all along in their possession as tenants-in-common.

The second suit in 1895 was on the footing that the zamindari was impartible. The suit was filed by some of the plaintiffs in the earlier suit who claimed to be the next reversioners to the eighth zamindar. They alleged that the second defendant trespassed on the zamindari without any legal right. Their other contentions and the pleas of the second defendant in this suit were the same as in the earlier suit. Rejecting, as not proved, the oral authority to adopt, but upholding the other pleas of the second defendant the District Judge dismissed both the suits. Thereupon the plaintiffs preferred these two appeals.

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K. Srinivasa Ayyangar, P. Narayanamurti, S. Gopalaswami Ayyangar, A. Krishnaswami Ayyar and S. Varada Acharys for appellants.

The Hon'ble the Advocate-General and the Hon'ble T. Ranga Achariyar for respondents.

K. Srinivasa Ayyangar for appellants.—The oral authority to adopt is false and the written authority is a forgery. The registration of this authority is invalid for various reasons and it is inadmissible in evidence under section 49 of the Indian Registration Act. This authority to adopt was brought into British India from the Nizam's Dominions, where it is alleged to have been executed, more than four months before it was presented for registration in British India. The Sub-Registrar knew this and yet registered it mala fide on receipt of an illegal gratification. Registration without sending for the party who had, as in this case, given notice of his objection is invalid. Even if there is no opposition the Sub-Registrar can register only, if after notification by him, e.g., in the District Gazette, he finds that there is no opposition: see sections 69 and 35 of the Act. Acceptance for registration is equivalent to registration: *Gangadara v. Sambasiva*(1). The words 'so executed' in section 25 (a) mean that the document is executed out of British India and brought into British India within four months of the date of presentation. The 'satisfaction of the Sub-Registrar' in respect of these two requirements can be reviewed by Courts; *Smith v. The Queen*(2), *DeVerteuil v. Knaggs*(3), *Board of Education v. Rice*(4), *R. (Bryson) v. Lisnaskea P.L.G.*(5). Moreover, this authority was not presented for registration by a competent person. An authority to adopt can be presented for registration only by the donor or the donee of the power, or by the adopted boy and by no one else, such as an agent, or the natural father of the adopted boy as in this case, though all other documents can be presented by agents or by legal representatives. The absence of a provision enabling agents, etc., to present authority to adopt is not a case of inadvertent omission in the Act. The reason is, that if

such power is given in respect of such important documents, there would be a likelihood of their forging them.

Where a power is conferred by statute on certain persons only, it cannot be exercised by others. A presentation by an agent under a power-of-attorney not executed in the manner indicated by the Registration Act has been held to invalidate the registration of the document, though in the course of the inquiry by the Sub-Registrar the executant came and admitted the execution: *Jambu Prasad v. Muhammad Aftab Ali Khan*(1). It has been held in England that there are several acts which can be done only by infants and not by their guardians; see Simpson on Infants, page 34, Farwell on Powers, 3rd edition, page 133, *In re S.S.B.*(2), and *Arthington v. Coverly*(3). Even if a guardian can present it, the natural father of the boy was not the guardian, though he was the nearest dayadi and its registration is therefore bad: *Kristo Kisor Neoghy v. Kadermoye Dossee*(4).

P. Narayanamurti, for appellant, followed and argued that as a fact the defendant was not adopted.

A. Krishnaswami Ayyar, for appellant, next argued that the zamindari was partible, that even if it was once impartible, it became partible by subsequent agreement, and could not become impartible again. The suit was not barred by adverse possession, as the plaintiffs were always in receipt of their share of the family income as tenants-in-common and there was no exclusion. It is immaterial whether article 127 or 144 of the Limitation Act applies. See *Kumarappa Chettiar v. Saminatha Chettiar*(5), *Corea v. Appuhamy*(6), *Hardit Singh v. Gurumukh Singh*(7) and *Muttunayagam v. Brito*(8). Until partition is actually effected, receipt of maintenance is an effective mode of enjoyment of joint family property: *Rama Rao v. Rajah of Pittapur*(9), *Sri Raja Satrucharla Jagannadha Razu v. Sri Raja Satrucharla Ramabhadra Razu*(10) confirming *Jaganath v. Ramabhadra*(11). The difference in language in the third column of

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(1) (1915) I.L.R., 37 All., 49 (P.C.). (2) [1906] 1 Ch., 712.

(3) (1733) 2 Eq. Cas. Abr. 518, Case No. 3.

(4) (1878) 2 C.L.R., 583.

(5) (1919) I.L.R., 42 Mad., 481.

(6) [1912] A.C., 230, 231.

(7) (1919) 9 L.W., 123 (P.C.).

(8) [1918] A.C., 895, at 900.

(9) (1918) I.L.R., 41 Mad., 778 (P.C.).

(10) (1891) I.L.R., 14 Mad., 237 (P.C.).

(11) (1888) I.L.R., 11 Mad., 880, at 888.

(1) (1917) I.L.R., 40 Mad., 759.

(2) (1878) 8 App. Cas., 614 (P.C.).

(3) [1918] A.C., 557.

(4) [1911] A.C., 179.

(5) [1918] 2 Ir. R., 258.

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article 127 of the Limitation Act of 1877, and that of article 13 (1) of section 1 of the Limitation Act, 1859, is in my favour: *Sri Raja Lakshmi Devi Garu v. Sri Raja Surya Narayana Dhatarazu Bahadur Garu*(1) and *Lachnun Singh v. Shumshere Singh*(2).

Evidence to show that the zamindari was partible was next referred to.

Hon'ble Mr. T. Ranga Achariyar for the respondent.—On the footing that the estate is impartible, even if the defendant is not the adopted son the sole plaintiff in the later suit cannot succeed as there are heirs nearer to him. If the estate was partible then, Ruckamma and her daughter Lutchama had adverse possession for more than twelve years to the exclusion of everybody else. Each enjoyed it as the heir of Kothandaramayya, treating it as his exclusive property. The second defendant was as a fact adopted. The authority to adopt is genuine and it was brought into British India only on the 22nd April 1892. Evidence on the above points was referred to.

The Hon'ble the Advocate-General, for the respondent, continued.—Article 127 will not apply as these are not suits by some members of a joint Hindu family against others, but are suits by persons claiming to be tenants-in-common against a person in possession claiming to be sole owner. Either article 132 or 144 will apply and the suits are barred whichever article applies. Payment of maintenance cannot keep alive co-ownership if any; it is rather evidence against any such claim: *Raghunath Bali v. Maharaj Bali*(3) and *Appasami Odayar v. Subramanya Odayar*(4). Nature of intention is essential to determine ouster—see Freeman on Cotenancy, para. 223. This authority to adopt does not require registration and is admissible in evidence without it. The Indian Registration Act affects only documents executed in British India and such other documents executed outside British India as relate to lands in British India. The legislature in India has power to legislate only for British India and not for Native States. 'Authority to adopt' in section 17 of the Act, means only

(1) (1897) I.L.R., 20 Mad., 256 (P.C.). (2) (1874) 2 I.A., 58.
(3) (1885) I.L.R., 11 Cal., 777 (P.C.) at 783, 784.
(4) (1889) I.L.R., 12 Mad., 26 (P.C.).

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authority executed in British India. Other authorities to adopt do not come within clauses (a) to (d) of section 17 especially those executed by persons domiciled out of British India. Sections 17, 25 and 49 of the Act should be read together. The Registration Act is not merely a law of the *forum* but it is also a substantive law; section 49 does not only prohibit evidence being given of unregistered documents which require registration, but avoids the deeds themselves. See *Javanmal Jitmal v. Muktabai*(1), *Ram Coomar Singh v. Kishari*(2) and *Bristow v. Sequerville*(3). Supposing the registration law is only a law of the *forum* it ought not to be construed in such a way as to make the Act ultra vires. The Law of Registration is *lex loci* and not *lex fori*. See *Adams v. Clutterbuck*(4) and *Hicks v. Powell*(5) (a decision on section 49 of the Indian Registration Act), *Leroux v. Brown*(6), *Dulaney v. Merry and Son*(7), *Swift v. Attorney-General for Ireland*(8), *In re Grey's Trusts*, *Grey v. Stamford*(9), and Maxwell on Statutes, 5th Edition, page 230. Moreover, an authority to adopt does not affect immoveable property but creates only a personal relation. See *In re Goodman's Trusts*(10) which gives the distinction between status and transaction affecting immoveable property.

If by adoption the defendant acquired the status of a son to some one in Hyderabad the same must be recognized in British India also, for purposes of succession, etc. The defendant was a resident of Hyderabad like his adoptive father. The law of Hyderabad does not require registration of authority to adopt. Though, according to the law of England the law of domicile applies to all other matters except succession to immoveable property, there is no distinction in Hindu Law of succession between personal and real property. As soon as defendant was adopted, he became the daughter's son of the last male owner of the Munagala zamindari, and as such became entitled to succeed to all the moveable and immoveable property of the zamindar in

(1) (1890) I.L.R., 14 Bom., 516, 519.
(2) (1883) I.L.R., 9 Cal., 68. (3) (1850) 5 Ex., 275; 155 E.R., 118.
(4) (1883) 10 Q.B.D., 403, 406. (5) (1869) 4 Ch. App., 741 at 746.
(6) (1852) 12 C.B., 801; 138 E.R., 1119.
(7) [1901] 1 Q.B., 536.
(8) [1912] A.C., 276. (9) [1892] 3 Ch., 88.
(10) (1881) 17 Ch. D., 266, 291, 299.

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British India; see Dicey's Conflict of Laws, 2nd Edition, page 466, Westlake, 4th Edition, section 178, Foote's International Law, 4th Edition, pages 102 and 106, *Gurdial Singh v. Rajah of Faridkot*(1), *Abd-ul-Messih v. Farra*(2), *In re Wilkinson's Settlement*, *Butler v. Wilkinson*(3), *Shaw v. Gould*(4). Moreover, according to the law of Hyderabad then prevailing, no authority was required to enable a Sudra widow to adopt. Several judgments and two Full Bench decisions of the Hyderabad Court have been filed to prove this. The parties in the case are Telugu Sudras. Experts have also deposed to this being the law in Hyderabad. Foreign law is a question of fact. If the law at present, i.e., after the appeal was filed, is different, it is only additional evidence of the fact and as such is inadmissible in evidence according to Order XLI, rule 27, Civil Procedure Code. There is no lacuna in the evidence. See *Kessowji Issur v. G.I.P. Railway Company*(5). A guardian of a minor can present a deed of authority for registration on his behalf. The document does not confer a power on the minor but it gives him a right; see *Venkatappayya v. Annapuranamma*(6), *Tooth v. Power*(7), *Jadu Lal Sahu v. Janki Koer*(8), *Hearle v. Greenbank*(9), definition of 'guardian' in section 4 (2) of the Guardian and Wards Act, Simpson on Infants, pages 74-75, *Veeramma v. Abbiah*(10), *Nirvanaya v. Nirvanaya*(11). The natural father is a person *in loco parentis* who can do all acts for the benefit of the minor. *Nathuram v. Shoma Chhagan*(12), *Ganguprasad Bhattacharjee v. Hara Kant Choudhuri*(13), *Sitha Boi v. Radha Boi*(14). Even if the registration was not within four months it is only an irregularity and it does not invalidate the registration. Section 40 has to be read with section 32; see definition of 'representative' in the Registration Act. So far as the donor of the authority is concerned he must present it within four months. But so far as the donee of the power and the son to be adopted are concerned the right to present comes

- (1) (1895) I.L.R., 22 Cal. 222 (P.C.), at 238.
 (2) (1888) 13 App. Cas., 431, 437. (3) [1917] 1 Ch., 620.
 (4) (1868) L.R., 3 H.L., 55, 70. (5) (1907) I.L.R., 31 Bom., 881 (P.C.).
 (6) Appeal 200 of 1908 (unreported). (7) [1891] A.C., 284.
 (8) (1912) I.L.R., 39 Cal., 915 (P.C.), 920, 923.
 (9) (1749) 1 Ves. Sen., 268, 301. (10) (1895) I.L.R., 18 Mad., 99, 109.
 (11) (1885) I.L.R., 9 Bom., 365. (12) (1890) I.L.R., 14 Bom., 562.
 (13) (1910) 15 C.W.N., 558. (14) (1919) 36 M.L.J., 189.

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only after the death of the donor, because it is authority which can take effect only after the death of the donor. That is the effect of section 23; see section 41 (2) and the word 'shall' in section 41 (1). Sections 34 and 35 are made subject to section 41. They deal only with time for appearance of executants. Compare sections 23 and 26 of the Registration Act of 1866. The time limit is imposed only on persons who have a right to present but not on persons who get their rights later. *Arunmugam Pillai v. Arunachallam Pillai*(1). This provision as to authority to adopt was introduced for the first time only in the Act of 1871.

The grounds on which a Sub-Registrar becomes satisfied so as to register a document are not open to review by Courts: *Gokulbhoy v. Tullockchand*(2), affirmed on appeal in *Tullockchand v. Gokulbhoy*(3), *Abdool Hoosein v. Goolam Hoesin*(4), *Durga Singh v. Mathura Das*(5); cf. *The Secretary of State for India v. Mahadeva Sastrigal*(6). No enquiry before he becomes satisfied is contemplated by the Act. No such enquiry is necessary. The inquiry, if any, may even be *ex parte*. The other side is not entitled to notice or to cross-examine any witnesses: *Gangadara v. Sambasiva*(7) does not lay down that acceptance of a document for registration is equal to registering it: see Rule 27 framed under the Act. Among the objections that can be raised to registering an authority to adopt, presentation after four months is not one. Requisites as to time are only directory and not mandatory. Section 25 is not imperative. Defects in registration do not invalidate it but are cured by section 87. *Sah Mukhun Lall Panday v. Sah Koondun Lall*(8), *Muhammad Ewaz v. Birj Lal*(9). The cases of *Jambu Prasad v. Muhammad Aftab Ali Khan*(10) and *Mujib-un-nissa v. Abdur Rahim*(11) do not conflict with the above view as they deal with sections 32 and 34 whose provisions are imperative and mandatory.

Evidence as to whether the zamindari was partible or impartible was then referred to.

- (1) (1897) I.L.R., 20 Mad., 254. (2) (1897) I.L.R., 21 Bom., 69.
 (3) (1897) I.L.R., 21 Bom., 724. (4) (1906) I.L.R., 30 Bom., 304, 330.
 (5) (1884) I.L.R., 6 All., 460. (6) (1917) I.L.R., 40 Mad., 58 (F.B.).
 (7) (1917) I.L.R., 40 Mad., 759.
 (8) (1875) 2 J.A., 210. (9) (1877) I.L.R., 1 All., 465 (P.C.).
 (10) (1915) I.L.R., 37 All., 49. (11) (1901) I.L.R., 23 All., 233 (P.C.).

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A. Krishnaswami Ayyar, for the appellant, in reply.—The authority to adopt requires registration. The Registration Act applies to such documents executed even by domiciled subjects of Native States, sections 17 and 49 do not contain any saving clauses in respect of such instruments; see also section 26. The Registration Act enacts only a rule of evidence. *Lex fori* applies. The Statute of Frauds which though it did not contain any express provision that it applied to instruments executed outside the British Isles was held to apply to a contract executed in France by two foreigners: see *Leroux v. Brown*(1), *Hansen v. Dixon*(2), *Rochevoucauld v. Boustead*(3), *Royal Exchange Assurance Corporation v. Sjørfor-sakrings Aktiebolaget Vega*(4), *The Kronprinzessin Victoria*(5), *The Consul Corfitzon*(6), *Ertel Bieber and Co. v. Rio Tinto Company*(7), Dicey's Conflict of Laws, page 710, Westlake, page 296, *Finlay v. Finlay and Rudall*(8), *Ex parte Melbourne: In re Melbourne*(9). He distinguished *Dulaney v. Merry and Son*(10), *Hicks v. Powell*(11). Even if the Registration Act enacts a rule of substantive law, it does not cease to be a law enacting a rule of evidence also; cf. *Bristow v. Sequeville*(12). If the law of Hyderabad requires an authority to adopt and if the defendants' claims in British India have been adopted in Hyderabad he has to prove the authority in the only manner which our Courts will recognize. It is not correct to say that status recognized in one State must be recognized everywhere else. The law of domicile does not apply to persons who are governed by their personal law which is the same wherever they reside. This is a case of succession to moveable and immoveable properties of one who was domiciled in and who died in British India. In such a case the succession to moveables is governed by the law of domicile of the deceased; and as regards immoveables the law of the place where they are situated governs; see Storey's Conflict of Laws, 8th Edition, page 147 (footnote) and *Atkinson v. Anderson*(13).

(1) (1852) 12 C.B., 801; 138 E.R., 1119.

(2) (1907) 96 L.T., 32.

(3) [1897] 1 Ch., 198, at 207.

(4) [1901] 2 K.B., 567, at 575

(5) [1919] A.C., 261.

(6) [1917] A.C., 550, at 555.

(7) [1918] A.C., 280, at 302.

(8) (1862) 31 L.J. (P. & M.), 149.

(9) (1870) 6 Ch. App., 64.

(10) [1901] 1 Q.B., 540.

(11) (1889) 4 Ch. App., 741.

(12) (1850) 5 Ex., 275; 155 E.R., 118.

(13) (1882) 21 Ch.D., 100.

Section 41 of the Registration Act has nothing to do with time limit for presentation; for if so understood it will lead to the conclusion that even a testator must present his will within four months, which conclusion is contradicted by section 27. Section 41 (1) deals only with the procedure laid down in sections 34 and 35. The history of the registration law as to wills and authorities to adopt shows this.

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WALLIS, C.J.—[His Lordship briefly stated the facts, discussed the evidence, and held that the Zamindari was impartible; and that on the death of the last Zamindar in 1854, his widow was put into possession according to the opinion of the pundits, that the next heir of a person divided from his collaterals was his widow. His Lordship then continued:]

Now the succession of the widow of the late Zamindar and of her daughter after her was a clear denial of the claim of the junior branches that the estate was either joint family property or owned by the family as tenants-in-common. The possession of the daughter from 1868 onwards was in my opinion clearly adverse to the claim of the junior branches that it was joint family property. Their case now is that the different branches had become divided by the suit of 1857 or earlier, and if this is so, they are not in my opinion governed by article 127 which covers suits by a person excluded from joint family property to enforce a right to a share therein. This article in my opinion applies to suits by one or more members of a joint family against other members to enforce a right to share therein against other co-parceners, and does not apply to a suit brought after partition by some members of the family against others when they have become tenants-in-common and the exclusion is therefore not from joint family property within the meaning of the article. Neither condition is to be found here. The suit is not against another member of the joint family but against the second defendant claiming through his mother as heir to the last Zamindar, and the plaintiff does not now claim to be entitled to a partition as a member of a joint family, but as one of several tenants-in-common. If the suit can be regarded as brought by the plaintiff as the heir of one of the tenants-in-common against the second and other defendants as heirs of the other tenants-in-

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common, then the suit must be governed by article 144. In this view the possession of the Zamindar's daughter from 1868 to 1892 must, in my opinion, be regarded as adverse to and exclusive of the claims of the other branches of the family, and adverse to them from the first within the meaning of article 144. She did not enter as a tenant-in-common with the members of the junior branches, but as heiress to her father and entitled as such to succeed to the impartible zamindari. The case of the junior branches from 1868 to 1882 was, not that the zamindari was partible, but that the succession went not to the widow and daughter of the late Zamindar but to the senior dayadi; and it was only in 1882 that they altered their position and renewed the claim that the estate was partible, a position they varied during the course of the suit by alleging that it was not partible joint family property, but as property enjoyed after partition by the family as tenants-in-common. The second defendant's mother did not enter as heiress to one of several tenants-in-common but notoriously as heiress to her father, and her possession was never that of one tenant-in-common holding on behalf of herself and the other tenants-in-common but adverse from the first to the claims of the junior members as tenants-in-common, and none the less so because of irregular payments made to them for maintenance. Such payments in those days having regard to the notions then prevailing in Southern India as to the nature of impartible estates and the interests therein of the junior members of the family, were attributable to their position as junior members of the family and quite consistent with the claim to hold the estate as an impartible zamindari adversely to the rest of the family. For the foregoing reasons I see no reason to differ from the conclusion of the District Judge that the estate is impartible and that the suits for partition are barred by limitation.

These findings do not however dispose of the case, because the plaintiff in the second suit is the nearest dayadi and the nearest heir of the late zamindar, if the second defendant's adoption be not established, and he would be consequently entitled to succeed on the death of the zamindar's daughter, if his rights have not become barred by limitation. Now the rights of this plaintiff and the other members of the family as co-parceners or tenants-in-

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common or as preferential heirs to the zamindar's widow and daughter have in my opinion become barred and extinguished under the Limitation Act, but the widow and daughter having taken as preferential heirs to the other members of the family, I do not think the rights of the other members of the family to succeed on failure of the daughter's line have been affected. It is therefore necessary to consider whether the second defendant's adoption is established. There is really no dispute about the factum of the adoption, and the only question is whether the authority to adopt is duly established. The first question which arises is, whether the provision in section 17 of the Indian Registration Act, which requires authorities to adopt not contained in a will to be registered, has any application to an authority to adopt given in Hyderabad, outside British India, by a subject of that State domiciled there. If not, such an authority is not a 'document required by section 17 to be registered' within the meaning of section 49 of the Act, and is not affected by the provisions of that section. Now the limits of legislative authority are territorial, and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. *Prima facie*, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects. The authorities on the subject of the territorial effect of statutes are collected in the late Mr. Craies' Statute Law, Second Edition, pages 398—425, and I will only refer to *Cooke v. Charles A. Vogeler Company*(1), *Dulaney v. Merry & Son*(2) and *Swift v. Attorney-General for Ireland*(3) where it was held that an Irish statute enacting that, where one of the parties to a marriage was a Protestant, the marriage if celebrated in a particular manner, viz., 'by a Popish priest' should be null and void, had no application to the marriage so celebrated in Austria of a Protestant domiciled in Ireland. The Indian Legislature might of course enact that an authority to adopt wherever and by whomsoever made should not be recognized in India for any purpose unless it had been registered in British India pursuant to the provisions of the Indian Registration Act, and we should be bound to give effect

(1) [1901] A.O., 102.

(2) [1901] 1 Q.B., 536.

(3) [1912] A.C., 276.

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to that provision, as effect was given in the *Sussex Peerage Case*(1) to the provision of the Royal Marriage Act, that no descendant of the body of George II should be capable of contracting matrimony without the previous consent of His Majesty and that any marriage of any such descendant without such consent first had and obtained shall be null and void. There is however a strong presumption against attributing to it any such intention.

The instruments of which registration is compulsory under the Act are enumerated in section 17, and the effects of failure to register are to be found in section 49. The documents which were required to be registered by the earliest Registration Acts all related to immoveable property, meaning of course immoveable property situated in British India; and it may be taken that the legislature has sufficiently manifested its intention that none of the enumerated documents affecting immoveable property situated in British India should be valid unless so registered, even if executed outside British India, as held in *Hicks v. Powell*(2), more especially as section 26 provides for the registration of such documents at any time within four months after their first arrival in British India.

Different considerations, however, apply to the provisions of section 17 (3), which were first enacted in 1871, that 'authorities to adopt a son executed after the first day of January 1872 and not conferred by a will, shall also be registered.' That is a provision affecting status. The Indian Legislature has no authority to legislate as to the status of the subjects of Native States domiciled in such States and this provision cannot in my opinion on the well established rules of construction be read as extending to an authority to adopt conferred in Hyderabad by a subject of that State domiciled there, whose only connexion with British India was that his wife owned property there. Questions of the validity of adoptions made outside British India by persons who are not British subjects may arise in our Courts, not only in connexion with claims to succeed to immoveable property situated in British India, but also in other ways too numerous to mention, and it would in my opinion be

(1) (1844) 11 Cl. & F., 85.

(2) (1869) 4 Ch., App., 741.

altogether opposed to the accepted canons of construction to attribute to the Indian Legislature when it inserted in the Registration Act what is now section 17(3) an intention to interfere in any way with the question of such adoptions which is a matter outside its competence. For these reasons, I am of opinion that the provisions of the Indian Registration Act did not apply to the authority to adopt the second defendant; and that it is unnecessary to consider the further question whether these provisions were in fact complied with.

On the supposition that they were applicable much manifestly false evidence has been adduced on behalf of the plaintiffs to show that the authority to adopt was taken to Masulipatam and shown to the Collector shortly after its execution, as well as some not very satisfactory evidence on behalf of the second defendant, which the District Judge has accepted, that, though the donee of the authority resided almost continuously in British India after her husband's death, the authority to adopt remained in the Nizam's dominions until shortly before the Registration proceedings. I do not consider it necessary to decide this question, or the questions as to the construction of the Registration Act which arise if it be held applicable to this authority to adopt. As regards these questions of construction, I am inclined to agree with the conclusions of my learned brother, whose judgment I have had the advantage of reading.

I also agree with my learned brother for the reasons given by him that there is no sufficient reason for differing from the findings of the District Judge that the authority was in fact given and the adoption in fact made.

The appeals are dismissed with costs. The case is one of great complexity and under rule 41 of the Appellate Side Rules, we grant a special fee of Rs. 3,000 to cover the vakil's fees in both suits.

SADASIVA AYYAR, J.—[His Lordship dealt with the evidence at length and held that the Zamindari was impartible, had descended by lineal primogeniture and that it was the separate property of Rukkamma's husband at his death. His Lordship also held that Rukkamma and her daughter enjoyed the Zamindari for as long as 38 years continuously, their possession being statedly adverse and exclusive and that it created a bar which

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destroyed the rights of Kodandaramayya's divided agnates and vested in Rukkamma and her daughter prescriptive rights in the estate.

His Lordship next examined the evidence regarding the oral authority and the genuineness of the written authority to adopt and came to the conclusion that the oral authority was not proved and that the written authority was genuine; and further held that it came into British India only on 22nd April 1892, and was presented for registration on 20th August 1892. His Lordship then continued :—]

On this finding it is unnecessary to consider the other legal questions argued on both sides, except the question of the validity of the presentment for registration by the defendant's natural father, assuming that registration was necessary to make it admissible and to give it validity. On this last question, namely, whether section 17, clause (3), applies at all to a document executed out of British India by persons domiciled out of British India, I am inclined to agree with the contention of the learned Advocate-General, that section 17 of the Registration Act which makes compulsorily registrable certain documents (compulsorily registrable documents being under section 49 incapable of affecting immoveable property, or conferring power to adopt, or of being received in evidence unless so registered) was intended to deal only (a) with documents relating to immoveable property situate in British India (clause (1) of section 17) and (b) with authorities to adopt executed by a person domiciled in British India (clause (3)). As regards the concession given in section 26 to have certain documents, including an authority to adopt executed out of British India, presented for registration within four months after it is brought into British India, it was, in my opinion, intended to meet the case of a person domiciled in British India travelling abroad (in Europe or America, etc., or even in a Native State on a pilgrimage) and suddenly finding himself in a bad state of health, executing an authority to adopt in favour of his wife to be used by her. The observations in some English cases (*Cooke v. Charles A. Vogeler Company*(1), *Dulaney v. Merry & Son*(2) and *Swift v. Attorney-General for Ireland*(3))

(1) [1901] A.C., 102.

(2) [1901] 1 Q.B., 536.

(3) [1912] A.C., 276.

seem to me to establish that the legislature could not have intended to make the validity of a power to adopt executed in a Native State, by a person domiciled within the Native State, depend upon its being registered in British India, or even its admissibility in evidence without registration depend upon its having been registered in British India within four months of its arrival therein. I shall take a case to illustrate what I mean. *A*, domiciled in the Nizam's territory and holding large properties therein and owning no property in British India, gives his wife authority to adopt in 1875 and dies at once. His wife adopts accordingly a son *B* in 1875. Two years afterwards she starts on a pilgrimage to Benares, Rāmēswaram and other places, and carries with her the box containing all her papers including the authority to adopt and returns to her native place after the pilgrimage in 1880. Then in 1900 her husband's brother *C*, who had settled in Madras as a trader in 1885, dies in Madras leaving no nearer heir than his brother's adopted son *B* residing in the Nizam's territory. Can it be argued that the authority to adopt given by *A* (which validates the adoption of *B* under the Hindu Law) cannot be proved and is not valid because it was in the adoptive mother's luggage box, forming part of her luggage during her pilgrimages in 1877, and had not been registered in British India within four months of that date? Is a person to lose his right as heir because he could not prophesy that 23 years after his adoptive father gave his adoptive mother authority to adopt in the Nizam's dominions, he might have to prove and establish the adoption in a British Indian Court? I think that if the status of a person as an adopted son has been established as valid in the domicile of the adoptive parents, that adoption must be held valid according to the principles of International Law in all other places where there is no express statute law to the contrary effect. In Maxwell on Interpretation of Statutes, Chapter VI, the whole question is considered. I shall quote a few passages therefrom. A State "has a right to impose its legislation on its subjects—natural or naturalized in every part of the world"; "on such matters as personal status or capacity it is understood always to do so"; "in the absence of an intention clearly expressed or to be inferred either from its language or from the object or subject matter, or history of the enactment,

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the presumption is that Parliament does not design its statutes to operate on them" (that is, even on its own subjects) "beyond the territorial limits of the United Kingdom. They are therefore to be read usually as if words to that effect had been inserted in them." "Every statute should be so interpreted and applied as not to be inconsistent with the comity of nations or with the established rules of International Law. If therefore the legislature intend to exceed its jurisdiction, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it. All general terms must be narrowed in construction to avoid it." "In general, statutes must be understood as applying to *those only who owe obedience to the legislature which enacts them* . . . that is, its own subjects. . . . but that as regards aliens resident abroad, the legislature has no concern to protect their interests, *any more than it has a legitimate power to control their rights.*"

I shall now deal with the remaining contentions on the question of the validity of the registration. I am unable to agree with the learned Advocate-General that the plain words of section 23, that all documents other than wills ought to be presented for registration to the proper officer within four months subject to section 26 do not apply to authorities to adopt and that the language of section 41, clause (2), overrides the language of section 23 and that if the conditions mentioned in section 41, clause (2) are satisfied, the document ought to be registered without reference to the time limits mentioned in sections 23 and 26. The terms of section 27 which *expressly* state that a *will* may be presented for registration at any time, clearly preclude the contention that there is a right to present an authority to adopt also for registration at any time. The reasonable meaning of section 41, clause (2) is that, provided the other conditions mentioned in parts 4 and 6 are satisfied, an authority to adopt shall be registered if the registering officer is satisfied in respect of the three *additional* conditions mentioned in sub-clauses *a, b* and *c* of clause (2) of section 41.

I shall now come to the contention on the plaintiff's side about presentment. It was argued, that as section 40 only allows the adopted son to present, nobody could present it for him, even if he is a minor. In fact it was argued that even if the adopted son is an infant two years old, it was his hand that

ought to present the document to the Sub-Registrar for registration. This would reduce to an absurdity, the provisions of the Registration Act giving a right to present documents for registration to persons claiming under documents executed in favour of minors or other persons under disability, if the obligors or donors neglect or refuse to present them. Some English cases were quoted as regards the presentation to livings by minors but I must frankly admit that I was unable to follow the argument. I referred to Simpson on Infants (pages 73 and 74, 3rd Ed.) but I find that the guardian's concurrence is necessary when a minor presents to a living—no doubt, the mere act of making a mark and putting a seal by the hand of an infant *guided by the guardian* was held valid in an old case, the ground being that "there can be no inconvenience because the Bishop is to judge of the qualification of the clerk presented." I do not think that there is any analogy between presenting a document for registration and presentation to a living under the peculiar historical and religious circumstances connected with English Equity and Ecclesiastical law.

A guardian is a trustee (see section 20 of the Guardians and Wards Act) and he is entitled to exercise, *for the benefit of the minor*, all powers and do all acts which the minor could do if he were a major and such acts have the same legal validity as they would have if the minor did it after he attained majority. (See Trevelyan on Minors, pages 48, 49 and 139 as to guardianship being a trust and the guardian *representing* the minor fully.) Presentation of documents for registration by guardians on behalf of minors has always been allowed by registration rules and officers as a matter of practice and it has been held to be valid in Appeal No. 200 of 1918 in this Court decided by AYLING and NARIEB, JJ.; the donee of an authority to adopt (the widow of the donor) was a minor and her guardian's presentation for registration was held to be valid.

Under section 35 (1) (c) of the Registration Act, where an executant is dead, the representative can admit execution. But if the heir is a minor, "his guardian should appear on his behalf" according to rule 472 of the Registration Department Rules.

So also rule 493 says in regard to a question analogous to the one before us,

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"Under the general principle of law that a guardian may do all acts which are for the benefit of his ward, a will may be accepted for registration after the death of the testator from the guardian of a person claiming under it."

Another contention on the defendant's side was that section 87 of the Registration Act cures the defect of jurisdiction when a registering officer registers a document presented to him more than four months after its execution or after its arrival in British India, provided that the registering officer *bona fide* believed that it had been executed within four months or had been brought into British India within four months. Let us suppose a case in which the Sub-Registrar in good faith reads a document dated in January as dated in June and registers it in October. I do not think this is a mere irregularity which could be cured by section 87.

Next, it was argued that under Hindu Law the natural father of the boy after he had been adopted, ceases to be his natural guardian. Admitting that this is so, it has been held in a Bombay Case *Nirvanaya v. Nirvanaya*(1), that the natural father would continue to be the proper guardian of his son so far as it is necessary to take all steps to assert and establish his rights to be the heir of the adoptive father as against his rival claimants.

The next question is one of fact, namely, whether the defendant was actually adopted by Latchamma. I think the evidence is simply overwhelming on this point in defendant's favour.

If the adoption is true and if the authority to adopt is genuine and if it is a valid authority to adopt as I have found, the plaintiffs have no case. As the second defendant is the sole heir entitled to inherit the property as the daughter's son of Kothandaramiah No. II, the dismissal of both suits by the District Judge has to be upheld.

In the result, the appeals fail and should be dismissed with costs of the principal defendant.

N.B.

(1) (1885) I.L.R., 9 Bom., 365.

BOOKS AND PUBLICATIONS OF THE LEGISLATIVE DEPARTMENT OF THE GOVERNMENT OF INDIA FOR SALE.

*List of Books and Publications for Sale which are
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LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India, No. 8, Hastings Street, Calcutta.]

The prices of the General Acts, Local Codes, and Index to Enactments have been considerably reduced.

The British Enactments in force in Native States were issued by the Foreign Department.

[IN THE PRESS.]

The United Provinces Code.

[The amounts within parentheses where noted are for packing and postage.]

I.—THE INDIAN STATUTE-BOOK.

LOCAL CODES.

The Central Provinces Code, 4th Edn., 1918. Royal 8vo, cloth. Rs. 4 as. 8. (As. 8.)

II.—ACTS, REGULATIONS AND ORDINANCES OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL AS ORIGINALLY PASSED.

Acts (Unrepealed) of the Governor-General of India in Council from 1918 up to date.

Regulations made under the Statute 33 Vict., Cap. 3, from 1918 up to date.

Ordinances of the Governor-General of India from 1918 up to date.

[The above may be obtained separately. The price is noted on each.]

III.—REPRINTS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL, AS MODIFIED BY SUBSEQUENT LEGISLATION.

Act VIII of 1878 (Sea Customs), as modified up to 1st August 1918. Royal 8vo, stitched. Rs. 1 as. 6 (As. 2 p. 6.)

Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. As. 14 (As. 2.)

Act XXX of 1852 (Naturalization of Aliens), as modified up to 1st October 1919. Royal 8vo, stitched. As. 2 Pies 9 (Ann 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

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The prices of the General Acts, Local Codes, and Index to Enactments have been considerably reduced.

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- Act VII of 1884 (Indian Steamships), as modified up to 1st July 1890. As. 6. (Anna 1.)
- Act IX of 1884 (Legal Practitioners), as modified up to 30th June 1909. Anna 1 p. 6. (Anna 1.)
- Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February 1903. As. 2. (Anna 1.)
- Act VII of 1885 (Panch Mahal Laws), as modified up to 1st June 1911. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. As. 5. (Anna 1.)
- Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st May 1911. As. 6. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. As. 9. (As. 2.)
- Act XIII of 1886 (Indian Securities), as amended by Act XII of 1891. As. 2 p. 9. (Anna 1.)
- Act VII of 1887 (Suits Valuation), as modified up to 1st November 1904. Anna 1 p. 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. As. 6. (Anna 1.)
- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 8. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act III of 1888 (Police), as modified up to 1st January 1909. Anna 1 p. 9. (Anna 1.)
- Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. Anna 1 p. 9. (Anna 1.)
- Act II of 1889 (Measures of Length), with footnotes. Anna 1 p. 3. (Anna 1.)
- Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908. As. 6. (Anna 1.)
- Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. As. 2 p. 9. (Anna 1.)
- Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. As. 5 p. 6. (Anna 1.)
- Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. As. 3. (Anna 1.)
- Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. As. 2 p. 6. (Anna 1.)
- Act IX of 1890 (Indian Railways), as modified up to 1st June 1909. Re. 1 as. 2. (As. 2.)
- Act X of 1890 (Press and Registration of Books), as modified up to 1st December 1903. As. 2 p. 3. (Anna 1.)
- Act XI of 1890 (Prevention of Cruelty to Animals), as modified up to 15th September 1915. As. 2. (Anna 1.)
- Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October 1908. Anna 1 p. 6. (Anna 1.)
- Act X of 1891 (Indian Criminal Law Amendment), as modified up to 1st August 1909. Anna 1. (Anna 1.)
- Act XII of 1891 (Amending Act), showing the Schedules as modified up to 31st May 1902. As. 12. (Anna 1 p. 6.)
- Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897. Anna 1 p. 3. (Anna 1.)
- Act I of 1894 (Land Acquisition), with footnotes, brought down to 1st August 1903. As. 7. (Anna 1.)
- Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. As. 9. (As. 2.)
- Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898. As. 8. (Anna 1 p. 6.)
- Act XII of 1896 (Excise), as modified up to 1st March 1907. As. 8. (As. 2.)
- Act XX of 1896 (Sindh Incumbered Estates), as modified up to 1st June 1906. As. 4. (Anna 1.)
- Act IV of 1897 (Indian Fisheries), with footnotes. Anna 1 p. 9. (Anna 1.)
- Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. As. 2 p. 9. (Anna 1.)
- Act X of 1897 (General Clauses), as modified up to 1st February 1910. As. 5 p. 6. (Anna 1 p. 6.)
- Act III of 1898 (Lepers), as modified up to 1st September 1909. As. 4. (Anna 1.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. Rs. 3 as. 10. (As. 8.)
- Act II of 1899 (Indian Stamp), as modified up to 1st March 1907. Re. 1. (As. 2.)
- Act VIII of 1899 (Indian Petroleum), as modified up to 1st July 1911. As. 7 p. 6. (Anna 1 p. 6.)
- Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. As. 2 p. 9. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XVI of 1899 (Northern India Canal and Drainage), with footnotes. Anna 1. (Anna 1.)
 Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900. Anna 1. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st July 1910. As. 6 p. 6. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration), as modified up to 1st July 1910. Re. 1 as. 4. (As. 2.)
 Act II of 1902 [Cantonments (House-accommodation)], as modified up to 1st June 1910. As. 6 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. As. 5 p. 6. (Anna 1.)
 Act I of 1910 (Indian Press), with footnotes. As. 3 p. 6. (Anna 1.)
 Regulation III of 1818 (Bengal State Prisoners), as modified up to 1st August 1909. As. 2 p. 9. (Anna 1.)
 Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
 Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903. Anna 1 p. 9. (Anna 1.)
 Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894. As. 13. (As. 2.)
 Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911. As. 15. (As. 2.)
 Regulation VI of 1886 (Ajmer Rural Boards), as amended by Reg. 9 of 1893. As. 5 p. 6. (Anna 1.)
 Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899. As. 4 p. 9. (Anna 1.)
 Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April 1902. As. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Nagri. Pies 6. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Nagri. Pies 3. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Urdu. Pies 6. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Urdu. Pies 6. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Urdu. Pies 6. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Nagri. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chaukidari), as modified up to 1st November 1903. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XX of 1856 (Bengal Chaukidari), as modified up to 1st November 1903. In Nagri. As. 2 p. 6. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Nagri. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Nagri. Pies 3. (Anna 1.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Urdu. Re. 1 as. 5. (As. 5.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Nagri. Re. 1 as. 5. (As. 5.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Urdu. As. 2 p. 9. (Anna 1.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Nagri. As. 2 p. 9. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XXXI of 1863 (Official Gazettes), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXXI of 1863 (Official Gazettes), with footnotes. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Urdu. Anna 1. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Nagri. Anna 1. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Urdu. Pies 3. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Nagri. Pies 3. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Urdu. Pies 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Urdu. As. 11 p. 3. (As. 2.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Nagri. As. 11 p. 3. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Urdu. Pies 9. (Anna 1.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Nagri. Pies 9. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st December 1896. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. In Urdu. Anna 1. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraos), as modified up to 1st August 1908. In Nagri. Pies 6. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Urdu. As. 5 p. 9. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Nagri. As. 5 p. 6. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Nagri. Anna 1 p. 9. (Anna 1.)
- Act V of 1871 (Prisoners), as modified up to 1st May 1894. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Urdu. Pies 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Nagri. Pies 9. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (As. 2.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Nagri. As. 8. (As. 2.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st November 1904. In Urdu. As. 2 p. 6. (Anna 1 p. 6.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Urdu. As. 9 p. 9. (As. 3.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Nagri. As. 9 p. 9. (As. 3.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Urdu. As. 3. (Pies 9.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Nagri. As. 4. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1873 (Agra Village and Road Police). In Urdu. Anna 1. (Anna 1.)
- Act IX of 1874 (European Vagrancy). In Urdu. As. 2. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Urdu. Pies 3. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Nagri. Pies 3. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Urdu. As. 3 p. 9. (Anna 1 p. 6.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1876 (Oudh Laws). In Urdu. As. 2. (Anna 1.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Nagri. As. 4. (Anna 1 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Urdu. As. 2. (Anna 1.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Nagri. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Nagri. As. 2. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Nagri. As. 2 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XII of 1880 (Kazis), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1880 (Vaccination). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XIII of 1880 (Vaccination). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
 Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
 Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Urdu. As. 9. (Anna 1 p. 6.)
 Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Nagri. As. 9. (Anna 1 p. 6.)
 Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Urdu. As. 4. (Anna 1.)
 Act XXVI of 1881. (Negotiable Instruments), as modified up to 1st September 1909. In Nagri. As. 4. (Anna 1.)
 Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Urdu. As. 3 p. 6. (Anna 1.)
 Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. In Nagri. As. 3 p. 6. (Anna 1.)
 Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Urdu. As. 6 p. 9. (As. 2.)
 Act IV of 1882 (Transfer of Property), as modified up to 1st March 1900. In Nagri. As. 6 p. 9. (As. 2.)
 Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Urdu. Anna 1. (Anna 1.)
 Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. In Nagri. Anna 1. (Anna 1.)
 Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act IV of 1884 (Indian Explosives), as modified up to 1st September 1908. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Urdu. Pies 6. (Anna 1.)
 Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Nagri. Pies 6. (Anna 1.)
 Act II of 1885 [Negotiable Instruments (Amendment)]. In Urdu. Pies 9. (Anna 1.)
 Act III of 1885 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act X of 1885 [Oudh Estates (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
 Act XXI of 1885 [Madras Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act IV of 1886 [Indian Contract (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1886 (Births, Deaths and Marriages Registration). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 9. (Anna 1.)
 Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Urdu. As. 3 p. 3. (Anna 1.)
 Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Nagri. As. 3 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Nagri. Pies 9. (Anna 1.)
 Act VII of 1887 (Suits' Valuation). In Urdu. Pies 9. (Anna 1.)
 Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Urdu. As. 2 p. 3. (Anna 1.)
 Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Nagri. As. 2 p. 3. (Anna 1.)
 Act X of 1887 (Native Passenger Ships). In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Urdu. As. 3 p. 6. (Anna 1.)
 Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Nagri. As. 3 p. 9. (Anna 1.)
 Act XV of 1887 (Burma Military Police). In Urdu. Pies 9. (Anna 1.)
 Act XV of 1887 (Burma Military Police). In Nagri. Pies 9. (Anna 1.)
 Act XVIII of 1887 (Allahabad University). In Urdu. Anna 1. (Anna 1.)
 Act III of 1888 (Police), as modified up to 1st January 1909. In Urdu. Pies 3. (Anna 1.)
 Act III of 1888 (Police), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
 Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893. In Urdu. Pies 3. (Anna 1.)
 Act IV of 1888 (Indian Reserve Forces), as passed. In Nagri. Pies 3. (Anna 1.)
 Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Urdu. Pies 6. (Anna 1.)
 Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Nagri. Pies 6. (Anna 1.)
 Act II of 1889 (Measures of Length). In Urdu. Pies 3. (Anna 1.)
 Act II of 1889 (Measures of Length). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Urdu. Anna 1 p. 9. (Anna 1.)
 Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Nagri. As. 2. (Anna 1.)
 Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Urdu. Pies 6. (Anna 1.)
 Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
 Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903. In Urdu. Anna 1 p. 9. (Anna 1.)
 Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Urdu. Pies 9. (Anna 1.)
 Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Nagri. Pies 9. (Anna 1.)
 Act XVI of 1889 (Central Provinces Land Revenue). In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XVI of 1889 (Central Provinces Land Revenue). In Nagri. Anna 1 p. 6. (Anna 1.)
 Act XX of 1889 [Indian Lunatic Asylums (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act I of 1890 (Revenue Recovery). In Urdu. Pies 3. (Anna 1.)
 Act II of 1890 (Probate and Administration). In Urdu. Pies 2. (Anna 1.)
 Act V of 1890 (Forest). In Urdu. Pies 6. (Anna 1.)
 Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
 Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act VIII of 1890 (Guardians and Wards). In Urdu. As. 2 p. 3. (Anna 1 p. 9.)
 Act IX of 1890 (Indian Railways), as modified up to 1st June 1905. In Urdu. As. 8. (As. 2.)
 Act IX of 1890 (Indian Railways), as modified up to 1st May 1896. In Nagri. As. 8. (As. 2.)
 Act X of 1890 [Press and Registration of Books (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XI of 1890 (Prevention of Cruelty to Animals). In Urdu. Pies 6. (Anna 1.)
 Act XX of 1890 (United Provinces). In Urdu. Anna 1. (Anna 1.)
 Act X of 1891 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1891 (Oudh Courts). In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Urdu. Pies 3. (Anna 1.)
 Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Nagri. Pies 6. (Anna 1.)
 Act II of 1892 (Marriages Validation). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1892 (Bengal Court of Wards (Amendment)). In Urdu. Pies 6. (Anna 1.)
 Act IV of 1893 (Partition). In Urdu. Pies 3. (Anna 1.)
 Act I of 1894 (Land Acquisition). In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
 Act of 1894 (Land Acquisition). In Nagri. Anna 1 p. 6. (Anna 1 p. 6.)
 Act III of 1894 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Urdu. As. 2 p. 9. (Anna 1.)
 Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Nagri. As. 2 p. 6. (Anna 1.)
 Act IX of 1894 (Prisons). In Urdu. As. 2 p. 3. (Anna 1.)
 Act IX of 1894 (Prisons). In Nagri. As. 2 p. 3. (Anna 1.)
 Act VII of 1895 [Punjab Laws Act (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VII of 1895 [Punjab Laws Act (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1895 (Pilgrim Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act II of 1896 (Cotton-duties). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act II of 1896 (Cotton-duties). In Nagri. Anna 1. (Anna 1.)
 Act VI of 1896 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1896 (Inland Bonded Warehouses). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1896 (Inland Bonded Warehouses). In Nagri. Pies 3. (Anna 1.)
 Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu As. 2 p. 9. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Nagri As. 3 p. 3. (As. 2.)
 Act I of 1897 [Public Servants (Inquiries) Amendment]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1897 [Public Servants (Inquiries) Amendment]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1897 (Epidemic Diseases). In Urdu. Pies 3. (Anna 1.)
 Act III of 1897 (Epidemic Diseases). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1897 (Fisheries). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1897 (Fisheries). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1897 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1897 [Negotiable Instruments (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1897 (Reformatory Schools). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1897 (Reformatory Schools). In Nagri. Pies 6. (Anna 1.)
 Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
 Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
 Act X of 1897 (General Clauses). In Urdu. Anna 1. (Anna 1.)
 Act X of 1897 (General Clauses). In Nagri. Anna 1. (Anna 1.)
 Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1898 (Lepers), as modified up to 1st September 1909. In Urdu. Pies 6. (Anna 1.)
 Act III of 1898 (Lepers), as modified up to 1st September 1909. In Nagri. Pies 6. (Anna 1.)
 Act IV of 1898 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Urdu. Re. 1 as. 4. (As. 8.)
 Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Nagri. Re. 1 as. 6. (As. 8.)
 Act VI of 1898 (Indian Post Office). In Urdu. As. 3 p. 3. (Anna 1.)
 Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)
 Act IX of 1898 (Live-stock Importation). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1898 (Live-stock Importation). In Nagri. Pies 3. (Anna 1.)
 Act X of 1898 (Indian Insolvency Rules). In Urdu. Pies 3. (Anna 1.)
 Act I of 1899 [Indian Marine Act (1887) Amendment]. In Urdu. Pies 6. (Anna 1.)
 Act I of 1899 [Indian Marine Act (1887) Amendment]. In Nagri. Pies 6. (Anna 1.)
 Act II of 1899 (Stamps), as modified up to 1st March 1907. In Urdu. As. 7 p. 6. (Anna 1 p. 6.)
 Act II of 1899 (Stamps), as modified up to 1st March 1907. In Nagri. As. 7 p. 6. (Anna 1 p. 6.)
 Act IV of 1899 (Government Buildings). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1899 (Government Buildings). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Urdu. Anna 1 p. 6. (Anna 1.)
 Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Nagri. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act IX of 1899 (Indian Arbitration). In Urdu. Pies 9. (Anna 1.)
 Act IX of 1899 (Indian Arbitration). In Nagri. Pies 9. (Anna 1.)
 Act XI of 1899 [Court-fees (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act XI of 1899 [Court-fees (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1899 (Currency Notes Forgery). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1899 (Currency Notes Forgery). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Nagri. Pies 9. (Anna 1.)
 Act XIV of 1899 [Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1899 [Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XX of 1899 (Presidency Banks). In Urdu. Pies 3. (Anna 1.)
 Act XX of 1899 (Presidency Banks). In Nagri. Pies 3. (Anna 1.)
 Act XXI of 1899 (Central Provinces Tenancy (Amendment)). In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1899 (Central Provinces Tenancy (Amendment)). In Nagri. Pies 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Urdu. As. 2 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Nagri. As. 2 p. 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Urdu. Pies 6. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Nagri. Pies 9. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration). In Urdu. As. 5. (As. 2.)
 Act VI of 1901 (Assam Labour and Emigration). In Nagri. As. 5. (As. 2.)
 Act VII of 1901 (Native Christian Administration of Estates). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1901 (Native Christian Administration of Estates). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Urdu. Anna 1. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Nagri. Anna 1. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act II of 1902 [Cantonments (House-accommodation)]. In Urdu. Anna 1. (Anna 1.)
 Act II of 1902 [Cantonments (House-accommodation)]. In Nagri. Anna 1. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1902 [United Provinces (Designation)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Nagri. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Nagri. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Urdu. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Nagri. Anna 1 p. 6. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Urdu. Pies 9. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Nagri. Pies 9. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1904 (Indian Stamp (Amendment)). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XV of 1904 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1905 (Indian Railway Board). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Urdu. Pies 9. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Nagri. Pies 9. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Nagri. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1908 [Indian Trusts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1908 (Code of Civil Procedure). In Urdu. Re. 1 as. 2. (As. 6.)
- Act V of 1908 (Code of Civil Procedure). In Nagri. Re. 1 as. 2. (As. 6.)
- Act VI of 1908 (Explosive Substances). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1908 (Explosive Substances). In Nagri. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Nagri. Pies 3. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Urdu. As. 2. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Nagri. As. 2. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Urdu. Pies 3. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XVI of 1908 (Indian Registration). In Urdu. As. 2. (As. 2.)
- Act XVI of 1908 (Indian Registration). In Nagri. As. 2. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Urdu. As. 2 p. 3. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Nagri. As. 2 p. 3. (As. 2.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Nagri. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1909 (Anand Marriage). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act VII of 1909 (Anand Marriage). In Nagri. Pies 3. (Anna 1.)
- Act I of 1910 (Indian Press). In Urdu. Pies 6. (Anna 1.)
- Act I of 1910 (Indian Press). In Nagri. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Urdu. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Nagri. Pies 6. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Urdu. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XV of 1910 (Cantonments). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1910 (Cantonments). In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Urdu. Pies 3. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Nagri. Pies 3. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Urdu. Pies 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Nagri. Pies 9. (Anna 1.)
- Act IV of 1911 (Criminal Tribes). In Urdu. Pies 3. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1911 [Indian Paper Currency (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1911 [Indian Paper Currency (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act X of 1911 (Prevention of Seditious Meetings). In Urdu. Pies 3. (Anna 1.)
- Act X of 1911 (Prevention of Seditious Meetings). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1911 [University (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1911 (Factories). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XII of 1911 (Factories). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act XIII of 1911 [Christian Marriage (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1911 [Christian Marriage (Amendment)]. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XIV of 1911 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1911 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1911 [Bengal, Agra and Assam Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Aircraft). In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Aircraft). In Nagri. Pies 3. (Anna 1.)
 Act I of 1912 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1912 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1912 (Co-operative Societies). In Urdu. Anna 1. (Anna 1.)
 Act II of 1912 (Co-operative Societies). In Nagri. Anna 1. (Anna 1.)
 Act III of 1912 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1912 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1912 (Lunacy). In Urdu. Anna 1 p. 9. (Anna 1.)
 Act IV of 1912 (Lunacy). In Nagri. Anna 1 p. 9. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Urdu. Pies 6. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Nagri. Pies 6. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Nagri. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Urdu. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1914 (Destructive Insects and Pests). In Urdu. Pies 3. (Anna 1.)
 Act V of 1914 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1914 [Indian Telegraph (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act VII of 1914 [Indian Telegraph (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Nagri. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Urdu. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Nagri. Pies 6. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1914. [Indian Army (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1914 [Indian Army (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislation Continuance). In Urdu. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislation Continuance). In Nagri. Pies 3. (Anna 1.)
 Act III of 1915 [Foreigners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1915 [Foreigners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1915 [Defence of India Criminal Law (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act IV of 1915 [Defence of India Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patents and Designs Temporary Rules). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patents and Designs Temporary Rules). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1915 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act XIII of 1915 (North-West Frontier Constabulary). In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1915 (North-West Frontier Constabulary). In Nagri. Pies 9. (Anna 1.)
 Act XIV of 1915 (Enemy Trading). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1915 (Enemy Trading). In Nagri. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Urdu. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Nagri. Pies 8. (Anna 1.)

17.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act II of 1916 (Defence of India Amendment). In Urdu. Pies 3. (Anna 1.)
 Act II of 1916 (Defence of India Amendment). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1916 (Indian Tariff Amendment). In Urdu. Anna 1. (Anna 1.)
 Act IV of 1916 (Indian Tariff Amendment). In Nagri. Anna 1. (Anna 1.)
 Act VII of 1916 (Indian Medical Degrees). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1916 (Indian Medical Degrees). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1916 (Presidency Banks Amendment). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1916 (Presidency Banks Amendment). In Nagri. Pies 3. (Anna 1.)
 Act X of 1916 (Enemy Trading). In Urdu. Pies 6. (Anna 1.)
 Act X of 1916 (Enemy Trading). In Nagri. Pies 6. (Anna 1.)
 Act XI of 1916 (Imports and Exports). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1916 (Imports and Exports). In Nagri. Pies 3. (Anna 1.)
 Act XII of 1916 (Indian Lunacy). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1916 (Indian Lunacy Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1916 (Bills of Exchange). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1916 (Bills of Exchange). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1916 (Hindu Disposition of Property). In Urdu. Pies 3. (Anna 1.)
 Act XV of 1916 (Hindu Disposition of Property). In Nagri. Pies 3. (Anna 1.)
 Act I of 1917 (Inland Steam Vessels). In Urdu. Anna 1 Pies 6. (Anna 1.)
 Act I of 1917 (Inland Steam Vessels). In Nagri. Anna 1 Pies 6. (Anna 1.)
 Act II of 1917 (Motor Spirit Duties). In Urdu. Pies 3. (Anna 1.)
 Act II of 1917 (Motor Spirit Duties). In Nagri. Pies 3. (Anna 1.)
 Act III of 1917 (Indian Defence Force). In Urdu. Pies 6. (Anna 1.)
 Act III of 1917 (Indian Defence Force). In Nagri. Pies 6. (Anna 1.)
 Act IV of 1917 (Indian Army Suspension of Sentences). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1917 (Indian Army Suspension of Sentences). In Nagri. Pies 3. (Anna 1.)
 Act V of 1917 (Destruction of Records). In Urdu. Pies 3. (Anna 1.)
 Act V of 1917 (Destruction of Records). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1917 (Indian Tariff Amendment). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1917 (Indian Tariff Amendment). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1917 (Super-Tax). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1917 (Super-Tax). In Nagri. Pies 3. (Anna 1.)
 Act IX of 1917 (Indian Bills of Exchange Amendment). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1917 (Indian Bills of Exchange Amendment). In Nagri. Pies 3. (Anna 1.)
 Act X of 1917 (Indian Army Amendment). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act X of 1917 (Indian Army Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XI of 1917 (Indian Paper Currency Temporary Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1917 (Indian Paper Currency Temporary Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1917 (Freight Railway and Inland Steam-vessels Tax). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1917 (Freight Railway and Inland Steam-vessels Tax). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1917 (Prevention of Cruelty to Animals Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1917 (Prevention of Cruelty to Animals Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1917 (Indian Registration Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XV of 1917 (Indian Registration Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XVII of 1917 (Government Savings Banks Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1917 (Government Savings Banks Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XVIII of 1917 (Post Office Cash Certificates). In Urdu. Pies 3. (Anna 1.)
 Act XVIII of 1917 (Post Office Cash Certificates). In Nagri. Pies 3. (Anna 1.)
 Act XIX of 1917 (Indian Paper Currency Amendment). In Urdu. Pies 3. (Anna 1.)
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EXECUTION SALE— <i>Purchase in Court sale of specific properties when judgment-debtor an undivided member—Subsequent decree for partition—Allotment to judgment-debtor of some items purchased and other properties—Right of execution purchaser for compensation by way of substitution.</i> A purchaser bought in Court auction specific items of properties said to belong to a member of a joint Hindu family. Subsequently there was a partition decree and only some of these items fell to the share of the judgment-debtor. Held, that the purchaser was entitled to only such of the items as are common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale certificate.	
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INDIAN RAILWAYS ACT (IX OF 1890), ss. 3 AND 121— <i>Indian Railway Board Act (IV of 1905), Rules 244, 229 and 231—Stationmaster deputing signaller to collect tickets and excess fare—Assault on signaller by passenger.</i> Under Rules 244, 229 and 231 framed under Railway Board Act (IV of 1905) a Stationmaster has power to depute a signaller subordinate to him to collect tickets and excess fares from passengers alighting at the station, and a signaller so deputed is a 'Railway servant employed by a Railway administration' within the meaning of section 3, clause (7) of the Indian Railways Act (IX of 1890). An assault by a passenger on such signaller rightly demanding excess fare is an offence under section 121 of the Indian Railways Act.	
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MADRAS CITY MUNICIPAL ACT (III OF 1904), SEC. 366— <i>Order by Health Officer to remove a patient to isolation hospital—Removal to isolated house—Disobedience of order—Charge under section 269, Indian Penal Code, whether sustainable—Duty of prosecution—Essentials of offence—'Illegally' and 'unlawfully', distinction between.</i> A person who was directed by the Health Officer acting under section 366 of the Madras City Municipal Act to remove his son to an isolation hospital, removed him to an isolated house. Held, that he was not guilty of an offence under section 269, Indian Penal Code. Although, under section 366, clause 3, of the Madras City Municipal Act, a person disobeying an order under the section is to be deemed to have committed an offence under section 269, Indian Penal Code, the prosecution must prove not only that there has been disobedience to the order but also that he had unlawfully or negligently done an act which he knew, or had reason to believe, would spread infectious disease. <i>Cahoon v. Mathews</i> (1897) I.L.R., 24 Cal., 494, referred to.	
<i>Kandaswamy Mudaliar v. King Emperor</i>	
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MALABAR LAW— <i>Karnavan, removal of, from his office—Senior anandravan—Exclusion from succession to office of karnavan—Power of Court to declare senior anandravan unfit to succeed to office—Grounds of exclusion.</i> A Court can for good cause remove a karnavan and declare the senior anandravan to be unfit to succeed to the vacant office. <i>Kunhan v. Sankara</i> (1891) I.L.R., 14 Mad., 78, followed; <i>Chindan Nambiar v. Kunhi Raman Nambiar</i> (1918) I.L.R., 41 Mad., 577 (F.B.), referred to; dictum of SADASIVA AYYAR, J., in <i>Cheria Pangi Achan Nambiar v. Unhalachan</i> (1917) 32 M.L.J., 323, dissented from.	
<i>Nemanna Kudre v. Achmu Hongsu</i>	
(1920) I.L.R., 43 Mad., 319	

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

SABAPATHI PILLAY, APPELLANT (FIRST DEFENDANT)

v.

THANDAVAROYA ODAYAR, RESPONDENT (PLAINTIFF*)

1919,
August 14.

Execution sale—Purchase in Court sale of specific properties when judgment-debtor an undivided member—Subsequent decree for partition—Allotment to judgment-debtor of some items purchased and other properties—Right of execution purchaser for compensation by way of substitution.

A purchaser bought in Court auction specific items of properties said to belong to a member of a joint Hindu family. Subsequently there was a partition decree and only some of these items fell to the share of the judgment-debtor.

Held, that the purchaser was entitled to only such of the items as are common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could not compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale certificate.

SECOND APPEAL against the decree of F. H. WALLACE, District Judge of Tanjore, in Appeal No. 400 of 1917 preferred against the decree of K. S. GOPALARATNAM AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 192 of 1916.

The facts are given in the judgment. The first defendant against whom a decree was given by both the lower Courts preferred this second appeal.

A. V. Viswanatha Sastri for S. Muttayya Mudaliyar for appellant.

T. M. Krishnaswami Ayyar for respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The plaintiff's vendor purchased certain properties in execution of a money decree against the first defendant and obtained a certificate of sale—Exhibit A. At the time of the attachment, a partition suit between the first defendant and his co-parceners was pending. The decree in the partition suit allotted certain properties to the first defendant. On comparing the sale certificate, Exhibit A, with the list of the properties which the first defendant obtained under the partition decree, it is found that the sale certificate included items which did not correspond to the items in the partition decree.

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* Second Appeal No. 467 of 1918.

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MORTGAGE—Equity of redemption of moiety of mortgage property—Purchase by mortgagee—Extinction of mortgage.] In the absence of fraud, the purchase by the mortgagee in Court auction of the equity of redemption of some items of the mortgaged properties discharges that portion of the mortgage debt which was chargeable on those items, that is, it discharges a portion of the mortgage debt which bears the same ratio to the whole mortgage debt as the value of those items bears to the value of all the mortgaged properties. *Bisheshur Dial v. Ram Sarup* (1910) I.L.R., 22 All., 284 (F.R.), followed. *Sami Rowappa v. Kuppusami Iyengar* (1911) 2 M.W.N., 342, overruled. *Ponnambala Pillai v. Annamalai Chettiar*... (1920) I.L.R., 43 Mad. (F.B.)

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PENAL CODE (INDIAN), SEC. 289 :—See MADRAS CITY MUNICIPAL ACT (III OF 1904).

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STAMP ACT (II OF 1899), SEC. 2 (5), arts. 15 and 40 of Schedule I—Court Fees Act (IV of 1870), Schedule II, art. 6—Security bond by receiver binding himself and his properties—Proper stamp—Whether liable under Stamp Act and Court Fees Act.] A security bond, in favour of a Court, executed by a receiver binding himself and his properties for the due discharge of his duties, must be stamped both under the Court Fees Act and under article 40 of Schedule I of the Stamp Act. *Kulnanta v. Mahabir Prasad* (1889) I.L.R., 11 All., 16 (F.B.) and Referred Case No. 19 of 1911, followed.

Amirkammal v. Ramalinga Goundan ... (1920) I.L.R., 43 Mad. (F.B.),

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STAMP ACT, INDIAN (II OF 1899), SEC. 5—Sale—Mortgage for due performance of covenants—Distinct matters, meaning of—Stamp payable.] A sale-deed, in which the vendor mortgages lands not included in the sale as security for the due performance of his covenants, need not be stamped both as a sale and a mortgage. *Govindan Nambudiri v. Moidin* (1918) I.L.R., 41 Mad. 489 (F.B.) overruled.

Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras (Referring Officer) (1920) I.L.R., 43 Mad. (F.B.),

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Plaintiff obtained 2·83 cents under the sale certificate. His suit was for the allotment of this extent from the items given under the partition decree. Some of the items being common to both, there will be no difficulty in decreeing them to the plaintiff. As regards those which are not found in the partition decree, the question is whether the plaintiff is entitled to have their equivalent from out of the properties which fell to the first defendant's share in the partition.

It was first argued that whatever may be the plaintiff's rights, he is not entitled to claim that the exact extent, minus the extent of the items which are common, should be carved out of the other items. There is much to be said for this argument, because the properties that were allotted at the partition might be more valuable than the properties purchased at the auction. The latter might be unproductive punja lands. But the point was not put in issue in the Courts below or even here specifically. The consideration of the question would necessitate the taking of evidence; we have therefore refused to hear the question argued.

The more important question is, has the plaintiff any right or equity against the first defendant to compel him to give properties in substitution of those which were purchased at the Court auction. It was contended by Mr. A. V. Viswanatha Sastri that as there is no warranty in a Court sale, as the principle of *caveat emptor* applies to it, and as the plaintiff has chosen to bid for and purchase specific properties, he is not entitled to claim their equivalent from other properties of his judgment-debtor. There is no direct authority on the question. *Thakur Barmha v. Jiban Ram Marwari*(1), only lays down that there is no warranty in a judicial sale.

Mr. T. M. Krishnaswami Ayyar drew our attention to the decision of the Judicial Committee in *Byjnath Lall v. Ramoodeen Chowdry*(2). That was a case of a mortgage of specific properties belonging to an undivided family. The case arose before the Transfer of Property Act came into force. Their Lordships say:—

"It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages: but it is also clear that

he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

This principle was apparently enunciated as arising from first principles of jurisprudence, and was not based upon any statutory recognition of warranty. No doubt, by the Transfer of Property Act, the legislature has provided for a warranty in favour of the mortgagor (vide Section 65), but the decision above quoted was wholly independent of legislative warranties. In *Manjaya v. Shanmuga*(1), SANKARAN NAYAR, J., applied this principle to a case of private sales of specific properties by a coparcener. Mr. A. V. Viswanatha Sastri contended that this decision is opposed to principle, and to the judgment of BHASHYAM AYYANGAR, J., in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(2). In this latter case what the learned Judge decided was, that where a sale is made of specific items before partition, the proper remedy of the purchaser is to sue for partition and to claim the allotment to his vendor of the specific items sold to him. It was also held, that if this cannot conveniently be done, the right to compensation for selling properties without title can be enforced against the vendor. This does not affect either SANKARAN NAYAR, J.'s, dictum in *Manjaya v. Shanmuga*(1) or the present case. Further, SANKARAN NAYAR, J.'s, dictum has been accepted as correct by OLDFIELD and SADASIVA AYYAR, JJ., in their Order of Reference in *Rangayya Reddy v. Subramania Ayyar*(3).

The further question is, whether these rulings are applicable to adjustment of rights dependent upon Court sales. The point was thrice argued, as we had doubts on the question and as it is *res integra*. The learned vakils on both sides have placed all the available authorities before us—but none of them really touches the question we have to decide. There are some general principles on which alone we can rest our decision:—(1) There is no warranty in a Court sale; see *Thakur Barmha v. Jiban Ram Marwari*(4). (2) There is no privity of contract between an auction purchaser and a judgment-debtor. Under the old

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(1) (1915) I.L.R., 38 Mad., 684.

(2) (1902) I.L.R., 25 Mad., 690 (F.B.).

(3) (1917) I.L.R., 40 Mad., 365 (F.B.).

(4) (1914) I.L.R., 41 Cal., 590 (P.C.).

(1) (1914) I.L.R., 41 Cal., 590 (P.C.) (2) (1874) 1 I.A. 106.

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Code of Civil Procedure if the purchaser had reason to believe that there was no saleable interest at all in the property sold, he had a right of action against the decree holder for refund of money. The new Code has taken away that remedy, and limits the purchaser's rights to an application for refund. There is no indication in the Code that the purchaser has any remedy against the judgment-debtor. (3) It must be remembered that it is the decree holder that brings the property to sale; he prepares the proclamation and to the best of his knowledge places before the public all the available information in respect of the property to be sold. Although the judgment-debtor is expected to assist the Court in settling the proclamation, and although his failure to do so may entail some serious consequences, there is no provision of law which brings him into contact with the bidders at a sale. These persons are bound by the principle of *caveat emptor*. They take the risk of the property corresponding to the description given. If that fails, they can have no remedy against the judgment-debtor, because there was no act, or representation, by him which has contributed to the result.

Having regard to the principles above indicated, it seems to us that there is no justification for extending the theory of substitution, which has been enunciated in respect of persons standing in the relation of promisor and promisee, to persons who are strangers to each other. In this view, we must hold that the plaintiff is not entitled to any property, against the defendant, other than those which his vendor purchased in the Court sale. As the parties cannot agree in this Court, regarding the identity of properties, we must reverse the decree of both the Courts below, and remand the suit to the Court of first instance for ascertaining what the properties are, in the possession of the defendant, which are identifiable with the items purchased at the Court auction.

Plaintiff is entitled to a decree to the share of the judgment-debtor which his vendor purchased at the Court auction. There will be a preliminary decree as above indicated, and the Court of first instance will pass the final decree in the usual course. Each party must bear his own costs hitherto incurred. Further costs will be provided for in the revised decree.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

SESHAGIRI RAO AND EIGHT OTHERS (PETITIONERS NOS. 1 TO 4,
5, 6, 7 AND 8), APPELLANTS,

1919,
August
15 and 19.

v.

SRINIVASA RAO AND TWELVE OTHERS (RESPONDENTS NOS. 1 TO 9,
11, 12, 13 AND 15), RESPONDENTS.*

Limitation Act (IX of 1908), Arts. 168 and 181—Exonerated defendants—Sale of properties, including share of exonerated defendants—Application to set aside sale—Limitation.

In a decree awarding maintenance a charge was created on the shares of some of the defendants in lands belonging jointly to them and the appellants, but the shares of the latter were expressly exonerated. In execution of the decree, however, the lands were sold by Court auction, including the shares of the appellants therein. On an application by them a year and seven months later to set aside the sale of their shares.

Held that article 181, and not article 168, of the Limitation Act applied, and that the application was not barred.

APPEAL against Appellate Order of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Appeal Suit No. 308 of 1917, preferred against the decree of T. A. SUBBAYYA PILLAI, the District Munsif of Conjeevaram, in Civil Miscellaneous Petition No. 1016 of 1916, in Original Suit No. 19 of 1904.

The material facts appear from the judgment.

C. V. Anantakrishna Ayyar and C. Sitaramayya for the appellants.

S. Ranga Achariyar and S. Vaidyanatha Ayyar for the respondents.

The JUDGMENT of the Court was delivered by

MOORE, J.—There is no dispute as to the facts in this case. MOORE, J.
A suit for maintenance was brought by one Yamuna Bayee. Some of the present appellants were defendants Nos. 9 to 12 in the suit and were added as supplemental defendants, as they belonged to a divided branch of the family. Yamuna Bayee obtained a decree for maintenance against defendants Nos. 1 to 8, and the maintenance awarded was made a charge on the shares of defendants Nos. 1 to 8 in certain properties.

* Appeal against Appellate Order No. 76 of 1918.

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The appellants and their three-fourths share of the properties were expressly exonerated under the decree. In 1906, the decree-holder applied for execution of the decree against defendants Nos. 1 to 8 only and no notice of the execution proceedings was taken out to the appellants Nos. 1 to 4. Certain lands were attached as belonging to the first defendant in the suit and on 26th January 1910, 3 acres 84 cents of land in Shrotriyam Thenambakkam village, including the three-fourths share of the appellants, were sold in Court auction and purchased by one Murugesan Chetti, the present ninth respondent. The sale was confirmed on 16th July 1910, and a sale certificate issued to the auction purchaser on 18th November 1910, delivery of the properties being given on 16th December 1910. On 25th July 1911 (a year and seven months after the sale) the appellants filed a suit, Original Suit No. 378 of 1911, in the Conjeeveram District Munsif's Court, to set aside the auction sale and for partition and recovery of their three-fourths share, alleging that the sale was invalid so far as their share of the properties was concerned. The District Munsif dismissed the suit, on the ground that as the plaintiffs were parties to the suit in execution of which the sale was held, it was barred by section 47 of the Code of Civil Procedure. The District Munsif's decision was affirmed on appeal by the District Judge. In Second Appeal No. 356 of 1914, the High Court remanded the suit to the Court of first instance for disposal as a proceeding under section 47 of the Civil Procedure Code, the question whether the application was barred by limitation being left open. The lower Courts have dismissed the application as barred by article 166 of the Limitation Act. Hence the present appeal.

Mr. Anantakrishna Ayyar, for the appellants, contends that the lower Court erred in applying article 166 of the Limitation Act, and that the article applicable is article 181, which provides a period of three years from the time when the right to apply accrues in the case of an application to which no period of limitation is provided elsewhere in the schedule or by section 48 of the Civil Procedure Code. In our opinion the application is governed by article 181, and not by article 166, of the Limitation Act and is consequently not barred by limitation, as it was made within the period prescribed by article 181. The appellants were parties to the suit (see the explanation to

section 47 of the Code of Civil Procedure), but were not parties to the decree under which they were exonerated, no notice of the application for attachment and sale of the properties was admittedly given to them, and they were strangers to the execution proceedings.

It is not disputed that under the terms of the decree the Court had no power to sell the appellants' three-fourths share in the properties. The sale was void for want of jurisdiction [vide *Raghunath Das v. Sundar Das Khetri*(1), *Shyam Mandal v. Satinath Banerjee*(2) and *Shivbai v. Yesoo*(3)]. If an execution sale is a nullity (i.e., is made without jurisdiction or is void *ab initio*) article 166 has in our view no application, and the residuary article 181 should be applied. We are justified in our conclusion by the decision in *Ramavenkatasubbier v. Subramania Chettiar*(4). In that case, the facts were that the plaintiff had taken a mortgage from a member of the judgment-debtor's family and had obtained a decree for sale of the one-sixth share of the joint family properties, to which his mortgagor was entitled. Under the decree, however, a one-fourth instead of one-sixth share was brought to sale and purchased by the plaintiff decree-holder. The learned Judges (WALLIS, C.J., and SPENCER, J.) held, that the sale, in so far as it purported to sell more than the one-sixth share awarded by the decree, was made without jurisdiction, according to the principle laid down by the Privy Council in *Malkarjun v. Narhari*(5). The learned vakils for the ninth respondent's (the auction purchaser's) vendees relied on the decision in *Muthiah Chettiar v. Bava Sahib*(6). In that case, the decree directed the sale of items in a particular order. They were, however, sold in a different order. It was held, that an application to set aside the sale on the ground that it took place contrary to the direction in the decree was one under section 47 of the Civil Procedure Code and would be governed by article 166. *Muthiah Chettiar v. Bava Sahib*(6) is, however, clearly distinguishable, as it was the judgment-debtor who moved the Court to have the sale set aside. The facts of the present case are

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(1) (1915) I.L.R., 42 Cal., 72 (P.C.). (2) (1917) I.L.R., 44 Cal., 954.
(3) (1919) I.L.R., 43 Bom., 235.
(4) Second Appeal No. 389 of 1914 (unreported).
(5) (1901) I.L.R., 25 Bom., 337 (P.C.). (6) (1914) 27 M.L.J., 605.

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certainly different. The appeal is accordingly allowed with costs payable by the ninth respondent.

The District Munsif is directed to restore the appellants application to set aside the sale to his file and dispose of it according to law.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastri.

ANGAPPA MUDALI AND ELEVEN OTHERS (PETITIONERS),

v.

RAMAPURAM PERUMAL CHETTY AND RAMAPURAM
KRISHNAPPA CHETTY (COUNTER PETITIONERS).*

Criminal Procedure Code (Act V of 1898) ss. 133, 135, 138 and 139—Issue of notice by Subdivisional Magistrate—Option to appear and show cause before a second-class Magistrate—Appointment of a jury—Verdict submitted to Subdivisional Magistrate—Jurisdiction in Subdivisional Magistrate to deal with verdict and dispose of case.

A Subdivisional Magistrate, who issues notice under section 133, Criminal Procedure Code, calling upon a person to do something within a specified time, or to appear before another Magistrate to have the order set aside, is not deprived of his jurisdiction, but has power to deal with the matter under section 139, Criminal Procedure Code, on receiving the verdict of the jury appointed by him under section 138. The word 'Magistrate' in section 139 (1) refers to the Magistrate who issued notice.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to revise the order of N. KOIL PILLAI, the Subdivisional First-class Magistrate of Sankari, in Miscellaneous Case No. 9 of 1919, dated the 21st day of February 1919.

The counter-petitioners own a cotton ginning factory at Tiruchengodu. The residents of the locality complained of the working of the factory during nights and filed a petition under section 133, Criminal Procedure Code, before the Subdivisional Magistrate of Sankari to prohibit the nuisance. The Magistrate, after recording evidence and reading the police report, issued

* Criminal Revision Case No. 184 of 1919.

notice to the counter-petitioners under section 133, Criminal Procedure Code, to cease working the factory between 7 p.m. and 6 a.m., or to appear before the Second-class Magistrate of Tiruchengodu and move to have the said order set aside or modified in the manner provided for by the Code. The counter-petitioners applied, under section 135, Criminal Procedure Code, to the Subdivisional Magistrate for an order appointing a jury. A jury was accordingly empanelled and they submitted their verdict to the Subdivisional Magistrate, as required by the order. The Subdivisional Magistrate thereupon forwarded the records together with the verdict of the jury to the Second-class Magistrate for disposal according to law. The petitioners filed a petition before the Subdivisional Magistrate, and contended that his order forwarding the verdict to the Second-class Magistrate was passed without jurisdiction, and that he and not the Second-class Magistrate had jurisdiction to deal with the case on receipt of the verdict of the jury. The Subdivisional Magistrate, however, held that the Second-class Magistrate alone had jurisdiction to pass final orders and dismissed the petition. The petitioners thereupon preferred this criminal revision petition to the High Court.

Dr. S. Swaminathan for the Petitioners.

V. L. Ethiraj for Public Prosecutor, for the Crown.

T. M. Krishnaswami Ayyar for the Counter-petitioners.

ORDER.—The First-class Magistrate of Sankari passed orders under section 133, Criminal Procedure Code, directing the counter-petitioners not to work a cotton ginning factory during nights or to appear before the Second-class Magistrate, Tiruchengodu, on the 25th March 1918 and move to have the order set aside or modified.

The counter-petitioners applied, under section 135, to the First-class Magistrate to appoint a jury and a jury was empanelled under section 138, who sent their verdict to the Magistrate. The records were then sent by the First-class Magistrate to the Second-class Magistrate for disposal. The petitioners objected to the order, on the ground that the Second-class Magistrate had no jurisdiction to deal with the matter after the verdict of the jury, but their objection was overruled; hence this revision petition.

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The question for decision is whether a Magistrate who sends a notice under section 133 and directs the party to appear before another Magistrate is competent to deal with the matter on receiving the verdict of the jury empanelled under section 138. The case is one of first impression and, agreeing with the contention of the Public Prosecutor, I am of opinion that the First-class Magistrate has jurisdiction.

Section 135 enables a party either to obey the order, or to show cause, or to apply to the Magistrate by whom the order was passed to appoint a jury to try whether the order is reasonable and proper. Section 138 empowers the Magistrate who passed the order to empanel a jury, and he is given power to fix a date for the return of their verdict and to extend the time so granted. Form XVII, of Schedule V of the Code, requires that the verdict should be sent to the Magistrate who passed the order and not to the Magistrate before whom the Magistrate passing the order directs the counter-petitioner to show cause under clause (1) of section 133.

Section 139 enacts that if the jury, or the majority of the jurors, find that the order of the Magistrate was reasonable and proper or subject it to a modification which the Magistrate accepts, the Magistrate shall make the order absolute. In other cases the proceedings are to be dropped.

Reading these sections together, it seems to me that in all cases where the counter-petitioner elects to leave the matter to the decision of a jury the case has to be disposed of by the Magistrate who passed the order under section 133.

If the effect of passing an order directing the counter-petitioner to show cause before some other Magistrate is to transfer all further proceedings to such Magistrate, and to divest the Magistrate who passed the order of all jurisdiction, it is difficult to see why the application under section 135, clause (b), or the duty of empanelling a jury under section 138, should be cast on the Magistrate who passed the order, or why the verdict should be submitted to him and not to the other Magistrate.

It has been argued for the counter-petitioners that the duty of appointing jurors is so important that the legislature did not want it to be performed by Second-class Magistrates, but it should be observed that under section 133 the accused may be directed to show cause before another First-class Magistrate, and

that no exception is made in such cases. It is also difficult to see how the act of calling together a jury is more important than the decision as to whether the verdict of the jury is proper or the acceptance of any modification by them. If the latter duties can be performed by the Second-class Magistrate, there is no reason why he should not empanel the jury whose verdict he has power to dispose of.

I am of opinion that the words "the Magistrate" in section 139, clause 1, refers to the Magistrate to whom application has to be made under section 135, clause b, to empanel a jury and who under section 133 does so.

I set aside the order of the Lower Court and direct that the application be disposed of according to law.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

NEMANNA KUDRE (SECOND DEFENDANT), APPELLANT.

v.

ACHMU HENGSI AND NINE OTHERS (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENT. *

Malabar Law—Karnavan, removal of, from office—Senior anandravan—Exclusion from succession to office of karnavan—Power of Court to declare senior anandravan unfit to succeed to office—Grounds of exclusion.

A Court can for good cause remove a karnavan and declare the senior anandravan to be unfit to succeed to the vacant office.

Kunhan v. Senkara (1891) I.L.R., 14 Mad. 78, followed;

Chindan Nambiar v. Kunhi Raman Nambiar (1918) I.L.R., 41 Mad. 577 (F.B.), referred to; dictum of SADASIVA ATYAR, J., in *Cheria Pangi Achan Nambiar v. Unmalachan* (1917) 32 M.L.J. 323, dissented from.

SECOND APPEAL against the decree of T. JIVAJI RAO GARU, the Subordinate Judge of South Kanara, in Appeal Suit No. 217 of 1917, preferred against the decree of M. ANANTHAGIRI RAO, the District Munsif of Udipi, in Original Suit No. 133 of 1916.

* Second Appeal No. 1284 of 1918.

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—
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SASTRI, J.

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The suit was brought by plaintiffs as members of an Aliyasantana family to remove the first and second defendants, from the management of the affairs of the family, as being unfit and to appoint first plaintiff as ejmanthi. First defendant was the karnavan, and second defendant was the senior anandravan. The lower Courts found that in 1905 the two defendants in conjunction with their mother, now deceased, had divided all the family properties among themselves by a registered partition deed, excluding the plaintiffs altogether and had dealt with the properties as their own, mortgaging them, etc.

The lower Courts further found that the first defendant had failed to look after the junior members of the family and to maintain them out of the income and that he had in collusion with the second defendant, and for the individual benefit of themselves, dealt with the family property so as to deprive the plaintiffs entirely of any benefit from it.

The lower Courts declared the first and second defendants unfit to be ejmans of the family and appointed first plaintiff ejmanthi in place of first defendant. The second defendant alone appealed.

K. P. Lakshmana Rao for appellant.

B. Sitarama Rao for first, second and ninth respondents.

SPENCER, J. — The first point argued in this Second Appeal has not been taken in the appellant's grounds of appeal, but as it involves a question of principle, and as it strikes at the root of the jurisdiction of the Courts if the appellant succeeds on it, we have allowed it to be argued.

I agree with my learned brother that what the Courts were asked to do in this suit was not to frame a scheme, or to exercise any undefined authority of selecting the most suitable person to manage the affairs of this family, but to remove the present ejman for mismanagement and at the same time to declare that the next in order of seniority was unfit to hold the vacant office, and I fail to see any reason for supposing that Civil Courts have not power to grant such a declaration.

Speaking for myself, I am averse to putting any narrow limitations on the power of Courts to do all that is needful to settle the disputes of the parties in all Civil matters that come up to be adjudicated upon. To hold otherwise would be to

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deprive these tribunals of authority to make a final settlement of opposing contentions. In *Chindan Nambiar v. Kunhi Raman Nambiar*(1), the Full Bench had no doubt about the Civil Court's power to remove from the karnavanship for misfeasance a person who had attained that position by a course different from the ordinary course, namely by a family agreement.

In *Kunhan v. Sankara*(2), acts of misfeasance, committed before the appellant became de jure karnavan, were held to be a sufficient cause for removing him, the learned Judges observing :

"whether the misfeasances were committed either solely or in conjunction with another; in either case the interest of the tarwad requires that the management of its affairs should not be entrusted to him."

Moral unfitness seems to me to be an equally good reason for exclusion as mental or physical deficiencies.

On the second point, the findings of the lower Courts, as I understand them, are that the second defendant was guilty of fraud and collusion, and as these are findings of fact which we must accept, the result is that the declaration of unfitness follows as a natural consequence. The Second Appeal is dismissed with costs.

KRISHNAN, J. — This Second Appeal arises from a suit brought by the plaintiffs as members of an Aliyasantana family to remove as unfit, the first and second defendants from the management of the affairs of the family, and to appoint the first plaintiff as ejmanthi, and give her possession of the family properties. Defendants had denied that plaintiffs were members of their family and had in 1905 in conjunction with their mother, now deceased, divided all the family properties among themselves by a registered partition deed, excluding the plaintiffs altogether and had dealt with them, each with his share as his own. Though the first defendant was the ejman and the second defendant was the senior anandravan of the family, at the date of suit, they did not look upon themselves as members of an undivided family at all, but each managed the properties he obtained on partition. Hence the form of the prayer to remove both of them from management.

(1) (1918) I.L.R., 41 Mad., 577 (F.B.). (2) (1891) I.L.R., 14 Mad., 78.

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The learned Subordinate Judge gave the decree prayed for. The second defendant alone has appealed to us, and it is contended on his behalf that Courts have no power to interfere with the right of the senior anandravan to succeed when the karnavan is removed, and that in any case there are no proper grounds for excluding the second defendant from ejamanship in this case.

The first contention is a general one and it is sought to be supported by an observation of SADASIYA AYYAR, J., in *Cheria Pangi Achan v. Unnalachan*(1) where the learned Judge quoted with approval some passages from an article in the Madras Law Journal(2). The effect of the passages is no doubt to show that the Court has no power to exclude the eldest anandravan from succeeding when a karnavan is removed. But it may be pointed out that the learned Judge's remarks are obiter dicta, and with all respect to the learned Judge I am unable to accept his view.

To understand the bearings of the question raised it may be useful to consider how the Court acts in removing a karnavan. That a Court can remove a karnavan for good reason is well established by numerous decisions, beginning from the decision of the Sadr Adalat in 1 Sud Dec. 118, and is not now disputed. The authorities do not however make it clear on what basis the power is founded. It seems to me however that it is based on the theory that the institution of karnavanship in a tarwad is intended for the benefit of the tarwad, and the continuance of a karnavan in office is dependent on a proper discharge by him of his obligations to the family. When he fails to do his duties and his retention in office becomes injurious to the interests of the tarwad, he forfeits his office. But as he could not be removed by act of parties without his own consent the aid of the Court is sought to do it by its decree. If the right to karnavanship is an absolute right inherent in the eldest member and is independent of his obligations, it is difficult to see how the breach of those obligations can affect the right, whatever other remedies there may be. I do not consider that the removal of a karnavan for his misdeeds is by way of punishment at all. The Civil Court will hardly be the tribunal for it. The Court adopts the remedy of removal as necessary to protect the interests of the tarwad.

(1) (1917) 32 M.L.J., 323, at 332.

(2) (1901) 11 M.L.J., 129, at 136.

It is true that it is not every failure to perform an obligation that would lead to the removal of a karnavan but only such misconduct as would make it necessary in the interests of the tarwad to have him removed. As observed in *Kunhan v. Sankara*(1) the question to be kept in view is whether the interests of the tarwad require that the management of its affairs should not be entrusted to him. The jurisdiction to remove him seems to me really to be founded upon his forfeiture of his office in gross misconduct rendering him unfit for it.

If this view is right, I do not see any difficulty in Courts declaring, on the prayer of the parties, that the next person is unfit to assume the office of karnavan. If circumstances exist which show that he could not or would not perform his obligations to the family, why should not the Court prevent him from assuming office if it is in the interests of the family to do so?

It is easy to suggest conditions when the senior anandravan may be totally unfit to become a karnavan. He may be an idiot or a lunatic, or in the words of Dr. Ormsby, in his "Outlines of Marumakkattayam Law", 'a person physically or mentally incapable of conducting the affairs of the tarwad,' or he may be of so depraved a mortal character that the interests of the tarwad may require that its affairs should not be entrusted to him. Is the Court then to tie its hands and allow him to become the karnavan? I think not. To hold that the Court has no power, in such a case to exclude him will be to nullify the very object of removing the obnoxious karnavan. I consider, that in the same manner that the Court can remove a karnavan it can in the same suit declare the next man to be unfit and pass on the succession to his junior.

It is quite true that the senior anandravan succeeds to the office of karnavan by virtue of his seniority, and not by any appointment to it. But his rights are no higher than those of the karnavan who is in office and who is entitled to continue in it till his death; nevertheless Courts have felt no difficulty in removing him from office. It is mere hypercriticism to say that the Court has no power to appoint a karnavan and therefore it cannot choose a person for the office. This is no doubt strictly so but what the Court does is not to appoint any person it likes, but the person next in rank to the karnavan and the excluded senior

(1) (1891) I.L.R., 14 Mad., 78, at 80.

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member or members; that person really succeeds by virtue of his position, on the exclusion of his seniors and his appointment is really a superfluity. The question whether a power to exclude exists does not depend on the existence of a power to appoint, for it is conceded that a power to remove a karnavan exists though the power to appoint him may not.

The most important objection to excluding the senior man from karnavanship is that in doing so you judge from his conduct as a junior member his unfitness to be a karnavan, without allowing for the possibility that he may turn over a new leaf when he is given the responsibilities of the karnavan's office. No doubt there is force in this argument, but I do not consider that it necessarily applies in every case or that it necessarily tells against the existence of the power to exclude. It shows that great care should be taken in judging of such a person's unfitness and that the power of exclusion should be used only sparingly and only when it is clearly necessary to do so in the interests of the tarwad. Each case has to be judged on its own facts and no hard and fast rules can be laid down.

The Courts have in many cases exercised the right of considering the fitness of the person who will succeed on the removal of the karnavan and have barred his succession when there is good reason to do so. No doubt a senior man should not be passed over in favour of his junior, on any ground of preference on account of the greater fitness of the latter, but only on the ground of his own unfitness. Where, however, good grounds exist I am not prepared to say that the Courts have acted beyond their powers in barring the succession of the next senior man when removing the karnavan from office. The first contention of the appellant therefore fails.

The next contention is one on the merits. The second defendant is found to have conspired fraudulently with his brother in denying the membership of the plaintiffs and excluding them from all participation in the enjoyment of the tarwad properties. He has in fact by getting up the partition deed attempted to put an end to the family itself, and he has taken the family properties which fell to his share as his own, and subsequently alienated some of them to strangers. His conduct was thus entirely against the interests of the tarwad, and there is no indication that he is likely to behave properly in the future.

In these circumstances I am not prepared to say that the lower Courts were wrong in removing him along with his brother.

The Second Appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Bakewell and Mr. Justice Moore.

RAMANATHAN PILLAI, APPELLANT (PLAINTIFF),

v.

DORAISWAMI AIYANGAR AND NINE OTHERS, RESPONDENTS
(DEFENDANTS NOS. 1 TO 4 AND NOS. 6 TO 10).*

Civil Procedure Code (V of 1908), ss. 47 and 145—Third party executing surety bond for a judgment-debtor—Suit for a declaration that the bond is void for fraud and undue influence and for cancellation of the bond, maintainability of.

A person, not a party to the suit, who stands surety for a judgment-debtor for the due performance of a decree, has no independent right, under section 47 of the Civil Procedure Code, to apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud and undue influence. His only remedy is by way of suit. He is a party to the suit within the meaning of section 47, Civil Procedure Code, only for the limited purpose mentioned in section 145 of the Code, namely, for appeal.

SECOND APPEAL against the decree of F. A. COLERIDGE, District Judge of Madura, in Appeal No. 121 of 1917, preferred against the decree of K. V. KARUNAKARA MENON, Temporary Subordinate Judge of Madura, in Original Suit No. 6 of 1916.

The facts are given in the judgment.

B. Sitarama Rao and S. R. Muttuswami Ayyar for appellant.

A. Narasimha Achariyar for V. V. Srinivasa Ayyangar for respondents.

The JUDGMENT of the Court was delivered by

MOORE, J.—In execution of the decree in C.S. No. 34 of MOORE, J. 1912 in the High Court, one Sayyed Muhammad Rowther was arrested. On 29th September 1914, the judgment-debtor and the present appellant as surety on behalf of the judgment-debtor, executed a security bond for Rs. 4,443-2-0 in favour of the District Court of Rāmnād, in which Court the execution proceedings were pending, and the judgment-debtor was released.

* Second Appeal No. 1061 of 1918.

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The bond provides for the payment of the amount either jointly or severally by the executants. There is also a further provision, that in case of default in payment, the money should be recovered from the surety personally, and from the properties hypothecated under the security bond and from the other properties of the surety. The properties hypothecated are, it appears, situate in the Madura district. On 8th February 1915, the appellant filed a suit (Original Suit No. 19 of 1915), in the Subordinate Judge's Court of Madura, against the plaintiffs in C.S. No. 34 of 1912 and their judgment-debtors for a declaration that the security bond had been fraudulently obtained by the defendants, and was void and not binding on the appellant's properties, and for cancellation of the security bond. It was alleged in the plaint, that the appellant was a person of weak intellect, and that the bond had been executed owing to undue influence, fraud and coercion practised upon him by certain persons acting in collusion with the defendants. A preliminary objection was taken by the defendants (respondents) that the suit was barred by section 47, Code of Civil Procedure. The Temporary Subordinate Judge held that, the appellant had alternative remedies, (1) in execution proceedings in the Rāmnād District Court and (2) by way of suit. He further decided that, as the appellant had a remedy in execution proceedings, the Court should not in the exercise of its discretion grant the declaratory relief sought for, and in the result dismissed the suit. In appeal the District Judge took the same view and held,

"that as the party had a remedy in execution and also an appeal,"

the declaratory relief asked for was rightly refused.

Mr. Sitarama Rao for the appellant contended, (1) that the lower appellate Court ought to have held that no relief such as is claimed in the plaint could be granted in execution, (2) that the suit being for the substantial relief of cancellation of the document on the ground of undue influence and fraud, which the executing Court could not grant, the lower appellate Court erred in holding that it had a discretion in relief, and (3) that in any view of the case the discretion had been improperly and illegally exercised.

The question raised in this appeal, viz., whether a third party who has given security on behalf of a judgment-debtor for the due performance of a decree has an independent right of application under section 47 of the Code of Civil Procedure and can apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud, or whether his only remedy is by way of suit, is a novel one and not free from difficulty. No decision directly bearing on the question has been cited before us. Section 145 of the Code of Civil Procedure, which corresponds to section 253 of the Code of 1882, is in these terms:

"Where any person has become liable as surety (a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree, or (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47. Provided that such notice as the Court in each case thinks sufficient has been given to the surety."

The section provides a summary remedy in execution and dispenses with the necessity for a separate suit to the extent to which the surety has rendered himself personally liable. *Motilal Virchand v. Thakore Chandra Sangji*(1), and *Amir v. Mahadeo Prasad*(2), which were relied on by the learned vakil for the appellant, have no direct bearing on the question which we have to decide. In the Bombay case it was held, that where a bond is passed by third parties as security for restitution in the event of the decree being reversed in appeal, the obligee may file a suit upon the contract contained in the bond. In the Allahabad case the learned Judges held, that if the surety takes upon himself more than the personal liability and hypothecates immoveable property, such hypothecation can only be enforced against the property by means of a regular suit.

The learned vakil for the respondents has referred us to *Subramanian Chettiar v. Raja of Rāmnād*(3). In that case the

(1) (1912) I.L.R., 38 Bom., 42. (2) (1917) I.L.R., 29 All., 225.
(3) (1918) I.L.R., 41 Mad., 327.

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question was whether, when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under Order XLI, rule 5 (3), of the Code of Civil Procedure, that property can be realized by a decree holder in execution, or can only be realized by a separate suit. The learned Judges (WALLIS, C.J. and KUMARASWAMI SASTRI, J.) were of opinion that the matter being one relating to execution under section 47 of the Code of Civil Procedure a separate suit did not lie, and that the fact that the bond was given to the Court did not make it a question arising between the judgment-debtor and a third party, so as to take it out of the section. At page 333 of the report the learned Chief Justice observed, that it was unnecessary to deal with cases of security given by third parties under section 145 of the Code of Civil Procedure. The point for decision in this appeal is whether the surety can be regarded as a party to the suit, so as to entitle him to present an application to the Court executing the decree. In *Linga Reddy v. Hussain Reddy*(1), it was held on the authority of *Thirumalai v. Ramayyar*(2), *Shek Suleman v. Shivram Bhikaji*(3), and other cases with reference to section 253 of the Code of 1882, that the surety should be treated as a party to the suit and cannot bring a suit for a declaration that he is not liable under the surety bond. Section 145 of the Code of Civil Procedure differs in some respects from the old section. Section 145 says, that the surety shall "for the purposes of appeal be deemed to be a party within the meaning of section 47." We think that the words "shall for the purposes of appeal be deemed to be a party," which were apparently introduced in order to give effect to certain rulings under the old Code—*Shek Suleman v. Shivram Bhikaji*(3) and *Akhoot Ramanah v. Ahmed Eusoofjee*(4)—only mean that if an order is made in execution against a surety, the surety may appeal against the order as if he were a party to the suit in which the decree or order sought to be executed was passed, and that the reference to section 47 does not in other respects import into section 145 the provision contained in section 47, which bars a separate suit. If it were not for the provisions of section

(1) (1905) I.L.R., 28 Mad., 117.

(2) (1840) I.L.R., 13 Mad., 1.

(3) (1888) I.L.R., 12 Bom., 71.

(4) (1871) 15 W.R., 538.

145 the liability of the surety would have to be enforced by a separate suit, because it does not arise under the decree but subsequently and under a separate contract with the Court. The effect of the section is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit, or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within section 47, and section 145 only makes him a party for a limited purpose, namely, for appeal.

It is doubtful whether the question in this case related to the execution, discharge or satisfaction of the decree, since it relates to the surety bond and not the decree, and to the enforcement of the liability incurred thereunder, and not under the decree. We doubt whether the surety, if he be not made a party to execution proceedings can intervene in a matter in which he has no interest.

We are unable, therefore, to agree with the conclusion arrived at by the lower Courts that the surety has a right to apply under section 47 to have the security bond cancelled.

The lower Courts have refused the declaratory relief sought for, on the ground that it was a discretionary relief and as the appellant had a separate remedy by way of suit. We think that the lower Courts were wrong, and that the suit should have been tried on the merits. We accordingly allow the appeal with costs in this Court, and reverse the decrees of the lower Courts. The Temporary Subordinate Judge is directed to restore the suit to his file and dispose of it according to law. Costs in the lower Courts will abide the result. The appellant is entitled to a refund of the Court fee of the Second Appeal.

N.R.

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APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

GANDI APPA RAZU (ACCUSED), PETITIONER,

v.

KING-EMPEROR, RESPONDENT.*

Criminal Procedure Code (Act V of 1898), ss. 435 and 436—Refusal of District Magistrate to interfere and commit to Sessions before completion of inquiry before Sub-Magistrate—Power of Sessions Judge to commit suo motu after discharge by Sub-Magistrate.

An order of a District Magistrate refusing to call for the records and commit to the Sessions an accused person while the charge against him is still under inquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order committal of the accused to the Sessions Court after his discharge by the inferior Magistrate.

Kalimuthu v. Emperor (1903) I.L.R., 26 Mad., 477, distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure to the High Court to revise the order of J. C. FERNANDEZ, Sessions Judge of Gōdāvari, in Criminal Revision Case No. 1 of 1919 in R.C. No. 2 of 1918 on the file of the Sub-Magistrate of Coringa.

The facts are given in the judgment.

Hon. Mr. T. Richmond for the petitioner.

V. L. Elthiraj for the Public Prosecutor for the Crown.

The ORDER of the Court was delivered by

KRISHNAN, J. KRISHNAN, J.—It is contended on behalf of the petitioner, the first accused, that the learned Sessions Judge had no jurisdiction to order his committal to the Sessions on charges under sections 147 and 304, Indian Penal Code, and that his order to that effect must be set aside.

As regards the charge under section 147, Indian Penal Code, we think the contention is well-founded, as the accused was acquitted by the Sub-Magistrate on that charge, under section 258, Criminal Procedure Code. So long as that order of acquittal stands, he cannot be again charged and tried for that offence on the same facts. Section 403, Criminal Procedure Code, is a bar to it. It was not open to the Sessions Judge to set aside that

* Criminal Revision Case No. 184 of 1919 and Criminal Revision Petition No. 161 of 1919.

acquittal, or to treat it merely as an order of discharge as he seems to have done. His order so far as it refers to section 147, Indian Penal Code, must therefore be set aside.

But the charge under section 304, Indian Penal Code, stands on a different footing. Though the complaint alleged facts against this accused constituting an offence under section 302, Indian Penal Code, the Sub-Magistrate disbelieved the evidence on the point, and did not frame any charge under section 302, or 304, Indian Penal Code. His action amounted in law to an order of discharge on those counts, even though no express order of discharge was recorded by him. See *Krishna Reddi v. Subbamma*(1). That being so, it was open to the Sessions Judge under section 436, Criminal Procedure Code, to act *suo motu* and set aside the implied discharge and direct the committal of the accused to the Sessions on being satisfied that he had been improperly discharged, as the offence under section 304, Indian Penal Code, is one exclusively triable by the Sessions Court.

But it is argued that the District Magistrate had passed a previous order, on an application by the complainant, refusing to set aside that discharge, and that that order prevents the Sessions Judge, who is a co-ordinate authority with the District Magistrate, from re-opening the matter, and reliance is placed on the ruling in *Kalimuthu v. Emperor*(2). It was ruled in that case, that under clause (4) of section 435, Criminal Procedure Code, it was not competent to the District Magistrate to entertain an application to commit, when the Sessions Judge had already refused to pass such an order, and that the reason of the prohibition applied equally to cases in which the authorities acted *suo motu*. It would not of course matter whether the District Magistrate or the Sessions Judge acted in the first instance, as they are co-ordinate authorities under the section.

It seems to us however that this ruling is not applicable to the facts of the present case. What happened here was that as soon as the Sub-Magistrate framed charges under sections 147, 323 and 325, Indian Penal Code, against the first accused and while the case was still pending before him, the first prosecution witness put in an application to the District Magistrate under section 435,

(1) (1901) I.L.R., 24 Mad., 136.

(2) (1903) I.L.R., 26 Mad., 477.

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Criminal Procedure Code, asking him to call for the records and direct a committal of the case to the Sessions. The prosecution was a police prosecution though it was on the information of prosecution witness No. 1. The District Magistrate sent the petition to the District Superintendent of Police recording on it that he was not inclined to stay proceedings or to call for the records; finally he rejected the petition on the ground that the police, in whose hands the case was, were satisfied with the procedure of the Magistrate. Now, it will be noticed that at the time the application was made, there was no express order of discharge as to section 304, Indian Penal Code, nor could an order of discharge be implied under the authority of *Krishna Reddi v. Subbamma*(1), above referred to, as the trial had not come to a close as in that case, and it was still open to the Sub-Magistrate to frame further charges and commit under section 347, Criminal Procedure Code, if he thought fit to do so. There was thus no order of discharge to revise, and the application cannot be looked upon as one for that purpose. The District Magistrate also seems to have treated it as an incompetent application, as he declined jurisdiction under section 435, Criminal Procedure Code, and refused to call for the records on the ground that the police were the proper parties to apply and not prosecution witness No. 1. This case is therefore clearly distinguishable from the case quoted. Neither the application, nor the order of the District Magistrate who refused to entertain it and to consider it on the merits, can thus be properly treated in our opinion as a bar to the action taken *suo motu* by the Sessions Judge in this case. We may observe that, if we considered that there was any difficulty in upholding the Sessions Judge's order, we should have ourselves given notice to the accused and directed his committal to the Sessions under our revisional powers, if we considered it necessary in the ends of justice to do so, as the objection taken cannot apply in any case to our exercise of the powers vested in us. But, as the objection to the Sessions Judge's order so far as it refers to section 304, Indian Penal Code, fails, it is not necessary to do so.

On the merits, there seems to be good reason for directing a trial of this accused in the Sessions Court. Both the Deputy Magistrate to whom the case of the other accused was sent up for

(1) (1901) I.L.R., 24 Mad., 136.

enhanced punishment by the Sub-Magistrate and the Sessions Judge consider that the way in which the Sub-Magistrate dealt with the case was quite improper. There was a considerable body of evidence against this accused, and the Sub-Magistrate should have properly committed him to the Sessions, and not taken upon himself to discredit the case against him, on the ground of alibi, by giving him "the benefit of the doubt," as he did.

The order of committal by the Sessions Judge will therefore be confirmed, subject to section 147, Indian Penal Code, being struck out of it.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.
THE TANJORE LIFE ASSURANCE COMPANY, LIMITED
(DEFENDANT), APPELLANT,

1919,
September,
18 and 25.

v.

S. KUPPANNA RAU (PLAINTIFF), RESPONDENT.*

Life Insurance Company—Policy-holder—Alteration of rules—Effect on policy effected before alteration—Refund of premia paid.

A policy-holder in a Life Insurance Company is not bound by any alterations in the rules made after the contract between himself and the company had become concluded.

If a policy-holder, who is permitted by the rules of an Insurance Company to discontinue payment of premia after a stipulated period, does so after that period, the policy does not lapse and the Company is liable to refund the sums actually paid.

SECOND APPEAL against the decree of V. S. KRISHNA AYYAR, the Additional Temporary Subordinate Judge of Tanjore, in Appeal Suit No. 79 of 1918, preferred against the decree of K. S. VENKATACHALA AYYAR, the District Munsif of Tanjore, in Original Suit No. 218 of 1917.

The plaintiff's mother was a policy-holder in the defendant company, and plaintiff was the assignee. By the terms of the policy, Exhibit A, she had to pay a monthly premium of Re. 1 for a period of 15 years from the date of assurance or until death. Clause (1) of the conditions, on the back of Exhibit A, was as follows:—

"(1) Fifty per cent of the total premium invested in the Bank . . . shall be equally distributed among assignees or

* Second Appeal No. 2086 of 1918.

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heirs of the deceased policy-holder in every year subject to the following conditions." These conditions related to the maximum amounts payable in accordance with the period for which the holder had been assured. According to clause (1) (a),

"if the heirs of a policy-holder who has paid the premium of more than Rs. 50 gets in the distribution a sum less than twice the premium paid, the Company will pay the deficiency."

Rule 33, in force at the time when the contract was entered into, provided that

"(a) the policy-holders who are living after 64 months when the admission fee and the monthly premium have been paid for the entire 64 months, need not pay premium, etc. But only after their life-time, the assurance money will be paid to their heir or assignee.

(b) The policy-holders mentioned above who have been making payments duly in that manner, will be paid interest at Rs. 6 per annum. It is only after the death of the policy-holder aforesaid, that the life assurance amount will be determined.

(c) If the present policy-holders so desire, they may pay the entire amount for 60 months and stop paying the monthly premium."

Plaintiff's mother paid 60 monthly premia and then discontinued payment. But prior to that at an extraordinary general meeting a rule (Rule 70) was passed, providing that 'premia shall be payable until day of death.'

Plaintiff sued for the recovery of twice the premia paid together with interest from the date of notification to the Company of his mother's death. The District Munsif dismissed the suit on the ground that the policy had lapsed by non-payment until death as required by the amended rules. On appeal plaintiff gave up his claim for interest but claimed a bonus of 25 per cent, and claimed only the premia paid. The Subordinate Judge held that the plaintiff was entitled to a refund of the premia paid by his mother and decreed the amount with costs. From this decree and judgment the defendant Company preferred this second appeal. Further material facts and rules are to be found in the judgment.

T. L. Venkatarama Ayyar for the appellant.

T. K. Rangaswami for the respondent.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—Both the junior members of the bar who appeared in this case argued their case very ably. The

facts are not in dispute. A policy was effected on the life of one Nagammal on 29th May 1906. The premia were payable monthly. The assured made 61 payments, and then discontinued the payment. She died on 6th April 1914 and the present suit was instituted on 11th April 1917. The District Munsif dismissed the suit. In Appeal the Subordinate Judge gave a decree for the amount of premia paid by the deceased. I agree with the conclusion of the lower Appellate Court though not for the reasons given by it.

When the insurance was effected the rule of the company stood thus; [see Exhibit E, clauses (b) and (c)]:

"(b) The policy-holders mentioned above who have been making payments duly in that manner, will be paid interest at the rate of Rs. 6 per annum. It is only after the death of the policy-holder that the life assurance amount will be determined. (c) If the present policy-holders desire, they may pay the entire amount for 60 months and stop (paying) the monthly premium."

It was under this last clause that Nagammal paid for 60 months and then stopped payments. That she was justified in discontinuing payment is clear from two Exhibits C and C₁, which were letters written by the Secretary of the Company to the assured. In these letters it is pointed out that as she has discontinued payments she is not entitled to interest. There is no suggestion that the policy had lapsed owing to non-payment of the premium.

In or about January 1911, the share-holders held an extraordinary meeting at which they passed resolutions, to the effect that the premia should be continued to be paid till the death of the assured. Rule 70 is:

"Premium shall be payable until the death of a policy-holder."

It is common ground that no notice was given to the assured about this extraordinary meeting. The contention on behalf of the Company is that as under the new rules the premia ought to have been continued till the death of Nagammal, she forfeited her right even for the payment of the amount paid by her as the policy had lapsed by non-payment. The Subordinate Judge has not discussed the real question for decision, apparently as the arguments in the Court below were not directed to it. He has referred to section 65 of the Contract Act and has held that as

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the contract has become void, the promisee is entitled to the refund of the moneys paid under it. There can be no doubt that if there has been a failure to pay the stipulated premia the assured is not entitled to a refund of the sums actually paid. The principle is stated very succinctly in Crawley's book on Insurance, as to when and under what circumstances the premium will be repaid. Roughly speaking, in three classes of cases the assured can claim refund. Where there has been fraud on the part of the company in inducing the assured to insure in the Company, or where the policy has become void ab initio, or where no risk has been incurred by the insurer. Macgillivray quoted by Mr. Venkatarama Ayyar, for the appellant, states the law thus:

"The general rule applicable to claims for the return of the premium is that if the insurers have never been on the risk they have not earned the premium and ought to return it. Thus, if a contract of insurance is set aside on the ground of misrepresentation or mistake or for some other reason the policy is held to have been void ab initio, or to have been avoided before the risk began to run, the assured is, in the absence of any express condition to the contrary, entitled to claim repayment of any premium which he may have paid".

Bermon v. Woodbridge(1), *Anderson v. Fitzgerald*(2), *Goldstein v. Salvation Army Assurance Society*(3), *Moses and another v. Pratt*(4), *Pritchard v. The Merchants' and Traders' Mutual Life Assurance Society*(5), all bear out this statement of law.

The next question is, when is the risk run by the Company? In *Canning v. Farquhar*(6), it was stated that, in the absence of a provision to the contrary, the risk commences at the time when a binding contract of insurance is concluded. Applying this principle, the risk commenced against the defendant Company on the execution of Exhibit A, the policy of insurance, on the 29th May 1906, and if the assured is bound by the new rules passed by the Company at its extraordinary meeting there can be no doubt on the principles of the decisions already quoted by me, the heirs of the assured will not be entitled to claim the return of the premium.

(1) (1781) 2 Doug. (K.B.), 781.

(3) [1917] 2 K.B., 291.

(5) (1858) 3 C.B. (N.S.), 622.

(2) (1853) 4 H.L.Cas., 484.

(4) (1816) 4 Camp., 267.

(6) (1886) 16 Q.B.D., 727.

Now comes the question, which has been raised by the learned vakil for the respondent, whether the new rules were binding upon Nagammal. The right principle is, that ordinarily a concluded contract cannot be reopened by one of the parties to it making a change in regard to the terms of the contract. That principle is well illustrated by *Allen v. Gold Reefs of West Africa, Limited*(1). Lord Justice ROMER put this question to the counsel: "Can you alter articles so as to affect past transactions?" The answer was: We do not propose to alter the relation of debtor and creditor."

In the same judgment LINDLEY, M.R., says, at page 672:

"But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that if they are altered bona fide for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the company when the alteration is made. But, it will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up shareholder. He may have special rights against the Company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles so altered."

And then at the end of page 673 the learned Lord Justice says:

"A company cannot break its contracts by altering its articles but, when dealing with contracts referring to revocable articles and specially with contracts between a member of the company and the company respecting its shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered."

VAUGHAN WILLIAMS, L.J., who differed from the majority of the bench, says:—

"A resolution may alter the regulations of a company but cannot retrospectively affect existing rights."

Lord Justice ROMER also said that if there was a concluded contract the company will not be justified in altering its terms by subsequent resolution. The case before the Court of appeal was one affecting a shareholder.

(1) [1900] 1 Ch., 656, at p. 663.

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A shareholder would usually have no notice of the proposed change in the articles of association; he would have an opportunity of contesting the proposal to change the rule. His case is therefore not in *pari materia* with that of a stranger who is a policy-holder and who is not given notice of meetings of the company. Therefore, while the observations contained in this decision are certainly in favour of the view that a concluded contract should not be altered to the prejudice of the promisee by anything done behind his back and to which he had not submitted himself, the suggestion of the learned vakil for the appellant that a policy-holder is as much bound as a shareholder by any change that may be made in the rules is not borne out by this judgment. He, however, relied upon the decision of the House of Lords in *British Equitable Assurance Company, Limited v. Bailey*(1). That was undoubtedly a case of a policy-holder, and the question there was whether he was affected by a new rule passed at an extraordinary meeting of the company. The reservations contained in the judgment of the noble Lords support the view taken in *Allen v. Gold Reefs of West Africa, Limited*(2). In that case the facts were these: "The assured entered into a contract which contained these terms:—

"I agree to conform to and abide by the deed of settlement and by-laws, rules and regulations of the company in all respects."

Another provision to which he submitted was this:

"I shall pay, all such other sums, if any, as the company by their directors ordered to be added to such an amount by way of bonus or otherwise, according to their practice for the time being."

What was done at the extraordinary meeting was to set apart a certain amount of the profits for a reserve fund. The assured contended that, as the prospectus on the faith of which he assured his life did not provide allocating portion of the profits to the reserve fund, the action of the company was not binding on him. Lord MACNAGHTEN at the very outset of his judgment quotes these observations of COZENS HARDY, L.J.:—

"A company cannot by altering its articles justify a breach of contract,"

and then proceeds:

"No one, I should think, would be inclined to dispute the proposition thus asserted."

(1) [1906] A.C., 35.

(2) [1903] 1 Ch., 656.

The noble Lord then refers to the fact that the assured had bound himself to abide by any changes that may be made by the company and then says:—

"It will be observed that the prospectus does not purport to give an assurance of any sort that the allocations of profits would never be altered."

Finally he concludes:—

"I am at a loss to understand how the Court of appeal came to the conclusion that the statements in this prospectus constituted a collateral contract or ought to be treated as incorporated in the contract of insurance."

Lord ROBERTSON used similar language. Lord LINDLEY who took part in the decision in *Allen v. Gold Reefs of West Africa, Limited*(1) says at the bottom of page 42:—

"A by-law to the effect that no creditor or policy-holder should be paid what was due to him would, in my opinion, be clearly void as an illegal exercise of power."

The noble Lord, like Lord MACNAGHTEN, points out that the prospectus on the faith of which the policy-holder entered into the contract was not part of the contract and therefore as the assured had bound himself to abide by any changes that may be made regarding the distribution of profits, he should not be heard to say that the company had no power to change its rules.

* Now applying these principles to the present case, it is clear in the first place, that Nagammal did not bind herself to abide by any alterations that may be made by the company in future. Mr. Venkatarama Ayyar referred to this sentence in Exhibit A:

"The company shall be subject and liable to pay . . . to the assured or her assignee S. Kuppanna Rau, son or heirs or to whomsoever he assigns such sums that shall become due and payable by virtue of the rules contained on the back hereof agreeable to the regulations of the company."

That only related to the amount that may be found due. The assured did not submit herself to any changes that may be made by the company in its rule. Moreover, the contract between Nagammal and the company had become concluded, and it was not open to the company to change any of its terms by its one-sided action. It seems to me, therefore, that the action of the company so far as assurances which were completed before they passed new rules were concerned was *ultra vires*, and could not

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bind the policy-holders. In this view, in my opinion, the decision of the Subordinate Judge is right, and this appeal should be dismissed with costs.

MOORE, J.—The facts in the case are simple and may be shortly stated. Plaintiff's mother took out a policy in the Tanjore Life Assurance Company on 29th May 1906. The policy provided that, if the assured paid the future premium at one rupee per mensem until 20th May 1921 or till her death the company would be liable to pay her or her assignee the (plaintiff) "such sum as shall become due and payable by virtue of the rules contained on the back hereof agreeable to the regulations of the company on the completion of 15 years' premium or on satisfaction of proof of death and title of the assured." It is not disputed that plaintiff's mother paid the premia for 60 months, that is, till May 1911, that she made no further payments and that she died on 6th April 1914. The suit was brought to recover the amount which might be found due on taking accounts with interest thereon from 15th April 1914 and the claim was valued at Rs. 143-12-0 namely, twice the amount of the premia paid plus interest.

The District Munsif dismissed the suit, on the ground that the policy had lapsed on account of the non-payment of premia. In appeal, plaintiff gave up a portion of his claim. The Subordinate Judge reversed the decree of the District Munsif and held that plaintiff was entitled to recover Rs. 60, the amount of the premia paid. The principal question for decision in this appeal is whether plaintiff is entitled to claim a refund of the premia paid by his mother. Under the rules of the company which were in force when the policy was issued, policy-holders had the option of discontinuing the payment of the monthly premium after they had paid for 60 months. See rule 33 (c), which provided that if the present policy-holders so desired they might pay the entire amount for 60 months and stop paying the monthly premia. An extraordinary general meeting of the Directors was held on 29th December 1910, and it was resolved to alter the existing rules in view of the unsatisfactory financial position of the company. Another extraordinary general meeting was held on 15th January 1911 and it was resolved that the amended rules be confirmed, and adopted agreeably to the special resolution framed on 29th December 1910 which was

confirmed. See Exhibit D. The resolution of 29th December 1910 was communicated to the Registrar of the Joint Stock Societies and recorded by him. Rule 49 of the new rules provided that if premiums be not paid for four successive months on a policy the policy would lapse without any notice being given by the Company to the defaulter, but a lapsed policy might be renewed within six months from the date of the lapse, on payment of a fee for renewal and arrears of premia—rule 50. Rule 70, says that premium shall be payable till the death of a policy-holder. Rule 33 (c) of the old rules was not altered by any express rule in Exhibit D, but I doubt whether the Subordinate Judge is right in saying that Rule 49 applies only in the case of those policy-holders who have not paid premia for 60 months, and that rule 70 in Exhibit D must be read with the old rule 33 (c). The Subordinate Judge goes on to say :

"a lapsed policy means a void policy. The insurance Company must be ready to refund the premia paid in the case of a lapsed policy on the date of the death of the policy-holder . . . In the absence of an express stipulation for the forfeiture of the premia on avoidance of the policy, it seems that in order to obtain cancellation the insurer must at least in the absence of fraud be ready to return the premia."

The Subordinate Judge has, I think, misunderstood the law on the subject, and it appears to be clear from the authorities to which the learned vakil for the appellant has referred us, that when a policy lapses owing to non-payment of the premium the assured is not ordinarily entitled to claim a return of the premium paid.

"When the policy is void *ab initio*, or in any case where a premium has been paid but the risk has not been run, whether this has been owing to the fault, pleasure or will of the assured or to any other cause, the premium shall be returned by the insurers, but, if the risk has once commenced there shall be no apportionment or return of the premia afterwards."

Bunyan on Life Assurance, 5th Edition, page 109, and *Bermon v. Woodbridge*(1).

The law as to the right of an assured to claim a return of the premium in the case of the policy being or

(1) (1781) 2 Doug. (K.B.), 781.

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becoming void is the same in life assurance as in marine insurance. Halsbury's Laws of England, Vol. XVII, at page 557:

"Where a policy which is not illegal is void *ab initio* and no risk is run, the assured is entitled to a return of the premium he has paid, but if the risk has once commenced the premium cannot, in the absence of fraud, be reclaimed. On the other hand, if the assured is entitled to have the policy cancelled on the ground of his having been induced to enter into the contract of insurance by the fraud of the insurers, he is entitled to recover the premiums he has paid."

The Subordinate Judge was of opinion that plaintiff was entitled, under section 65 of the Contract Act, to a refund of the premiums paid by his mother, but section 65 applies only to cases where the agreement is discovered to be void or the contract becomes void at law for any of the reasons specified in the Contract Act; *Oriental Government Security Life Assurance Company, Limited, v. Narasimha Chari*(1).

It remains, however, to consider the question whether the new rules of the Society infringed the rights of the policy-holder, and are binding on the plaintiff's mother. Rule 70 which required policy-holders to continue making payments until death undoubtedly introduced an important change in the rules. The contract between the parties is contained in the policy of insurance, and plaintiff's mother did not take out the policy subject to the rules then existing as well as to the rules which might be framed or altered afterwards. The words in the policy are

"The company shall be liable to pay . . . to the assured such sums as shall become due or payable by virtue of the rules contained on the back hereof agreeable to the regulations of the company on the completion of the payment of 15 years' premiums."

It is significant that the letters, Exhibits (C) and (C₁) from the Secretary, merely say that as plaintiff's mother had discontinued payments she would not be entitled to interest, thereby implying that she was justified in discontinuing the payments. As regards the extent to which a Company can affect the rights

(1) (1902) I.L.R., 25 Mad., 183, at p. 214.

of members by an alteration in the articles I may refer to Lindley on Companies, Vol. I, 6th Edition, at page 463:

"When considering contracts referring to revokable articles it must not be assumed that the contract involves as one of its terms that the articles shall not be altered and the terms of the contract thereby varied. If there be such an agreement these rights cannot be altered by an alteration of the articles. If there is no such agreement they can be altered, provided the alteration does not affect rights which have ripened into claims for something done under the contract in its original form."

See *Allen v. Gold Reefs of West Africa, Limited*(1). *British Equitable Assurance Company, Limited, v. Baily*(2) was strongly relied on by the learned vakil for the appellant. The House of Lords decided, in the case of a Life Assurance Company, that the Company could alter its bye-laws and alter its practice in the distribution of the profits, and thereby vary its contract with a policy-holder, but it appears to be clear from the judgments of the learned Lords that the decision of the case turned on the question whether the prospectus formed part of the contract. Lord Lindley says at page 41:

"The prospectuses not being referred to in the Policies cannot, in my opinion, be legitimately referred to in order to construe the contract into which the policy-holders have been induced to enter. These contracts are to be found in the policies themselves."

Lord Macnaghten did not dissent from the proposition stated by Cozens Hardy, M. R., that a Company cannot by altering its articles justify a breach of contract. For the foregoing reasons I agree with my learned brother that the Insurance Company by altering its rules had no power to affect the rights of policy-holders whose contracts were concluded, and that the appeal should be dismissed with costs.

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(1) [1903] 1 Ch., 656.

(2) [1906] A.C., 85.

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APPELLATE CRIMINAL.

Before Mr. Justice Seshagiri Ayyar.

P. KANDASWAMY MUDALIAR (ACCUSED), PETITIONER,

v.

KING-EMPEROR.*

1919,
September
19 and 26.

Madras City Municipal Act (III of 1904), sec. 366.—Order by Health Officer to remove a patient to isolation hospital—Removal to isolated house—Disobedience of order—Charge under sec. 269, Indian Penal Code, whether sustainable—Duty of prosecution—Essentials of offence—'Illegally' and 'unlawfully'; distinction between.

A person who was directed by the Health Officer, acting under section 366 of the Madras City Municipal Act, to remove his son to an isolation hospital, removed him to an isolated house.

Held, that he was not guilty of an offence under section 269, Indian Penal Code.

Although, under section 366, clause (3) of the Madras City Municipal Act, a person disobeying an order under the section is to be deemed to have committed an offence under section 269, Indian Penal Code, the prosecution must prove not only that there has been disobedience to the order, but also that he had unlawfully or negligently done an act which he knew, or had reason to believe, would spread infectious disease.

Cahoon v. Mathews, (1897) I.L.R., 24 Cal., 494, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the conviction and sentence passed on the petitioner by MUHAMMAD MUNNIB SAHIB, Presidency Magistrate, Egmore, in Calendar Case No. 7124 of 1919.

The material facts and contentions appear from the judgment.

K. P. Kesava Menon for the petitioner.

The Crown Prosecutor on behalf of the Crown.

ORDER.—The facts of the case are these. The accused was asked by the Health Officer of the City of Madras to remove his son to the Isolation Hospital at Krishnampet, as the child was then suffering from small-pox. The child was being treated by Dr. V. Rama Kamath, a certified medical practitioner. This gentleman advised the accused to remove the patient to an

isolated house, which was done. Thereupon this prosecution was launched under section 269 of the Indian Penal Code. The Magistrate was apparently of opinion that as the Health Officer was the sole judge of the justness of the order to remove the infected child to a hospital, he had no option but to convict the accused of the offence. There is an affidavit that the Magistrate did not permit evidence being given as to the precautions, taken by the accused to avoid infection. The question for consideration is whether this conviction is right.

Under section 366 of the Madras City Municipal Act (Act III of 1904), under which the order for removal was made, it must 'appear to the Health Officer that a person is suffering from a dangerous disease', has no proper lodging or accommodation, or lodges in a place occupied by more than one family. Then he can order the person to be removed to the isolation hospital. So the Health Officer has to be satisfied not only that a person is suffering from infectious disease, but also that the infected person has no proper lodging, or is lodged in a place which is occupied by more than one family. In this case, no doubt at the time the order was made the son of the accused was being lodged in a place which was occupied by more than one family. Therefore, the order in its inception was right, although it is defective in that it gave no option to the accused to lodge his son in a proper place. The further question is whether the action of the accused in providing a separate lodging was such a violation of the order as brought him under section 269 of the Indian Penal Code. The 3rd clause of section 366 says:

"Whoever having charge of a person in respect of whom an order is made under sub-section (1) disobeys the said order shall be deemed to have committed an offence punishable under section 269 of the Indian Penal Code."

The learned Crown Prosecutor suggested that this notional imputation of crime deprived the Magistrate of power to inquire into the elements which constitute the offence under section 269. It would be dangerous to hold that the prosecution is not bound to prove the offence because the local legislature has enacted that a violation of the order of an executive officer is punishable under a particular section of the Code. The Penal

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Code is an All-India Statute, and anybody charged under it has the right to expect of the prosecution proof that he has committed the offence as defined in the section.

Turning to the Indian Penal Code, I find that to bring the offender within it, he should have unlawfully or negligently done an act which he knew or had reason to believe to be likely to spread the infection of any disease dangerous to life. The accused in this case is not charged with disobeying the order of a public servant lawfully promulgated. He is charged with having knowingly spread the infection of disease. Therefore, the question is not whether the order of the Health Officer in its inception was right, but whether the conduct of the accused in choosing the alternative of sending his son to an isolated house was an offence under section 269.

Before I refer to cases, I must draw attention to the language of the section. It uses the words 'unlawfully or negligently' and not illegally. As was pointed out by Lord ELLENBOROUGH, in *Re v. Vantandillo*(1), any indictment which charges a person to have done an act unlawfully or injuriously must assume or prove that there was no lawful excuse. LE BLANC, J., said this :—

"Neither did they pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner and the patient was kept from the society of others so as not to endanger a communication of the disease."

In such a case the law did not pronounce it to be an offence. So the gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid such an infection, the act cannot be said to be unlawful or negligent. In fact, the City Municipal Act contemplates that the action will not amount to an offence if a proper lodging or accommodation is found for the infected person. When we remember that section 269 does not use the word 'illegal', which has been defined by section 43 as being applicable to everything which is an offence or which is prohibited by law, but uses the word 'unlawful', it is clear that the prosecution must make out not only that there has been disobedience to the order of the Health Officer, but also that the

(1) (1815) 4 M. & S., 73.

disobedience was unlawful and negligent and had also the effect of spreading infectious disease.

The case nearest in point is *Cahoon v. Mathews*(1). In that case a mother was directed to remove her daughter to an isolation hospital. She refused to comply with the order unless she was herself allowed to accompany her child. Thereupon she was charged under section 269 of the Indian Penal Code. The learned Judges held, that as in her own house there were no lodgers, as the order to remove was passed upon a misapprehension as to the existence of lodgers, and as sufficient accommodation was provided for the infected child, the mother did not act unlawfully or negligently. The learned Judges say, and I entirely agree with that observation of theirs :—"An act, however, may be lawful though it may be illegal." Therefore, although in the present case the refusal to comply with the direction of the Health Officer might have been illegal as defined in section 43, I am not prepared to hold that it was unlawful, when it is found that proper precautions were taken to prevent infection and to provide suitable lodging for the person infected. I may refer in this connexion to the weighty observations of Lord BLACKBURN and Lord WATSON in *Metropolitan Asylum District v. Hill*(2). Lord BLACKBURN said :

"On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication."

Lord WATSON in the same case said :

"Where the terms of a statute are not imperative but permissive, the fair inference is that the legislature intended that the discretion as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights."

The Health Officer would have been well within his rights, if he had told the accused that he should either provide a proper lodging for the son or he should remove the child to the hospital. That would have been in the language of Lord WATSON an exercise of discretion compatible with private rights. The mere failure to carry out an order, which could otherwise have been bona fide obeyed by the avoidance of the danger of infection,

(1) (1897) I.L.R., 24 Cal., 494.

(2) (1881) 6 App. Cas., 193.

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cannot be regarded as an offence under section 269 of the Indian Penal Code. I must, therefore, quash the conviction. The learned Crown Prosecutor informed me that in case I come to the conclusion that the Magistrate was not justified in shutting out evidence he was not prepared to press for the case being sent down for further inquiry. All that is necessary in a case of this description is to state the principle which should guide the Magistrate under similar contingencies. The fine, if paid, must be refunded.

K.B.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Burn.

BHEEMANNA AND TWO OTHERS, PETITIONERS* (ACCUSED),

v.

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1919,
October 8.

Indian Railways Act (IX of 1880), ss. 3 and 121—Indian Railway Board Act (IV of 1905), Rules 244, 229 and 281—Stationmaster deputed signaller to collect tickets and excess fare—Assault on signaller by passenger.

Under Rules 244, 229 and 281 framed under the Railway Board Act (IV of 1905) a Stationmaster has power to depute a signaller subordinate to him to collect tickets and excess fares from passengers alighting at the station, and a signaller so deputed is a 'Railway servant employed by a Railway administration' within the meaning of section 3, clause (7) of the Indian Railways Act (IX of 1880). An assault by a passenger on such signaller rightly demanding excess fare is an offence under section 121 of the Indian Railways Act.

CRIMINAL REVISION against the conviction and sentence by M. NARASIMHAM PANTULU GARU, First-class Magistrate of Markapur, in Criminal Appeal No. 34 of 1919 preferred against the conviction and sentence by P. SRINIVASAYYA, Second-class Magistrate of Giddalur, in Calendar Case No. 529 of 1918.

The facts are set out in the judgment.

A. S. Viswanatha Ayyar for petitioners.

V. L. Ethiraj for the Public Prosecutor for the Crown.

The ORDER of the Court was delivered by—

SADASIVA AYYAR J.—The three accused (petitioners in revision) were convicted by the Giddalur Sub-Magistrate, the first two

of the offences under section 121, and the third of the offence under section 120 (b) of the Indian Railways Act, IX of 1890.

The petition is not pressed as regards the third accused, except in the matter of sentence (a fine of Rs. 25 has been imposed on each of the accused), but we do not think that the sentence is so excessive, having regard to the facts found by the first Magistrate and by the appellate Magistrate, to call for interference in revision in the case of any of the accused on that sole ground.

As regards the first and second accused, the facts found are: (a) that on 21st November 1918, the Stationmaster of Giddalur (prosecution witness No. 1) deputed the signaller (prosecution witness No. 2) to collect tickets and excess fare (where such had to be collected) from the passengers alighting from the 45 up-train arriving at Giddalur in the evening; (b) the first accused alighted with a rice bag, and prosecution witness No. 2 demanded payment of excess fare, evidently as the rice bag was heavier than the weight of luggage allowable on his ticket; (c) the first and second accused assaulted prosecution witness No. 2 and also prosecution witness No. 1 (the Stationmaster) when he intervened to help prosecution witness No. 2.

"Railway servant" is defined in section 3, clause (7), as "any person employed by a Railway administration in connexion with the service of a Railway." "Railway administration" means (in this particular case) "the Railway Company." [See section 3, clause (6).] "Railway Company" means "owners or lessees of a railway or parties to an agreement for working a railway" [clause (5)].

Thus a "Railway servant" in section 121 is a person employed by the owners or lessees of the railway or the persons working the railway in connexion with the service of the railway.

The employment (we take it) is by appointment and the "service of a railway" includes collecting tickets and fares from passengers.

The appointment of a ticket collector cannot be and is not made by all the proprietors forming the Railway Company, who are usually in England, but through agents appointed under rules, the rule-making power being vested in the Company under section 47, such rule providing among other matters, "(e)

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for regulating the conduct of the railway servants" and "(g) generally, for regulating the travelling upon, and the use, working and management of, the railway."

Mr. A. S. Viswanatha Ayyar, who appeared for the accused, did not dispute that prosecution witness No. 1 was the validly appointed Stationmaster, and prosecution witness No. 2 was the validly appointed signaller at the station. It is also found by the lower Courts that the Stationmaster did depute the signaller to collect tickets. Rule 244 of the General Rules made by the Railway Board acting under the Indian Railway Board Act (IV of 1905) says:

"The Stationmaster shall be responsible for the efficient discharge of the duties devolving upon the several members of the staff employed, and such staff shall be subject to his authority and directions in the working of the station."

Rule 229 says:

"Every Railway Servant must promptly obey all lawful orders given by any person placed in authority over him."

Rule 231 (1) allows a Railway servant, with the permission of his superior officer, to exchange duty with any other railway servant. We think that these rules give sufficient authority to the Stationmaster to delegate the duty of collecting tickets to a signaller. Thereupon, and especially when the signaller consents, it becomes the duty of the signaller as a railway servant to collect tickets, and there is nothing to prevent him from consenting to undertake the duty of collecting tickets. Once he undertakes such a duty and does act in discharge of that duty, he must be held to be "a Railway Servant acting in the discharge of his duty" within the meaning of that expression in section 121.

Mr. A. S. Viswanatha Ayyar, if we understood his rather subtle argument aright, relied upon section 69 of the Indian Railways Act and contended that the passenger was bound to present his pass or ticket only to the Railway Servant "appointed by the Railway Administration in that behalf", and hence it followed that he need not present a pass or ticket to a Railway Servant who was not appointed by the Railway Administration, but who was only appointed by the Stationmaster temporarily, and that obstruction to that person when he demands a pass or ticket is not obstruction "to a Railway Servant in the discharge

of his duty." We are unable to accept this argument. The appointment by the "Railway Administration" or Railway Company of a particular person to do a particular duty is through agents empowered by rules, and we think that the rules empower the Stationmaster as agent of the Railway Administration to appoint one of the station staff temporarily to do duties of a particular post in the station, and when the person so appointed to do that duty temporarily performs that duty, he is a "Railway Servant acting in the discharge of his duty", and obstruction to him is punishable under section 121 of the Indian Railways Act. We therefore dismiss the revision petition as regards accused Nos. 1 and 2 also.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

AGNIHOTRAM JAGANNADHA CHARYULU (PLAINTIFF),
APPELLANT,

v.

SRI RAJA BOMMADEVARA SATYANARAYANA
VARAPRASADA RAO BAHADUR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 111 and 118—Civil Procedure Code, O. XXI, rr. 90 and 92—Sale of ryot's holding for arrear of rent—Irregularity in conduct of sale—Application to Revenue Court by landholder to set aside sale—Jurisdiction of Revenue Court—Order setting aside sale—Suit by purchaser in Civil Court for declaration that order is ultra vires and void, whether maintainable.

When summary proceedings under sections 111 and 118 of the Madras Estates Land Act have been instituted by a landholder for recovery of rent by the sale of a ryot's holding and property has been sold, the Revenue Court has no jurisdiction, on an application by the landholder, to set aside the sale on the ground of irregularity in the publication, or conduct, of the sale; and if such an order is passed the purchaser can institute a suit in a Civil Court for a declaration that the order is ultra vires and void.

Order XXI, rules 90 and 92, Civil Procedure Code, do not apply to sales held under sections 111 and 118 of the Madras Estates Land Act.

SECOND APPEAL against the decree of C. RANGANAYAKULU NATUDU, the Temporary Subordinate Judge, Masulipatam, in Appeal Suit

* Second Appeal No. 1975 of 1918.

1919,
September
30 and
October 3.

JAGANNA-
DHA
CHARYULU
v.
SATYA-
NARAYANA
VARA-
PRASADA
RAU.
SPENCER, J.

No. 29 of 1918, preferred against the decree of T. R. NARASIMHA-MURTI SASTRI, the District Munsif of Avanigadda, in Original Suit No. 54 of 1916.

The material facts appear from the judgment.

P. Nagabhushanam for appellants.

V. Ramesam for respondents.

SPENCER, J.—The appellant, who purchased the holding of a ryot at a sale held under the provisions of Chapter VI of the Madras Estates Land Act (Madras Act I of 1908), brought this suit to have it declared that the order of the Deputy Collector setting aside the sale for irregularities in the issue of notice, on a motion made by the landholder who brought the holding to sale, was ultra vires and void. The suit was instituted in an ordinary Civil Court. The District Munsif who tried the suit held that as a Judge of a Civil Court he had jurisdiction to entertain it, but that no suit lay in consequence of the provisions of Order XXI, rule 92 (3), Civil Procedure Code. The Sub-Judge who heard the appeal agreed with him on the point that the suit was not maintainable, and held that it was also barred by the rule of res judicata. I have no doubt that they were both wrong on this point.

If the Deputy Collector had held a sale of the ryot's property in execution of a decree for rent passed by himself or by some other Collector, in a suit instituted under article 8 of Part A of the schedule to the Act, the provisions of the Civil Procedure Code, relating to the execution of decrees, including rules 90 and 92 of Order XXI, would by the force of section 192 of Act I of 1908 have become applicable to this case, so far as section 192 allowed it. But when summary proceedings are taken for the recovery of rent by the sale of the ryot's interest in the land under the provisions of section 111 and the following sections, the Collector has only to follow strictly the specific procedure laid down in the Act for the recovery of arrears without having recourse to a suit. Under that procedure it is not provided that a Collector may set aside a sale on account of irregularities. A sale may be postponed under section 121 or stopped by offering the amount due for arrears under section 122; but when once it is knocked down, the sale becomes final, and unless the defaulting ryot or some one else interested deposits the amount

of the arrears and the costs of the sale together with five per cent of the price within thirty days and so gets the sale set aside under section 131, it is imperative for the Collector to grant the purchaser a certificate of sale under section 124. The same was the case under the former Rent Recovery Act (see section 35 of Act VIII of 1865). There is no provision in either Act for sales being confirmed. Under the former Rent Recovery Act, it was expressly declared, in section 36, that no irregularity in publishing or conducting a sale of moveable property would vitiate such a sale, but this was not the case with sales of defaulter's holdings, although the same rules for conducting such sales were made applicable by section 40, as it was held in *Nattu Achalai Ayyangar v. Parthasaradi Pillai*(1) that a suit would lie in the Civil Courts to question the propriety of a sale of immoveable property under the Act, and to have it set aside for irregularities. *Dorasamy Pillai v. Muthusamy Mooppan*(2) was an instance of such a suit brought in a Civil Court.

Since the passing of the present Act, it has been held that a defaulter can sue in the Civil Courts to have it declared that the sale of his holding was void for fraud or irregularity in the conduct of the sale [see *Chidambaram Pillai v. Muthammal*(3) and *Gouse Mohideen Sahib v. Muthialu Chettiar*(4)].

When the prevailing law was that enacted by Act VIII of 1865, a purchaser could have brought a suit, such as the present, to declare that the Deputy Collector had no power to set aside a sale once completed [see *Velli Periya Mirav. Moidin Padsha*(5)] and in this respect too the enactment of Act I of 1908 has not effected any alteration in the law.

There being no other substantial objection to the plaintiff succeeding in this suit, the decrees of the lower Courts are reversed and the plaintiff will be given a declaratory decree as prayed for with costs throughout from first defendant.

KRISHNAN, J.—The lower Courts have dismissed the plaintiff's suit as barred by Order XXI, rule 92, clause (3), Civil Procedure Code, Act V of 1908, and hence this second appeal by him.

(1) (1881) I.L.R., 8 Mad., 114. (2) (1904) I.L.R., 27 Mad., 94.
(3) (1915) I.L.R., 38 Mad., 1042. (4) (1914) M.W.N., 55.
(5) (1886) I.L.R., 9 Mad., 332.

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He purchased the second defendant's father's holding at a rent sale held under section 118 of the Estates Land Act, when sold in public auction for arrears of rent due by the latter as a ryot to his landholder the first defendant who is the proprietor of the South Vallur Estate. The Revenue Inspector, who was appointed as the selling officer, under section 116 of that Act, accepted the plaintiff's bid and knocked down the property to him and received payment of the sale price as provided for in section 123. No application was made for setting aside the sale under section 131. Nevertheless the Deputy Collector, acting on a petition, put in by the first defendant's manager which alleged certain irregularities in the conduct of the sale and consequent loss by the holding being sold for a grossly inadequate price, set aside the sale and directed a resale. A review petition by the plaintiff was rejected after hearing the parties and the original order was confirmed.

Plaintiff has brought the present suit to have it declared that his purchase was a valid one, and that the order setting it aside and directing a resale was without jurisdiction, and null and void and not binding on him.

In making his order the Deputy Collector purported to act under Order XXI, rule 90, Civil Procedure Code, read with section 192 of the Estates Land Act. The lower Courts have supported this view and it is thus necessary to examine these provisions to see if that view is correct.

Section 192, Estates Land Act, no doubt makes rules 90 and 92 applicable to proceedings under the Act for the corresponding sections 311, 312 and 314 of the old Code are not excepted sections in section 192, clause (a). To decide the question as to what proceedings in particular they apply and whether they apply to the rent sale proceedings before us, we must examine the language of those rules themselves. Now if we turn to rule 90 we find that it applies only to cases where immovable property has been sold in execution of a decree; the rule therefore cannot be applied except to such sales, as its language precludes its application to sales in general even though made through Court officers. The difficulty in applying this rule to the rent sale before us is that it was not made in execution of any decree at all. An examination of sections 111 to 134 of the Estates Land Act which deal with such rent sales does not disclose

anything in the nature of a decree being passed; there is no adjudication by the Collector of any rights of the parties. Neither the sale of a holding nor that of property distrained under section 96, Estates Land Act, can, with any justification, be held to be a sale in execution of a decree. It seems therefore to be clear that rule 90 cannot be applied to such sales.

It was suggested that this view would nullify the effect of the application of rule 90 to proceedings under the Estates Land Act. That is not so, because the rule would apply to sales in execution, for example, of rent decrees passed by the Revenue Courts.

If rule 90 does not apply, rule 92 also cannot apply and the bar pleaded to the present suit under clause (3) of the latter rule fails.

It is conceded that no section of the Estates Land Act taken by itself gives the Deputy Collector power to set aside the sale of a holding for any irregularity. In the case of sale of distrained property, sections 103 and 104 make some provision for ordering a resale for certain irregularities mentioned in the latter section. But no such provision exists in the case of sales of holdings. In fact the language of section 124 seems to preclude the idea of the sale of a holding being set aside for irregularity, for under clause (2) thereof the Collector is bound to grant a certificate of sale to the purchaser when the purchase money is paid under section 123, save in the sole instance of an application under section 131 having been made and granted. Section 131 deals only with an application to set aside the sale of a holding on payment of the amount specified in the proclamation of sale and costs to the land-holder, less any amount paid to him subsequently, and 5 per cent of the purchase money to the purchaser; it is similar in character to rule 89 of Order XXI, Civil Procedure Code. That section has nothing to do with cases of irregularity in publishing and conducting sales. If we turn to schedule B to the Estates Land Act which mentions the various applications that can be made under the Act we find that it makes no mention of any application to set aside the sale of a holding for any irregularity, the only applications referred to therein in this connexion being applications under sections 114, 131 and 133; see Nos. 18, 19 and 20 of that schedule. It seems, therefore, that the legislature did not contemplate applications based on irregularities to set aside rent sales of holdings.

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It cannot be argued that the sale remained incomplete till the Deputy Collector decided whether the bid of the highest bidder should be accepted or not, for under sections 118 to 123 of the Estates Land Act that duty seems to be cast on the selling officer.

It seems therefore impossible to avoid the conclusion that the Deputy Collector had no power to set aside the sale to the plaintiff as he did and his action in doing so was ultra vires. In these circumstances it is conceded that the Civil Court had jurisdiction to give a declaration declaring the invalidity of the order and the validity of the plaintiff's purchase. See *Chidambaram Pillai v. Muthammal*(1), where also the order was found to be without jurisdiction. The suggestion that on the above view a person who has suffered loss on account of irregularity or fraud in the conduct of a rent sale of a holding will be left without a suitable remedy is, even if it is correct (about which I express no opinion), not one we can take into consideration in deciding the question before us, as our decision must depend entirely on the provisions of the law as we find it.

It was finally argued that, without getting a sale certificate under section 124 of the Estates Land Act, plaintiff is not entitled to a declaration of his title to the land. But that is not the declaration he is claiming. His prayer is to declare that his purchase is valid, and that the order setting it aside is invalid. Such a declaration cannot be treated as a futile one, as the Revenue authorities will no doubt act according to it when produced before them, and give plaintiff a sale certificate and possession of the land as required by section 124.

No objection having been raised in this suit to the validity of the plaintiff's purchase on the merits, and it not being explained how plaintiff's suit is barred by limitation though an issue was raised on the point as additional issue No. 5, and the Deputy Collector's order setting aside his purchase being found to be ultra vires, we must give him the declaration he has asked for in the plaint.

The decrees of the lower Courts must therefore be reversed and plaintiff's suit decreed as sued for with costs throughout against the first defendant.

K.R.

(1) (1915) I.L.R., 38 Mad., 1042.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

IDUMBA PARAYAN AND SIX OTHERS (PLAINTIFFS,
DECREE-HOLDERS), APPELLANTS,

v.

PETHI REDDI AND MUTHAMMAL (DEFENDANTS NOS. 5
AND 6), RESPONDENTS.*

1919,
October 8.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 8—Partition suit—Decree for recovery of plaintiff's share on payment to alienees on a certain date—Payment on subsequent date—Jurisdiction of Court to extend time for payment—Construction of decree.

A decree in a suit for partition provided inter alia that the plaintiffs could recover certain properties from the alienees on payment of a sum of money into Court by a certain date, without any provision as to effect of non-payment. Plaintiffs, however, paid the money on a subsequent date.

Held, that the decree was in terms and in effect one for redemption; and that the Court had jurisdiction under Order XXXIV, rule 8, to extend the time for payment.

APPEAL against Appellate Order of P. S. SITARAMA AYYAR, the Subordinate Judge of Coimbatore, in Appeal Suit No. 28 of 1918, preferred against the order of C. GOVINDAN NAYAR, the Principal District Munsif of Erpde, in E.A. No. 735 of 1917, in E.P.R. No. 1090 of 1917, in Original Suit No. 4 of 1915, on the file of the Additional District Munsif's Court of Erode.

The plaintiffs brought a suit for partition and for setting aside a sale by some of the coparceners in favour of some of the defendants and for recovery of the plaintiff's shares in the suit properties. The Court passed a preliminary decree directing division and delivery of the plaintiffs' shares on payment of a certain sum of money into Court on or before the 10th July 1916. On appeal by the defendants, who were alienees, the decree was confirmed, but no further time for depositing the amount was granted by the appellate decree. Meanwhile on 9th March 1916 the plaintiffs obtained a final decree allotting their shares, but this decree also provided that the plaintiffs should deposit the amount on or before the date

* Appeal against Appellate Order No. 99 of 1918 and Civil Revision Petition No. 5 of 1918.

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already specified, viz., 10th July 1916. The plaintiffs did not pay the amount before the due date, but on 8th February 1917, applied for a chellan for payment into Court, and actually paid the amount on 9th February 1917. The plaintiffs applied on 2nd July 1917, for delivery of possession of the lands allotted to them, and an order for delivery was passed without notice to the defendants on 7th July 1917, and possession was actually delivered on 22nd July 1917. The defendants, thereupon, filed an application, for the re-delivery of the lands from the plaintiffs, on the ground that the Court had no jurisdiction to extend the time for payment of the amount. Both the lower Courts upheld the defendants' contention and directed the re-delivery of the properties to the defendants. The plaintiffs preferred this Civil Miscellaneous Second Appeal.

K. S. Ganapathi Ayyar for the appellants.

C. V. Subrahmanya Ayyar for the respondents.

The JUDGMENT of the Court was delivered by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—The application for execution arose out of a partition decree. Some of the members of the family sued their co-parceners for partition, and sought to set aside certain alienations in favour of strangers. The decree gave the plaintiffs their share. The Court found that the alienation impeached was binding upon the members of the family to the extent of about Rs. 800 and odd, and directed that the plaintiffs do obtain possession of the property in the possession of the alienees after paying a sum of Rs. 400 and odd. In terms and in effect, this portion of the decree was one for redemption. The final decree does not however say that in case the money is not paid within the time fixed, viz., 10th July 1916, the suit for possession of the property shall stand dismissed. Nor does it say that the right to recover possession on subsequent payment is barred to the plaintiffs. The plaintiffs did not pay the amount within the time stipulated. They subsequently applied for possession of the property after paying into Court the amount which was ordered to be paid. The Courts below have held that as the money was not paid within the time fixed the plaintiffs are not entitled to any further extension of time, and that they are not entitled to recover possession of the property.

In the first instance on payment of the money by the plaintiffs, they were put in possession. On an application made by the alienees to cancel that order for possession on the ground that the money was not paid in time, the District Munsif reversed his own order and ordered plaintiffs to restore possession to the alienees. That order has been confirmed by the lower Appellate Court. Against that order this Civil Miscellaneous Second Appeal has been presented.

In our opinion, the application for extension of time ought to have been granted by the District Munsif. He quotes a large number of authorities beginning with *Ramaswami Kone v. Sundara Kone*(1), and says that he has no power to extend the time. What these decisions have laid down is that by the mere fact of confirmation of the decree by the Appellate Court, further time is not *ipso facto* given for payment of the money. They are not authorities for the position that the Munsif has no jurisdiction to extend time. Under Order XXXIV, rule 8, last clause, the Court may, upon good cause shown, and upon such terms as it thinks fit, from time to time, postpone the day fixed for payment. In *Het Singh v. Tika Ram*(2), where the decree directed that if money was not paid within a particular time, the suit should stand dismissed, the learned Judges held that as there was no bar to redemption, time should be extended and that the decree did not work itself out. If we turn to the earlier portion of Order XXXIV, rule 8, it is clear that until the defendant obtains an order debarring plaintiff from seeking redemption, the right to apply for further extension of time is not lost. In the picturesque language of KEKEWICH, J., in *Collinson v. Jeffery*(3), by the lapse of time fixed for payment, the action is not dead but is in a comatose condition; it will become dead only when an order is obtained under Order XXXIV, rule 8, debarring plaintiff from redeeming. Till then it is alive and is capable of being revived. Under Order XXXIV, rule 8, Courts have power to extend time for payment. We are therefore of opinion that the lower Courts had jurisdiction, and were not precluded by the fact that the money was not paid within the time limited, from extending the period for

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AYYAR, J.

(1) (1908) I.L.R., 81 Mad., 28.

(2) (1912) I.L.R., 34 All., 388.

(3) (1896) 1 Ch., 644.

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payment. There is one decision of this Court which on the face of it appears to be conclusive of the arguments advanced by the learned vakil for the appellants. In *Moideen Kuppai v. Ponnuswamy Pillai*(1), reference was made to sections 143 and 151, Civil Procedure Code, and it was pointed out that these sections have no bearing in regard to applications for extension of time under mortgage decrees. We are not in a position to ascertain what the exact language of the decretal order was in that case. It may be that the order directed that if the money was not paid within the time limited, the right of redemption would become barred. If that had been specifically mentioned in the decree no further application by the defendant to bar the right of redemption need have been made. The decree would have worked itself out and would have prevented the Court from exercising its powers, under the last clause of Order XXXIV, rule 8. As we are not in a position to ascertain the facts on which that decision proceeded we do not regard it as conclusive on the present question.

We have made these observations because the decree appears to be one for redemption. Having regard to the language of the decree and also in view of the charge which the defendants obtained for a portion of the money which was held binding on the family, the decree in this case must be construed as above indicated. In that view, we hold, following, KEKEWICH, J., in *Collinson v. Jeffery*(2), and in *Het Singh v. Tika Ram*(3), that it was competent to the District Munsif to extend the time and that there was no good cause for his reversing his original order. We must set aside the orders of both the lower Courts and dismiss the petition for re-delivery of the property made by the defendants. As the mistake has been largely due to the laches of the plaintiffs, we do not think that they are entitled to any costs. Each party will bear his own costs.

K.R.

(1) (1914) I.L.W., 882

(2) (1896) 1 Ch., 644.

(3) (1912) I.L.R., 34 All., 388.

APPELLATE CIVIL.

Before Sir Abdur Rahim, Kt., Officiating Chief Justice, and
Mr. Justice Burn.

M. VENKATAGIRI AYYAR (DEFENDANT'S FIFTH WITNESS),
APPELLANT,

1919,
October 23.

v.

N. M. FIRM (PLAINTIFF), RESPONDENT.*

*Criminal Procedure Code (V of 1898), ss. 215 and 478—Letters Patent, clause 15—
Order of commitment by a judge of the High Court on the Original Side—
Appeal on questions of fact only, whether permissible.*

A witness in a civil suit before the High Court was committed to the High Court Sessions for trial on charges of perjury. On appeal against the order of commitment,

Held, that assuming such an appeal could be preferred under the general words of clause 15 of the Letters Patent, section 215, Criminal Procedure Code, which enacts that an order of commitment made by any Civil Court can be quashed only on a point of law, modifies to that extent the general provisions of clause 15 of the Letters Patent, and that as no point of law is involved in the appeal, the order of commitment cannot be quashed.

Quære, whether an appeal lies under clause 15 of the Letters Patent from an order of commitment by a High Court judge trying a civil suit.

APPEAL against the Order and Judgment of the Hon'ble Mr. JUSTICE COUTTS TROTTER in the exercise of the ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 583 of 1918.

The material facts appear from the judgment.

L. A. Govindaraghava Ayyar and A. Viswanatha Ayyar for the appellant.

The Public Prosecutor for the respondent.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, OFFG. C.J.—Mr. JUSTICE COUTTS TROTTER, sitting on the Original Side of this Court, in the course of the trial of a civil case proceeded under section 478, Criminal Procedure Code, and committed a certain witness who gave evidence in that case to the High Court Sessions for trial on charges of perjury. This appeal is filed on the civil side of this Court against the order of commitment as made by Mr. JUSTICE COUTTS TROTTER.

ABDUR
RAHIM,
OFFG. C.J.

A preliminary objection is raised that no appeal lies in such a matter, except under the provisions of section 215, Criminal Procedure Code. Mr. Govindaraghava Ayyar, who appears for the appellant, admitted before us that he could not impeach the order on the grounds mentioned in section 215. But he says

*Original Side Appeal No. 81 of 1919.

VENKATAGIRI that, apart from the provisions of that section, an appeal lies on
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 N. M. FIRM. of the Letters Patent. We have no hesitation in holding that
 section 215 applies to this case, and an appeal is precluded by
 ABDUR
 RAHIM,
 OFFG. C.J. the express and clear language of that section, except under its
 provisions. That section says:—

“A commitment once made under section 213 or by a Court of Session under section 477, or by a Civil or Revenue Court under section 478 can be quashed by the High Court only, and only on a point of law.”

This is a specific injunction that a commitment made under section 478 by the Civil Court can be quashed by the High Court only on a point of law. Section 478 says that the proceedings of a Civil Court, acting under section 478, shall be deemed to have been held by a Magistrate. The argument is that under section 15 of the Letters Patent, there is an appeal from the order of Mr. Justice Courts Trotter sitting on the Original Side of this Court, and that section 215 should not be interpreted so as to take away that right. We do not desire to deal with the question whether under section 15 of the Letters Patent an appeal would lie from the order of commitment made by the learned judge trying a civil suit on the Original side of this Court. But supposing for the sake merely of argument, that such an appeal could be preferred under the general words of section 15 of the Letters Patent, section 215 of the Criminal Procedure Code, in our opinion, explicitly and clearly says that an order of commitment made by any Civil Court can be quashed only on a point of law. That is a specific provision regarding orders of commitment made by the Civil Court under the provisions of section 478 of the Criminal Procedure Code, and to that extent it clearly modifies the general provisions of section 15 of the Letters Patent, supposing that an appeal would lie under it in a case of this nature. There are no rulings on the point. But we think that the enactment is not open to any doubt. Mr. Govindaraghava Ayyar has referred us to a number of decisions on the interpretation of some of the sections in the Civil Procedure Code. But we do not think it necessary to refer to them as in our opinion they are quite beside the point. We dismiss the appeal with costs of the Government Solicitor.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
 and Mr. Justice Seshagiri Ayyar.

AMIRTHAMMAL (PLAINTIFF),

v.

MADDALAKARUN ALIAS RAMALINGA GOUNDAN
 (DEFENDANT).*

1920,
 January 22.

Stamp Act (II of 1899), sec. 2 (5), articles 15 and 40 of Sch. I—Court Fees Act (IV of 1870), Sch. II, article 6—Security bond by receiver binding himself and his properties—Proper stamp—Whether liable under Stamp Act and Court Fees Act.

A security bond in favour of a Court, executed by a Receiver binding himself and his properties for the due discharge of his duties, must be stamped both under the Court Fees Act and under article 40 of Schedule I of the Stamp Act; *Kulwanta v. Mahabir Prasad*, (1889) I.L.R., 11 All., 16 (F.B.) and Referred Case No. 19 of 1911, followed.

CASE referred under section 60 of the Indian Stamp Act (II of 1899) by the District Munsif of Tiruvannāmalai in Execution Petition No. 220 of 1919, in Small Cause Suit No. 1275 of 1915, as to the proper stamp on an instrument by which a receiver binds himself and his properties.

This is a reference made to the High Court by the District Munsif of Tiruvannāmalai under section 60 of the Indian Stamp Act (II of 1899). The plaintiff in a small cause suit (Small Cause Suit No. 1275 of 1919, on the file of the Munsif's Court), having obtained a decree, attached in execution a registered mortgage bond for Rs. 75 executed by one T in favour of the defendant. The plaintiff was appointed Receiver to collect the said debt, and for the due performance of her duties as Receiver, she executed a security bond in favour of the District Munsif. The document was as follows:—

“Security bond executed on 30th April 1919 by Amirtham-mal, daughter of Chinnu Pillai, Yadaya caste, Vishnu religion, cultivation (profession), aged about 40, in favour of the District Munsif of Tiruvannāmalai, sheweth—

“I am plaintiff in the suit and in execution of the decree by which defendant owes me Rs. 112-15-0, I attached the registered

* Referred Case No. 7 of 1919 (F.B.).

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GOUNDAN.

mortgage debt of Rs. 75 executed by one Thandavaraya Goundan on 11th August 1917 to defendant. As it is necessary to collect the said mortgage, and to credit it towards my decree against defendant, and as I have petitioned the Court to appoint me as receiver for the said purpose of collecting the debt, I shall act with all possible diligence and care in the said task of collecting the debt. If it is necessary to file a suit to recover the mortgage debt, I shall defray the costs thereof from my own funds, and deduct the same from the sum that may be recovered. I shall render due and proper account (of any and every sum collected) then and there. I do not require any remuneration or commission for my labour. For the proper discharge of the aforesaid obligation I bind myself and my heirs in the sum of Rs. 150, and as security thereof I pledge undermentioned immoveable property which is mine and which is in my possession and enjoyment, and worth Rs. 200. Thus is the security bond written with my free will and consent."

The District Munsif held that the instrument was a bond chargeable only with a court-fee of eight annas and allowed it to be stamped as such. But the Sub-Registrar, to whom the Munsif forwarded the document for registration, returned it as he thought it was also liable to a general stamp duty of one rupee, and he quoted as authority for his position Referred Case No. 19 of 1911. The District Munsif thereupon made this reference to the High Court, through the District Judge of North Arcot. The District Munsif relied on the decision of the High Court in Referred Case No. 9 of 1908 and distinguished *Re The District Munsif of Tiruvallur*(1) and Referred Case No. 19 of 1911.

The Government Pleader on behalf of Government.—The document was executed in favour of the Court by a Receiver appointed by the Court. It was executed in pursuance of an order of the Court directing the Receiver to furnish security under Order rule 3, Civil Procedure Code. The document falls under article 6, Schedule II, of the Court Fees Act. It also falls under article 57 as well as article 40 (b) of the Stamp Act. It is a security under article 57 of the Stamp Act. It is also a mortgage within the definition of section 2, sub-section 17 of

(1) (1914) I.L.R., 37 Mad., 17.

the Stamp Act. It therefore falls under article 40. In either case, it does not fall under article 15 of the Stamp Act, which is only a residuary article which will apply only when no other article applies. Hence stamp duty is payable both under Court Fees Act and Stamp Act. Reliance was placed on the decision in *Referred Case No. 19 of 1911*(1) and on the decision in *Kulwanta v. Mahabir Prasad*(2). The decision in *Referred Case No. 9 of 1908*(3) and in *Re The District Munsif of Tiruvallur*(4), support the contrary view.

The JUDGMENT of the Court was delivered by

WALLIS, C.J.—Following *Kulwanta v. Mahabir Prasad*(2) WALLIS, C.J. and *Referred Case No. 19 of 1911*(1) we hold that the bond must be stamped both under the Court Fees Act and under article 40 of Schedule I of the Stamp Act, as it comes within the definition of a mortgage in section 2 (5) of the Indian Stamp Act, and article 15 is therefore inapplicable. In *Referred Case No. 9 of 1908*(3) the point that the bond in question was a mortgage within the meaning of the definition does not appear to have been taken. In *Re The District Munsif of Tiruvallur*(4) the bond, which was given by a judgment-debtor and two sureties, does not appear to have been a mortgage bond and consequently came within article 15.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Olfield and Mr. Justice Seshagiri Ayyar.

SECRETARY TO THE COMMISSIONER OF SALT,
ABKARI AND SEPARATE REVENUE, MADRAS
(REFERRING OFFICER).*

1920,
January,
19 and 22.

Stamp Act, Indian (II of 1899), sec. 5—Sale—Mortgage for due performance of covenants—Distinct matters, meaning of—Stamp payable.

A sale-deed, in which the vendor mortgages lands not included in the sale as security for the due performance of his covenants, need not be stamped both as a sale and a mortgage.

Govindan Nambudiri v. Moidin (1918) I.L.R., 41 Mad., 469 (F.B.) overruled.

(1) Unreported.
(3) Unreported.

(2) (1889) I.L.R., 11 All., 16 (F.B.).
(4) (1914) I.L.R., 37 Mad., 17.

* Referred Case No. 3 of 1919 (F.B.).

SECRETARY
TO THE
COMMR.
OF SALT,
ABKARI AND
SEPARATE
REVENUE,
MADRAS
(REFERRING
OFFICER).

CASE stated under section 57 of the Indian Stamp Act (II of 1899) for decision of the High Court, by E. GRAHAM, the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras, as to whether the three sale-deeds referred to in his letter are to be treated each as relating to two distinct matters and chargeable to stamp duty both as sale-deeds and as mortgages.

This is a reference by the Board of Revenue to the High Court, under section 57 of the Stamp Act (II of 1899), for a decision on the question of proper stamp duty chargeable on three documents which were termed sale-deeds, each also containing a clause whereby the vendor hypothecated other specific property as security, to indemnify the vendee against loss for breach of covenant of sale. The Board pointed out, in its letter of reference that the practice was to require stamp duty only as a sale-deed, under the authority of the ruling in *Case No. 1 of 1876*(1) and other cases such as *Reference under Act I of 1879 (Indian Stamp Act) section 49(2)* until the ruling in *Govindan Nambudiri v. Moidin*(3) which related to a Malabar marupat or counterpart of a lease. The Board consequently submitted the case of the three sale-deeds in question for a decision by the High Court on the question whether, following the ruling in *Govindan Nambudiri v. Moidin*(3), the documents should be treated as relating to two distinct matters and chargeable with stamp duty both as sale-deeds and as mortgages. The sale-deeds were as follows :—

- (1) (Engrossed on a stamp paper of the value of Rs. 10.)
Sale for Rs. 1,000.

Sale-deed of ayan nanja lands, dated 18th December 1918, corresponding to 4th Margali 1904 by Vendantam Ayyangar, son of Desikam Krishna Ayyangar Avargal, Brahman, ryot, Vadakku Karukurichi, Ambasamudram taluk, in favour of Subrahmanyam Chettiar, minor, aged 6, son of A. Ramakrishnan Chettiar, Dhanavasyal, ryot, residence as above, represented by his father and guardian.

I have this day sold to you on behalf of the abovementioned minor on receipt of Rs. 1,000 as detailed below, the property described in the schedule which has been in my enjoyment,

(1) (1876) I.L.R., 1 Mad., 183. (2) (1895) I.L.R., 17 All., 55 (F.B.).
(3) (1918) I.L.R., 41 Mad., 489 (F.B.).

having been purchased out of my own earnings from Muttu Mooppan of Vadakku Karukurichi, and delivered unto you the possession thereof. As I have sold the scheduled land for a consideration of Rs. 1,000, you are to enjoy the property with conveyance and other absolute rights.

Details of payment.

I am in receipt of Rs. 1,000 by means of the sale-deed executed this day in my favour by you for yourself and as guardian of the minor. The sale-deed (relating to the property sold) in my name and its two previous title-deeds are also handed over to you. I declare that no encumbrance has been previously made on the property. If there be any such encumbrance, and in case any damage happens to the property in Schedule I, you may realize all kinds of losses likely to be incurred thereby from the property specified in Schedule II within a period of twelve years.

Schedule I.....

Schedule II.....

(2) (Engrossed on a stamp paper of the value Rs. 10.) Sale-deed, dated 30th January 1919, executed by Phillip Jerome Lewis, son of Bastian Lewis, Roman Catholic, cultivator, residing at Divikudru (Islet called Divi) in Moodu Tonse (East Tonse) village, Udipi taluk, in favour of Margaret Marceline Lewis Bayee, wife of Gregory Lewis, son of the executant and daughter of Padu Tonse Manuel George Lewis, same caste, residing at Baligara Kudru (Islet called by that name) in Padu Tonse (West Tonse) village in the said taluk. Whereas, the debt incurred by me on mortgage of the property shown below for the legitimate needs of my family remains still undischarged, and whereas it goes on increasing by the accumulation of interest as I have no means of repaying it and as it assumes threatening proportion giving rise to the probability of swallowing up all my property involving thereby much loss and trouble to me; in order to check and avoid such a contingency as well as to keep intact what little may remain (after meeting the debts) I am constrained to put up for sale the property described below being part of my portion obtained under the deed of partition between myself and others, executed on 6th October 1894 and registered as No. 1443 of 1894 of Book I, Volume 148,

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pages 139 to 143 of Sub-Registration office, Udipi, and which I have been enjoying by full right so far, having the patta in my name and paying the assessment thereof, and since you have offered it the highest price out of your own money, I hereby agree and sell it to you for Rs. 1,000 and give possession thereof to you. Whereas, you will pay the sum of Rs. 1,000 to Potail Pedru George Rebello of Moodu 'Tonse village and obtain receipt therefor being part and interest thereon as well the interest on the accumulated interest of the debt of Rs. 1,200 I owe him on the mortgage of this and other properties of mine secured by a deed executed on the 10th February 1913 and registered as No. 154 of 1913 of Book I, Volume 260, pages 316 to 319 in the office of the Sub-Registrar of Udipi, I hereby acknowledge the receipt in full of the said amount and declare nothing more is due to me. Therefore from this day you and your heirs and representatives may enjoy the said property improving it as you please and getting in patta transferred in your name and also paying the assessment. I, my heirs and representatives have no claim to say that we have any more right in the said property or that we must be paid something more as consideration, or even to say that you owe us any part thereof. Except that this property is included in the above mortgage to Potail Pedru George Rebello together with other properties, it is free from any other incumbrance or attachment or injunction or other securities. Although this property is included in the mortgage deed to the above said Pedru George Rebello, since I have released it from the said mortgage and sold it to you, the remaining properties only, described in the said mortgage deed, stand as securities for the balance of debt I owe him and the discharge of which is incumbent on me. Should I fail to do so and consequently should you sustain any loss up to Rs. 1,000 on account of any suit over this property I bind myself, my heirs and representatives, to pay you such amount with interest thereon on the security of the properties on the abovesaid mortgage deed, i.e., properties shown below as well as on my personal security. As long as you fail to pay the debt shown in this deed you are liable to pay interest thereon.

Schedule. Description of the property sold

Description of the property offered as security

(8) (Engrossed on a stamp paper of the value of Rs. 10.) Deed of sale, dated 24th October 1918, executed by Chinnappa Pillai, son of Virabhadra Pillai, ambalagar, Saivite, ryot, residing at Prathaparamapuram, Negapatam taluk, for himself, and as guardian of his minor sons Subbayyan and Murugayyan in favour of Muhammad Kasim Rowther, son of Pichai Rowther, Muhammadan, ryot, residing at Rituppundi West Sethi, Negapatam taluk.

I hereby sell to you that piece and parcel of land along with trees on it, described in the schedule hereunder which I got by partition and which is in my sole possession for a consideration of Rs. 500 (five hundred). This sum of five hundred rupees I have received as particularized below, viz., Rs. 231-4-0 for the discharge by you of a mortgage deed executed by me for Rs. 200 in favour of one Sinnathambi Konan of Prathaparamapuram, on the security of the undermentioned land which with the principal and interest aggregates to Rs. 231-4-0, and Rs. 268-12-0 which I have agreed to receive in cash in the presence of the Sub-Registrar at the time of registration, for the payment of purchase money due to one Nuriappa Konan, son of Naga Konan of Mahakkudayan from whom I have purchased land.

Thus I have received the full amount of Rs. 500, the consideration for the sale. Therefore by this deed, I convey to you the said land with trees, etc., thereon and you may henceforth enjoy the land with all absolute rights of alienation and inheritance.

In the event of you being disturbed from enjoying the property sold to you by any claim, I hereby bind myself to indemnify you against any loss you might incur on the security of the undermentioned immoveable property which belongs to me by purchase from one Mariappa Konan.

(Here follows specification of property given as security.)

The Government Pleader on behalf of Government.—The document refers to distinct matters within the terms of section 5 of the Stamp Act (II of 1899). Over and above the general indemnity arising out of the implied covenant under section 55 of the Transfer of Property Act, the vendee under this sale-deed takes a special security bond, charging distinct properties. The decision in *Case No. 1 of 1876*(1) is an

(1) (1876) I.L.R., 1 Mad., 133.

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authority in favour of this view, though it was a decision under section 14 of the old Act of 1869. The decision of the Full Bench in *Govindan Nambudiri v. Moidin*(1) is conclusive on the point. Reference was made to *In the matter of Reference from Board of Revenue under section 46 of Stamp Act*(2) and *Reference under Act I of 1879 (Indian Stamp Act) section 49*(3). If the contrary view is to prevail, the Full Bench decision in *Govindan Nambudiri v. Moidin*(1), will have to be overruled.

The JUDGMENT of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—After hearing the learned Government Pleader, and considering the authorities cited, we are of opinion that the three sale-deeds in question, in each of which the vendor mortgages lands not included in the sale as security for the due performance of his covenants, need not be stamped both as sales and mortgages by virtue of the provisions of section 5 of the Indian Stamp Act, 1899, as the sale-deeds are not instruments comprising or relating to distinct matters within the meaning of the section. The decision in the reference by the Board of Revenue—*Referred Case No. 1 of 1876*(4)—is not in point, as the terms of section 14 of Act XVIII of 1869, under which it was decided, are different from those of section 5 of the present Act, which was substituted for it in section 7 of Act I of 1879, which again is practically identical with section 4 (a) of the English Stamp Act, 1891. In *In the matter of a reference from Board of Revenue under section 46 of the General Stamp Act*(2), a decision under section 7 of the Act of 1879, it was held that an instrument by which a debtor leased certain lands to his creditor and empowered the latter to apply a portion of the annual rent in satisfaction of the debt, was both a lease and a usufructuary mortgage, but only required to be stamped as a mortgage as it did not relate to two distinct matters within the meaning of the section. In *Reference under Act No. I of 1879 (Indian Stamp Act), section 49*(3), it was held that an instrument by which certain parties took lands on lease and hypothecated other lands as security for the rent, did not relate to distinct matters, but only to the terms on which the lessors let the land, and the lessees took the holding. In *Reference*

under Stamp Act, section 57(1), a lease which contained a covenant for renewal was held not to relate to two distinct matters as the option to renew the lease was merely ancillary to the lease and formed part of the consideration for entering into it. Similarly in *Reference under Stamp Act, section 57*(2), though it was held that the agreement between the company and each of the ryots, who were parties to it, constituted distinct matters within the meaning of the section, the agreement with each ryot, by which in consideration of a payment of one rupee he granted a licence to prospect, agreed to sell if required, and covenanted to indemnify the company against claims by other persons, was held not to relate to distinct matters so as to require separate stamps. The same test was applied in England in *Price v. Thomas*(3), where it was held that an instrument of lease, in which both the lessee and a third party covenanted to pay the rent, did not require to be stamped both as a lease and as a deed, LITTLEDALE, J., observing that the lease was the principal, to which the covenant was an accessory, and PARKE, J., that the covenant was part of the consideration for granting the lease. In *Govindan Nambudiri v. Moidin*(4), which was decided without argument, the answer would no doubt have been to the same effect, if these authorities had been brought to the notice of the Court, and we think that the decision should not be followed in future cases.

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WALLIS, C.J.

K.R.

(1) (1902) I.L.R., 25 Mad., 3.
(3) (1831) 2 B. & Ad., 218.

(2) (1901) I.L.R., 24 Mad., 176.
(4) (1918) I.L.R., 41 Mad., 469.

(1) (1918) I.L.R., 41 Mad., 469 (F.B.). (2) (1882) I.L.R., 8 Calc., 254.
(3) (1895) I.L.R., 17 All., 55 (F.B.). (4) (1876) I.L.R., 1 Mad., 133.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Seshagiri Ayyar.*

1920,
January, 20,
21 and 23.

A. A. R. PONNAMBALA PILLAI AND THREE OTHERS
(DEFENDANTS NOS. 1 TO 3 AND 6), APPELLANTS,

v.

ANNAMALAI CHETTIAR AND THREE OTHERS (PLAINTIFF AND
FOURTH DEFENDANT LEGAL REPRESENTATIVES OF PLAINTIFF
AND LEGAL REPRESENTATIVES OF FOURTH DEFENDANT),
RESPONDENTS.*

*Mortgage—Equity of redemption of moiety of mortgage property—Purchase by
mortgages—Extinction of mortgage.*

In the absence of fraud, the purchase by the mortgagee in Court auction of the equity of redemption in some items of the mortgaged properties discharges that portion of the mortgage debt which was chargeable on those items, that is, it discharges a portion of the mortgage debt which bears the same ratio to the whole mortgage debt as the value of those items bears to the value of all the mortgaged properties.

Bisheshur Dial v. Ram Sarup (1910) I.L.R., 22 All., 284 (F.B.), followed.

Sami Rowappa v. Kuppunumi Iyengar (1911) 2 M.W.N., 842, overruled.

APPEAL against the decree of C. V. VISVANATHA SASTRI, Subordinate Judge of Kumbakonam, in Original Suit No. 42 of 1915.

The suit was on a mortgage bond for Rs. 3,000, executed on 17th May 1902 by first defendant. Defendants Nos. 2 and 3 were the sons of first defendant. The mortgaged property consisted of three items of immoveable property. In 1904, another creditor obtained a money decree against defendants Nos. 1 to 3 and in execution of it brought to sale two out of the three items of property mortgaged to plaintiff. On 9th November 1905 the equity of redemption of these two items was sold in Court auction and purchased by a person who was found by the Subordinate Judge to be an agent of the plaintiff in the present suit. On 24th December 1908 plaintiff sold outright the major portion of these two items for Rs. 3,750 and soon after sold the remainder for Rs. 1,629-5-6. He then brought a suit on 5th July 1915 for Rs. 11,500, being the principal and interest on the

* Appeal No. 190 of 1917.

mortgage amount after deducting Rs. 5,019-5-6, the amount of the sale price of the two items and interest thereon. The plea of the defendants was that the mortgage debt had been discharged by reason of the plaintiff's purchase of the two items in Court auction. The Subordinate Judge found that on the date of the Court sale the principal was Rs. 3,000, and the interest Rs. 1,845. He further found that the value of the items sold was Rs. 4,950 and that the value of the item now sought to be sold was Rs. 2,639-4-0. Following *Nand Kishore v. Raja Hari Raj Singh* (1) the Subordinate Judge held that the plaintiff was entitled to recover only "an ad valorem share of the mortgage debt" from the property in suit.

Plaintiff appealed, and the Appeal and Memorandum of Objections came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

This appeal arises in a suit on a mortgage bond by which three items of property were mortgaged to the plaintiff. Out of the three items, two items were sold in execution of a Small Cause Court decree, and bought by a person who was found to be an agent of the plaintiff. The purchase money paid for both the properties was Rs. 200. The plaintiff now seeks to realize the amount due to him from the third item, and the question of law that arises is whether he ought to give credit to the mortgagor for the full value of the two items purchased by him, and proceed against the other property only for the balance.

As regards the value of the properties purchased, it has been argued for the appellants that the learned Subordinate Judge's estimate is not correct, but we are unable to agree with this contention. It is not necessary to go into the details but it is sufficient to mention the fact that the plaintiff sold the property three years afterwards for Rs. 3,750 except the roofing of the house. We think the Subordinate Judge is right in accepting that figure. As regards the other properties there is no reason to doubt the correctness of the valuation.

Before we deal with the question of law raised by the appellant, it is convenient to dispose of the memorandum of objections. The bond provides for the payment of 15 per cent simple interest,

(1) (1898) I.L.R., 20 All., 23 (F.B.).

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and in default of payment at the specified date, compound interest with one yearly rests at 18 per cent. We think the Subordinate Judge has rightly held this to be penal, and we are unable to say that 18 per cent simple interest allowed by him is not sufficient compensation.

Upon the question of law, there is one ruling of this Court—*Sami Rowappa v. Kuppusami Iyengar*(1). There it has been held by AYLING and SPENCER, JJ., that where a mortgagee purchases one out of two properties subject to the mortgage, if the value of the property purchased is equal to, or exceeds, the mortgage amount, then the mortgage debt must be taken to be satisfied. In coming to this conclusion they followed the ruling of the Allahabad High Court in *Nand Kishore v. Raja Hari Raj Singh*(2). That was a ruling by a Full Bench of that Court of which BLAIR and BANERJI, JJ., were members. There it was held that the purchase of a part of the mortgaged property by the mortgagee subject to his mortgage has not necessarily the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage. The view suggested is that if the value of the property purchased is equal to or exceeds the amount of the mortgage debt then the mortgage must be held to be satisfied. But in a later Full Bench decision of the same Court, *Bisheshur Dial v. Ram Sarup*(3), a different proposition was laid down after a full consideration of the authorities, and it should be noted that BLAIR and BANERJI, JJ., the latter of whom delivered the judgment of the Full Bench, were parties to this decision. The head note is in these words: "When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of

(1) (1911) 2 M.W.N., 342.

(2) (1898) I.L.R., 20 All., 28 (F.B.).

(3) (1900) I.L.R., 22 All., 284 (F.B.).

the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage." In coming to this conclusion they mainly proceeded on the provisions of section 82 of the Transfer of Property Act, which lays down that where several parcels of property are mortgaged to secure one debt, every parcel is liable for the whole amount of the debt, but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. They point out that if the property had been bought by a stranger, then it could not be contended that that property in his hands would be liable for a larger amount than what would be proportionate to its value. It may be observed that section 82 of the Transfer of Property Act was not brought to the notice of the learned Judges who decided *Nand Kishore v. Raja Hari Raj Singh*(1), or of AYLING and SPENCER, JJ., who decided the Madras case—*Sami Rowappa v. Kuppusami Iyengar*(2). There is also a ruling of the Bombay High Court in *Lakshmidas v. Jamnadas*(3), in support of the view taken in *Bisheshur Dial v. Ram Sarup*(4). But the learned Advocate-General has referred us to a decision of the Privy Council in *Dulichand v. Ramkishan Singh*(5). The facts of that case are somewhat complicated. But it would be sufficient to mention that the plaintiffs there were the purchasers of a Mouza called Korina and they also stood in the shoes of the Bank of India, which held the first encumbrance on that Mouza. The appellant, the defendant in the suit, held a mortgage both of Korina and the Mouza Nandan, the mortgage on the Mouza Korina being a second mortgage and that on Nandan being the first mortgage. It appears that the appellant bought Mouza Nandan, and it was found that the value of that property after deducting the purchase-money of the equity of redemption exceeded the mortgage debt due to the appellant. Upon these facts the Privy Council held, that the appellant's mortgage was satisfied,

(1) (1898) I.L.R., 20 All., 28 (F.B.).

(2) (1911) 2 M.W.N., 342.

(3) (1898) I.L.R., 22 Bom., 304 (F.B.).

(4) (1900) I.L.R., 22 All., 284 (F.B.).

(5) (1881) I.L.R., 7 Calc., 648 (P.C.).

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and that therefore he could not proceed for any portion of the mortgage amount against the Mouza Korina. At page 651 their Lordships say :

"It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the appellant's mortgage, and was sufficient to cover not only that amount, but the Rs. 19,416 due to Lutf Ali Khan, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage debt was satisfied by the purchase of Nandan and the value of that estate."

At page 653 they say :

"It has been shown that at the time that this payment of Rs. 78,393 was made by the respondents to the appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that, in such a case, it is inequitable that he should hold the money paid to him, under compulsion, by the respondents. It is to be observed that the appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case, it is unnecessary to go into the question of marshalling the securities."

If their Lordships had satisfied themselves with saying that the appellant's mortgage on Korina was a second mortgage and therefore postponed to the mortgage of the Bank it could not be contended there would be any conflict between this decision and the ruling in *Bisheshur Dial v. Ram Sarup*(1). But that is apparently not the ground on which they based their conclusion. They held that upon the facts stated by them in their judgment, the appellant's mortgage was satisfied because of the value of the property having exceeded the debt. It must, however, be observed that the question whether the plaintiffs were entitled or not to proceed against the other Mouza for a proportion of the debt was not at all discussed at the bar and this case, as the head note itself would show, is regarded as an authority with reference to another question as to whether payment made by a person to save his property threatened to be sold in execution of a decree is a voluntary payment or not, and not upon the present question. The matter is one of some importance, and the correctness of the ruling in *Sami Rowappa v. Kuppusami Iyengar*(2) seems to be open to doubt. We

(1) (1900) I.L.R., 22 All., 284 (F.B.). (2) (1911) 2 M.W.N., 342.

therefore think that the question ought to be settled by a Full Bench of this Court, whether, when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing the mortgage debt if the value of the property purchased be equal to the amount due on the mortgage decree as held in *Sami Rowappa v. Kuppusami Iyengar*(1), or whether the true rule is as enunciated in *Bisheshur Dial v. Ram Sarup*(2).

ON THIS REFERENCE—

The Hon'ble the Advocate-General for the appellants. I contend that *Sami Rowappa v. Kuppusami Iyengar*(1), lays down the correct principle. Where a mortgagee purchases the equity of redemption of part of the property and the actual value of that moiety is greater than the whole mortgage debt, the latter is extinguished and discharged, and he has to account for the full value. I rely on *Dulichand v. Ramkishen Singh*(3). When a mortgagee buys a portion of the mortgaged property he is on a different footing to a stranger purchaser and the law of contribution does not apply. See *Nand Kishore v. Raja Hari Raj Singh*(4). *Bisheshur Dial v. Ram Sarup*(2), is against me, but it rests entirely on section 82 of the Transfer of Property Act. I have a number of cases to show that that section does not apply as between mortgagor and mortgagee. See *Krishna Ayyar v. Muthukumarasawmiya Pillai*(5), *Venkata Subba Reddi v. Bagiammal*(6). In *Nawab Asimut Ali Khan v. Jowahir Singh*(7), there is no question of the mortgagee purchasing the property. This decision is not in point, and later cases have been misconceived. *Dulichand v. Ramkishen Singh*(3), is directly in point. The principle to be elucidated from it is, that where the mortgagee buys the equity of redemption he is considered to have liquidated his mortgage.

K. Bhashyam Ayyangar for respondents. There was no merger of rights and the doctrine of contribution embodied in section 82 Transfer of Property Act, applies equally to

(1) (1911) 2 M.W.N., 342. (2) (1900) I.L.R., 22 All., 284 (F.B.).
(3) (1881) I.L.R., 7 Cal., 648 (P.C.). (4) (1898) I.L.R., 20 All., 23 (F.B.).
(5) (1908) I.L.R., 29 Mad., 217. (6) (1916) I.L.R., 39 Mad., 419.
(7) (1870) 13 M.L.A., 404.

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a mortgagee purchaser as to a stranger. His position as mortgagee is different from his position as owner of the equity of redemption: *Nawab Azimut Ali Khan v. Jowahir Singh*(1). In *Sami Rowappa v. Kuppusami Iyengar*(2), the Judges expressly find fraud and proceed on that finding. There is no discussion of the principle and they really follow *Nand Kishore v. Raja Hari Raj Singh*(3) which has been expressly overruled by *Bisheshur Dial v. Ram Sarup*(4). *Dulichand v. Ramkishen Singh*(5), has not been followed on this point anywhere, and there was no question of contribution there. The observations of their Lordships regarding the mortgagee purchaser's liability to account for the full value must be taken with the facts as found. Except the cases *Dulichand v. Ramkishen Singh*(5) and *Sami Rowappa v. Kuppusami Iyengar*(2), all the High Courts are in my favour. See *Nawab Azimut Ali Khan v. Jowahir Singh*(1), *Lakshmidas v. Jamnadas*(6), *Mir Eusuff Ali Haji v. Panchanan Chatterjee*(7), and *Bisheshur Dial v. Ram Sarup*(4). After the enacting of sections 60 and 82, Transfer of Property Act, *Dulichand v. Ramkishen Singh*(5), no longer applies. I contend therefore that the principle in *Bisheshur Dial v. Ram Sarup*(4) is correct. Reference also was made to *Appayya v. Rangayya*(8), *Perumal Pillai v. Raman Chettiar*(9), *Fishers' Law of Mortgages*, Sixth Edition, section 1937, and *Knight v. Marjoribanks*(10).

The OPINION of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—We agree with the decision of the Full Bench of the Allahabad High Court in *Bisheshur Dial v. Ram Sarup*(4), which was in accordance with the earlier Bombay decision, *Lakshmidas v. Jamnadas*(6), and has been followed in Calcutta in *Mir Eusuff Ali Haji v. Panchanan Chatterjee*(7). We have not been referred to any English authority in support of the opposite view. On the other hand, as pointed out in the last mentioned case, LORD COTTENHAM, in *Knight v. Marjoribanks*(10),

cited with approval the statement in Sugden's *Vendors and Purchasers*, Vol. 3, page 227, Tenth Edition :

"that a sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connexion with each other, and can only be impeached on the ground of fraud,"

And added

"that inadequacy of price would not be sufficient ground to impeach such a sale."

The decisions that a mortgagee by purchasing a part of the mortgaged property extinguished the mortgage debt, which were overruled in *Nand Kishore v. Raja Hari Raj Singh*(1), and the further decisions that such a mortgagee purchaser must credit the difference between the purchase price and the real value of the property purchased in discharge of the mortgage debt, which were overruled in *Bisheshur Dial v. Ram Sarup*(2), appear to be quite irreconcilable with the above statement. In this Court we have been referred to the decision of the Privy Council in *Dulichand v. Ramkishen Singh*(3), which is discussed in the Order of Reference. The judgment no doubt contains passages which may be read as meaning, that the mortgage was discharged because the value of the property purchased by the mortgagee after deducting the purchase price exceeded the mortgage debt, but there is no discussion of the principle involved, and in the absence of the judgment of the Lower Court and of any report of the arguments it is not easy to say what was intended. If it had been a ruling after contest, it would have been dealt with in the head note to the report of the case. On the other hand, in the earlier case of *Nawab Azimut Ali Khan v. Jowahir Singh*(4), the rule that the part of the mortgaged property purchased by the mortgagee was only chargeable with a proportionate part of the mortgage debt was treated as plainly applicable. That is the rule embodied in section 82 of the Transfer of Property Act, by which we are governed. If the legislature had intended to make an exception in the case of mortgagee-purchasers, it would no doubt have done so in express terms, as in the case of the special

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(1) (1870) 13 M.I.A., 404.

(3) (1898) I.L.R., 20 All., 23 (F.B.).

(6) (1881) I.L.R., 7 Cal., 648 (P.O.).

(9) (1917) I.L.R., 40 Mad., 968 (F.B.).

(10) (1849) 2 Mac. & G., 10.

(2) (1911) 2 M.W.N., 342.

(4) (1900) I.L.R., 22 All., 284 (F.B.).

(7) (1910) 6 I.C., 842.

(8) (1908) I.L.R., 31 Mad., 419 (F.B.).

(1) (1898) I.L.R., 20 All., 23 (F.B.).

(2) (1900) I.L.R., 22 All., 284 (F.B.).

(3) (1881) I.L.R., 7 Cal., 648 (P.C.) ; 8 I.A., 93.

(4) (1870) 13 M.I.A., 404.

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restrictions imposed upon them by the now repealed section 99. Not only is there no provision to that effect, but the case of a mortgagee acquiring a share of the equity of redemption is expressly dealt with in the last clause of section 60 which recognizes the mortgagor's right to redeem his own share in such a case upon payment of a proportionate amount of the mortgage debt, leaving the balance to be borne by the mortgagee purchaser, thus applying to this case the general rule provided in section 82. We answer the question in the negative, and overrule *Sami Rowappa v. Kuppusami Iyengar*(1).

M.H.H.

(1) (1911) 2 M.W.N., 342.

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Lockley v. King-Emperor ... (1920) I.L.R., 43 Mad., 411

HINDU LAW—*Mortgage by father, not for necessary purpose—Conditional decree—Personal decree against father and against ancestral properties of father and sons—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.* A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone. The Courts found that it was not for any purpose binding upon the sons; held, that the mortgage was entitled to a conditional decree, under Order XXXIV, rule 6, Civil Procedure Code, against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance, in case the sale-proceeds of the father's share of the mortgaged property was insufficient.

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MADRAS CITY POLICE ACT (III OF 1888), SEC. 76—*Breach of condition of license by servants of license-holder—Conviction not only of license-holder but of servants also, propriety of.* Under section 76 of the Madras City Police Act only the licensee under the Act is liable to punishment for a breach of the conditions of the license, whether committed by himself or his servants.

Velayuda Mudali v. King-Emperor ... (1920) I.L.R., 43 Mad., 438

MALABAR LAW—*Karnavan—Junior members—Kanom—Redemption, suit for—Suit by junior members, whether sustainable—Transfer of Property Act (IV of 1882), sec. 91—Interest to redeem.* Only under very special circumstances can junior members of a Malabar tarwad, following the Marumakkattayam law, maintain a suit for the redemption of a kanom granted by their karnavan.

Sooji v. Mariyona ... (1920) I.L.R., 43 Mad., 393

MINOR—*Guardian—Agent appointed by guardian—Liability of agent to account to minor—Settlement of accounts by arbitrator or mediator—Whether liable to be re-opened.* An agent appointed by the guardian of a minor is not liable to account to the minor for his acts even though he received properties belonging to such minor. A settlement of account by arbitrators or mediators cannot be re-opened except on the ground of fraud.

Ramanathan Chettiar v. Muthiah Chetty ... (1920) I.L.R., 43 Mad., 429

REGISTRATION ACT—(XVI OF 1908) *Mortgage-bond—Interpolation by mortgagor—Adding another item belonging to mortgagor for convenience of registration—Registration—Fraud on registration law—Document, whether properly executed, attested and registered.* A document mortgaging only one item of property, was duly executed, and attested, and another item of his property was interpolated by the mortgagor with the knowledge and consent of the mortgagee in the presence of the same attesting witnesses. The mortgagor registered

the deed in the Sub-Registrar's office within whose jurisdiction the latter item was situated. It appeared that the object of adding the second item was not so much to give an additional security to the mortgagee, as to enable the mortgagor to get the document registered near the place where he was lying and thus prevent delay in registering the deed. Held, that there had been no fraud on the registration law and that the document was duly executed, attested and registered with regard to both items of property. *Harindra Lal Roy Chowdhuri v. Haridasi Devi*, (1914) I.L.R., 41 Cal., 972 (P.C.), distinguished.

Kunhi Sankaran Nambiar v. Narayanan Tirumunpu. (1920) I.L.R., 48 Mad., 405
REGISTRATION LAW, FRAUD ON—*Sale-deed—Including a cent of land to enable a Sub-Registrar to register—Item of land, real and owned by vendor—No intention to pass title to vendee—Registration, whether valid.* The inclusion of an item of property belonging to the vendor in a sale-deed without any intention of passing title in it and purely for the purpose of making the deed available for registration in a particular place is a fraud upon the registration law, and such sale-deed must be deemed not to have been properly registered.

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Ramaswamy v. Soma Pitchayya ... (1920) I.L.R., 48 Mad., 410

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TRUST LANDS—*Permanent lease not void ab initio.* A permanent lease of trust lands is not void ab initio: it is only voidable.

Kadir Mastan Rowther v. Sengammal ... (1920) I.L.R., 48 Mad., 438

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Burn.

M. R. VENKATARAMA AIYAR (FIRST DEFENDANT), APPELLANT,
v.

THE SOUTH INDIAN BANK, LIMITED, TINNEVELLY, AND NINE
OTHERS (PLAINTIFFS NOS. 1 TO 6, 8 AND 9 AND DEFENDANTS

NOS. 2 AND 4), RESPONDENTS.*

1919,
September
18 and 19,
October 8
and 28.

Civil Procedure Code (Act V of 1908), sec. 73—Rateable distribution—Right of a decree-holder to impeach the decree of another before distribution—Suit for declaration whether maintainable.

One decree-holder cannot dispute the right of another decree-holder against the same judgment-debtor to share in a rateable distribution of the assets, merely on the ground that the latter's decree was not based on a real debt, unless there was collusion between him and the judgment-debtor in obtaining that decree.

Per SADASIVA AYYAR, J.—A decree-holder may file a suit for a declaration that another decree-holder is not entitled to rateable distribution under section 73, Civil Procedure Code, and for an injunction, even before the distribution of the assets by the Court.

APPEAL against the decree of R. GOPALA RAO, the Subordinate Judge of Negapatam, in Original Suit No. 22 of 1913.

Plaintiffs were the creditors of Vynagram Lakshmana Chetti and Nataraja Ayyar. Plaintiffs obtained several decrees against them and a considerable sum was realized in execution, and this sum was held by the Negapatam Sub-Court. The first defendant also obtained a decree *ex parte* in Original Suit No. 26 of 1910 against the same judgment-debtors, and applied for rateable distribution along with plaintiffs. As, at that time, proceedings were pending in the High Court which, if decided against him, would have resulted in the decree being set aside, the Court ordered retention of defendant's share in Court and ordered rateable distribution to the plaintiffs. After the passing of the final orders in favour of first defendant, the plaintiffs filed a suit for a declaration that the first defendant was not entitled to participate in the distribution of assets, under section 73 of the Civil Procedure Code. They alleged that the decree in Original Suit No. 26 of 1910 had been obtained by fraud and collusion, and that the promissory note on which the first defendant's claim was based was entirely unsupported by consideration. The Subordinate Judge dismissed the suit, holding that it was not sustainable without a prayer for consequential

* Appeal No. 336 of 1918.

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relief. On appeal to the High Court, this decision was set aside and permission given to plaintiffs to amend the plaint. On the rehearing before the Sub-Court of Negapatam the contest related firstly, to the question whether there had been fraud or collusion in obtaining the decree in Original Suit No. 26 of 1910 and whether the promissory note was supported by consideration or not; and secondly, to the question whether a suit of this nature was maintainable. The Subordinate Judge found that there was no consideration for the promissory note and that, except in one particular, there had been no extrinsic fraud or collusion. In Original Suit No. 26 of 1910 Lakshmana Chetti was proceeded against through his agent, one Narayana Sastri. The Subordinate Judge was of opinion that the impleading of Narayana Sastri when his agency had terminated by the insolvency of his principal, to the knowledge of the first defendant, was a fraudulent act on the part of first defendant. On the question of law, the Subordinate Judge held that the suit was maintainable and granted the plaintiffs the declaration and injunction prayed for. The first defendant appealed to the High Court.

K. Srinivasa Ayyangar, K. V. Krishnaswami Ayyar, K. S. Jayarama Ayyar and N. Swaminatha Ayyar for the appellant.

M. D. Devadoss for first respondent.

T. Ranga Achariyar for second respondent.

K. Bhashyam Ayyangar, N. Kunjithapatham Ayyar and A. Sambamurti Ayyar for second and eighth respondents.

D. Chamier instructed by Messrs Brightwell and Moresby, for sixth respondent.

BURN, J.

BURN, J. — [His Lordship stated the facts, and after considering the evidence regarding collusion, extrinsic fraud and consideration for the promissory note, continued as follows] :—

The facts then are that the decree in Original Suit No. 26 of 1910 was not obtained by collusion, that there was no extraneous fraud but that the promissory note on which the decree is based was unsupported by consideration. As far as the parties to the suit are concerned, the judgment is final, and there are no circumstances which would enable them to have it set aside: *Chinnayya v. Ramanna*(1), *Kadirvelu Nainar v. Kuppuswami Nainar*(2). An order in first defendant's favour for rateable

(1) (1915) I.L.R., 38 Mad., 203. (2) (1918) I.L.R., 41 Mad., 743 (F.B.)

distribution has been passed but no payment has been made to him. It remains to be determined whether it is open to third parties in the position of the plaintiffs to impugn the validity of the decree and whether a suit for a declaration of this kind is maintainable.

The latter point may be considered first.

The question is whether the suit is premature because the share of the first defendant has not been disbursed. Once assets have been disbursed, clause (2) of section 73 of the Civil Procedure Code, 1908, expressly provides for a suit for refund, where the payment has been made to a person not entitled to receive it. The contention for the appellant is that the plaintiffs have no cause of action until payment has been made and that a suit for declaration will not lie. Two decisions of this Court have been relied upon: *Parasurama Pattar v. Veeraraghava Pattar*(1) and an unreported case, *Venkatappiah Chetty v. James Short*(2). In the former case a decree-holder had been paid the whole sum realized by him in execution of his decree, as the application of another decree-holder for rateable distribution had been dismissed. The latter succeeded in getting the order of dismissal set aside, and the former was directed to pay back into Court the sum he had drawn. He then sued for a declaration that the other claimant was not entitled to rateable distribution but as no assets had come into the latter's hands it was held that the suit was not maintainable. *Hart v. Tara Prasanna Mukerji*(3) is referred to. There the Court had ordered under section 295 (section 73 of the Code of Civil Procedure, 1908) that the whole sum realized by the defendant in execution proceedings should be paid to him, in spite of plaintiff's application for rateable distribution. No disbursement was however made. The plaintiff sued for payment out of Court to him of the sum which he claimed as rateably due. The question whether a declaratory suit was maintainable was raised in the arguments. The judgment, however, proceeds on the basis that the suit was brought under the provisions of section 295 and the decision is that it would not lie because assets had not come into the hands of the defendant. There is no

(1) (1897) 7 M.L.J., 277. (2) C.C.C. Appeal No. 81 of 1909 (unreported).
(3) (1885) I.L.R., 11 Calc., 718.

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suggestion in the judgment that any other remedy was open to the plaintiff.

In *Trailakya Nath Adhya v. Pulin Behari Baral*(1), it was held that a suit would lie for a declaration that a decree-holder who was otherwise qualified to get rateable distribution under section 73 was not entitled to receive payment on the ground that his decree had been obtained by collusion and fraud. The decision in *Hart v. Tara Prasanna Mukerji*(2) was distinguished on the ground that the prayer was for a refund. The plaintiff had asked in the alternative for recovery from the defendant in the event of payment having been made, but the report indicates that this event had not happened, and he also asked for payment out of the assets held by the Court.

Both the Calcutta cases were considered in *Venkatappiah Chetty v. James Short*(3) though the facts on which the declaration was sought are not stated in the judgment. Apparently it was not a case in which the decree was attacked on the ground of collusion. *Parasurama Pattar v. Veeraraghava Pattar*(4) was followed and it also was a case in which the right to distribution was not disputed on the ground that the decree was collusive. The case of *Trailakya Nath Adhya v. Pulin Behari Baral*(1) is referred to as being in favour of the maintainability of a declaratory suit, and it is remarked that the decision may perhaps be distinguished on the ground that the decree of the rival decree-holder was alleged to be collusive. It was held that a suit for a declaration was not maintainable and it was pointed out that the legislature had provided a special machinery for a limited purpose and a special remedy for determining questions of right which might arise. To hold that such a suit is not maintainable would result in many instances in depriving the plaintiff of his only effective remedy. The Madras cases do not decide that such a suit is not maintainable when the decree is attacked on the ground of collusion. That is the case which was put forward in the plaint. In the absence of proof of collusion the suit in my opinion will fail on another ground and therefore this point need not be dealt with further. The case of the respondents is that as they were not parties in Original

(1) (1904) 3 C.L.J., 385.

(2) (1886) I.L.E., 11 Cal., 718.

(3) C.C.O. Appeal No. 31 of 1909 (unreported). (4) (1897) 7 M.L.J., 277.

Suit No. 26 of 1910 and as the judgment is only *in personam* they are entitled to have it vacated even on grounds which would not be open to the defendants in the suit. The judgment is said to be only a piece of evidence as to the existence of a debt which it is open to the respondents to rebut and which they have succeeded in rebutting. The Subordinate Judge has held that the fact that Exhibit H was not supported by consideration and that the defendant must have supported his claim by false evidence are sufficient to entitle the plaintiffs who held decrees against the same judgment-debtors to the relief they pray for in this suit. It is contended before us that this view is wrong. It is conceded that cases of collusion or proceedings in bankruptcy stand on a different footing. The argument advanced is that apart from the exceptions just mentioned, the plaintiffs would be entitled to relief in such circumstances only to which the principle illustrated by section 53 of the Transfer of Property Act is applicable. The fact that there has been a fraud by one creditor on the judgment-debtor will not enable other creditors to dispute the validity of the decree where the fraud was not aimed at them and they had no direct interest in the suit.

A number of English cases have been cited but it is unnecessary to deal with them at length, because all the decisions relate to bankruptcy proceedings, and there is really no controversy as to the powers of a Court exercising bankruptcy jurisdiction.

Ex parte Kibble In re Onslow(1), *Ex parte Lenox, In re Lennox* (2), *In re Fraser, Ex parte Central Bank of London*(3), and *In re Hawkins, Ex parte Troup*(4) were referred to.

These cases establish that the mere fact that a debt which is sought to be proved is founded on a judgment does not prevent the trustee in bankruptcy inquiring into the reality of the debt on which the judgment is based. Such an inquiry may be held even before a receiving order has been made and even at the instance of the debtor although the latter would be estopped by the judgment from disputing the existence of the debt in any other forum. In order to justify the rejection of

(1) (1875) 10 Ch., 467.
(3) [1902] 2 Q.B., 688.

(2) (1885) 16 Q.B.D., 316.
(4) [1895] 1 Q.B., 404.

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the debt by the Court, it is not necessary that there should be proof of collusion or of fraud. It is enough that the transaction should have been unfair and unreasonable. [Vide *In re Hawkins, Ex parte Troup*(1).] It is clear from the judgments that the decisions are based on the peculiar powers of the Court of Bankruptcy. The Court is charged with the administration of the estate for the benefit of the whole body of creditors, and the interference of the Court has far-reaching and permanent effects on their rights. The proceedings in bankruptcy are the acts of the Court, and it is not estopped by any prior conduct on the part of the debtor, by any engagements he may have entered into, or by any decrees which may have been passed against him, from inquiring into the true nature of the transactions so that the assets may be equitably distributed between the bona fide creditors of the bankrupt. These decisions do not touch the question of the rights of third parties to attack decrees on their own account. If the first defendant seeks to prove his debt in the Insolvency Court in order to share in the assets of Lakshmana Chetti held by the Receiver, it may be open to the Court to go behind the judgment in Original Suit No. 26 of 1910 and inquire into the consideration for Exhibit H. There is nothing in the cases cited to support the plaintiffs' contention as to the maintainability of the present suit. In this view, it is hardly necessary to notice the further argument that a Court acting under section 73 of the Code of Civil Procedure is invested with powers similar to those exercisable in insolvency proceedings. I think the correctness of this proposition is doubtful.

In *In Re Sunder Dass*(2) it has no doubt been held that the Court has a right to inquire whether any decree on which rateable distribution is claimed is a sham decree or not. The reason given is one which furnishes a ground for the interference of a Court of Bankruptcy in such matters, namely, that a debtor should not be allowed to defeat the rights of his bona fide creditors by means of claims brought into existence collusively for this very purpose. In *Shankar Sarup v. Mejo Mal*(3) the Judicial Committee expressed the following view as to the nature of proceedings under section 295 (73) of the Code

(1) [1895] 1 Q.B., 404.

(2) (1885) I.L.R., 11 Cal., 42.

(3) (1901) I.L.R., 23 All., 313 (P.C.).

of Civil Procedure: "The scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke v. Achut Jagannath Ghate*(1), and they concur in the further observation made by the learned Judge in that case that the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding, and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit." A Court cannot in execution go behind the decree which it is executing. If the orders passed under section 73 are made in execution of the several decrees which happen to be before the Court, it is difficult to see how the Court has authority to question the validity of any of them. The action of a Court under section 73 is materially different from that of a Court in Insolvency proceedings. The estate is not vested in the Court. The remedies open to the creditors in future are not curtailed. The Court merely gives effect to a rule of procedure enacted for the purposes set out in the judgment of STRACHY, C.J., in *Bithal Das v. Nand Kishore*(2). The decisions cited for the respondents do not help the determination of the point in issue. They however rely upon general principles as establishing their title to the relief now sought. They contend that the judgment in Original Suit No. 26 of 1910 is not one binding against all the world, that the existence of the debt sued upon is not *res judicata* as far as they are concerned and that the position they hold as judgment-creditors of the defendants in the suit entitles them to question the validity of the transaction. The judgment is not one *in rem*, the facts found are not *res judicata*, and the plaintiffs have now an interest in disputing the first defendant's right to receive payment. The answer furnished on behalf of the appellant is that there are exceptions to the rule that judgments *in personam* bind only parties and privies and that the present case

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(1) (1894) I.L.R., 15 Bom., 438. (2) (1901) I.L.R., 23 All., 106, at p. 110.

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falls within those exceptions. The existence of exceptions is recognized and acted upon in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(1). In that judgment a long passage is quoted with approval from an American Case, *Candee v. Lord*(2) as giving a clear instance of such an exception. The passage in question contains the whole of the argument for the appellant. The proposition enunciated is this. An owner may dispose of or burden his property as he pleases, provided he does not thereby cause injury to others. He may, for instance, contract a debt and this is a matter which concerns solely himself and the particular creditor, provided the act is not done in bad faith and to the prejudice of other creditors. When bad faith has been shown, the transaction can be avoided. When the proviso has been complied with, strangers cannot intervene. They are not entitled to question the way in which a man has dealt with his own, merely because he has been improvident in incurring liabilities or careless in defending his rights. As regards judgments the conclusion is thus stated (page 486): "It follows from the principle suggested that a judgment obtained without fraud or collusion and which concludes the debtor, whether rendered upon default, confession, or after contestation is, upon all questions affecting the title to his property, conclusive evidence against creditors to establish, first, the relation of creditor and debtor between the parties to the record; and second, the amount of the indebtedness." No Indian or English decisions covering the same ground have been cited before us. Black on Judgments, Volume I, section 294, Bigelow on Estoppel, page 167, and Bigelow on Fraud, page 91, indicate that the view taken in *Candee v. Lord*(2) is one generally accepted by American authorities.

An act of a debtor, or a judgment passed against him may subsequently become highly detrimental to the interests of other creditors, but this will not entitle them to interfere if all was done in good faith at the time the events took place. (Vide Bigelow on Fraud *loc. cit.*)

An illustration of the application of these principles is to be found in *Suppa Bhattar v. Suppu Sokkaya Bhattar*(3). X had

(1) (1910) I.L.R., 38 Mad., 488.

(2) 51 A.M., Dec., 294; 2 N.Y., 209.

(3) (1915) 29 M.L.J. 558

been the sole owner of certain property. Y claimed it under an alienation by X. Y's claim was upheld in a judgment passed in litigation to which all persons having an existing interest in disputing the claim were parties. Subsequently Z, who had not been a party to the previous suit, acquired such an interest and tried to question Y's rights on grounds similar to those which had failed before. It was held that he was not entitled so to do.

I think the principle of the decision to be, that the persons who had the exclusive right to settle the question had done so without any fraud on Z and he could not object to what had taken place.

The passages relied upon in the books referred to above lay stress on the fact that a fraud practiced on the debtor is not in itself any ground for interference by third parties. The defendant holds a decree which finally determines that the relation of creditor and debtor exists between him and his judgment-debtors and which is also conclusive as to the amount of the debt as between the parties. Fraud there has been, but not of a nature to enable the debtors to reopen the matter. The plaintiffs are now seeking to have the debtors' lost cause retried because the result is injurious to themselves. They have failed to establish collusion or fraud against themselves. In these circumstances I think the principle of the decision above referred to applies, and the plaintiffs are not entitled to attack the decree by showing that it is not based on a real debt.

I am therefore of opinion that the appeal must be allowed and the suit dismissed. I agree with the order as to costs proposed by my learned brother.

SADASIVA AYYAR, J.—The first defendant is the appellant. The plaintiffs and the defendants Nos. 2 and 3 (who have common interests with the plaintiffs) are the respondents. The material facts and pleadings have been mentioned in detail in the judgment just now pronounced by my learned brother, and I shall not repeat them.

I substantially agree with his conclusions throughout, and have not much to say in my own words.

The decree attacked in the plaint, namely, the decree in Original Suit No. 26 of 1910, was obtained by the first defendant against Nataraja Aiyar *ex parte*, and the assets held by the

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Court were realised in execution against his properties alone as the other judgment-debtor's (Lakshmana Chetti's) properties had vested in the Official Receiver on his insolvency. That decree is dated 16th April 1910.

The plaintiffs in the present suit state in paragraph 7 of the plaint:

"Nataraja Aiyar neglected to appear and the pleader engaged by him did not also appear on the date of hearing, and by reason of the gross and culpable neglect of the said Nataraja Aiyar and by the defendant getting untrue and false returns,"
(the first defendant in this suit, who was impleaded at first as the only defendant, being the plaintiff and decree-holder in the other suit)

"and by the said defendant falsely swearing that the debt was due, the decree has been obtained. The same is fraudulent, null and void and collusive and is devoid of legal effect as against the plaintiffs. The subsequent proceedings initiated by Nataraja Aiyar to set aside the *ex parte* decree were fraudulently and collusively conducted by him. He fraudulently abstained from letting in all the evidence which could have been availed of by him. But in any case the said decree is not binding on the plaintiffs."

Two of the eminent leaders of the bar of this Court, Messrs. T. R. Ramachandra Ayyar and K. Srinivasa Ayyangar appeared for the contesting parties (namely, Nataraja Aiyar and the present first defendant, respectively) in the proceedings conducted to set aside the *ex parte* decree and they have been examined as defence witnesses Nos. 2 and 1 in this case. As the learned Subordinate Judge remarks in paragraph 43 of his judgment,

"After reading their evidence it is not possible to find that there can be any collusion between Nataraja Aiyar and the first defendant in the conduct of those proceedings."

(See also *Venkatarama Aiyar v. Nataraja Aiyar*(1) which contains the report of those hotly contested proceedings between Nataraja Aiyar and the first defendant, and in which Nataraja Aiyar was unsuccessful.)

That a judgment though obtained on perjured evidence is conclusive between the parties has been now settled by the Full Bench decision in *Kadirvelu Nainar v. Kuppuswami Nainar*(2).

(1) (1913) 24 M.L.J., 235.

(2) (1918) I.L.R., 41 Mad., 748 (F.B.).

It is clear from the principle of the decisions in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(1) and in *Ramamurti Dhora v. The Secretary of State for India in Council*(2), which principle was substantially approved in *Suppa Bhattar v. Suppu Sakkaya Bhattar*(3), that when the relationship of decree-holder and judgment-debtor was finally established between the present first defendant and Nataraja Aiyar by the decree in Original Suit No. 26 of 1910, the extent and reality of Nataraja Aiyar's indebtedness under that decree cannot be questioned by third persons (though they are also creditors of Nataraja Aiyar), so long as that decree remains effective. As regards proceedings in insolvency and bankruptcy and proceedings taken in winding up registered companies, special powers are given to Courts and Receivers, not to set aside judgments and decrees, but as is said in some English cases, "to get round judgments", "to go behind judgments", so that the creditors who have got just debts alone may share in the distribution of assets and not the creditors whose debts are unjust, though they may be decree creditors. Those decisions are, in my opinion, not applicable to the question of rateable distribution in execution proceedings under the Civil Procedure Code. Most Insolvency and Bankruptcy Acts, for instance, contain special provisions which direct that domestic servants and clerks, etc., should be paid in full, the arrears of wages due to them for particular periods of time, in preference to other creditors and contain similar special provisions based on special considerations, but these considerations cannot be taken into account under the Civil Procedure Code.

I am therefore clear that the plaintiffs who are decree-holders (just like the first defendant) against Nataraja Aiyar cannot attack the first defendant's decree as not creating a valid debt against Nataraja Aiyar, and therefore as not being a decree capable of execution against Nataraja Aiyar's assets, if Nataraja Aiyar himself is precluded from setting aside that decree, and if there was no collusion between the first defendant and Nataraja Aiyar in the obtaining of the decree by the first defendant [Of course if there was such collusion, it was open to the

(1) (1910) I.L.R., 33 Mad., 483.

(2) (1913) I.L.R., 36 Mad., 141.

(3) (1915) 29 M.L.J., 558.

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plaintiffs to attack it. See *Suryanarayana Jagapati Raju v. Gopala Surya Rao*(1).]

In the above view, it is unnecessary to consider the question whether the plaintiffs have a right to sue for a declaration and injunction, and whether their only course was to have waited till the money was paid in the course of rateable distribution to the first defendant and then to bring their suit or suits for recovery of that money under the provisions of section 73, Civil Procedure Code. I might however for the sake of completeness express my considered view that they are not so precluded. It may happen that the remedy under section 73, Civil Procedure Code, may become, in certain cases, quite illusory; for example, where the creditor to whom it was wrongly paid is a pauper, or has no tangible property, or absconds. The right of a man to recover the debt out of his debtor's assets is a substantial right. Where that right is in danger, I do not see why he should be confined to a particular remedy given by a particular statute and why he should not resort to another remedy given by another statute (such as the Specific Relief Act) to protect his rights effectively. If there are observations in certain cases which hold that a suit for declaration and injunction (where the plaintiff is entitled to sue under section 73 after the wrong distribution takes place) is premature, I respectfully dissent from those observations. The actual decision in *Parasurama Pattar v. Veeraraghava Pattar*(2) can be supported on the ground that the consequential relief of injunction was not asked for. Exhibit I merely follows *Parasurama Pattar v. Veeraraghava Pattar*(2) and the actual decision may be supported on the same ground.

In the result, though with great reluctance, I agree with my learned brother in holding that the lower Court's decision must be reversed, and the suit dismissed, but as the first defendant obtained a dishonest decree and raised the false defence that the promissory note on which he obtained that decree in Original Suit No. 26 of 1910 was supported by consideration, I would direct the parties to bear their respective costs in both Courts.

K.R.

(1) (1912) 28 M.L.J., 690.

(2) (1897) 7 M.L.J., 277.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Bakewell.

OTTAPURAKKAL TAZHATHA SOOPI (SIXTEENTH DEFENDANT),
APPELLANT,

v.

CHARICHIL PALLIKKAL MARIYOMA AND SEVENTY-SIX
OTHERS (PLAINTIFFS NOS. 1 TO 4 AND DEFENDANTS NOS. 1 TO 15,
17, 19 TO 24, 27 TO 34, 36 TO 44, 46 TO 48, 50 TO 53, 55 TO 59
AND 61 TO 75), RESPONDENTS.*

1919,
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Malabar Law—Karnavan—Junior members—Kanom—Redemption, suit for—Suit by junior members, whether sustainable—Transfer of Property Act (IV of 1882), sec. 91—Interest to redeem.

Only under very special circumstances can junior members of a Malabar tarwad, following the Marumakkattayam law, maintain a suit for the redemption of a kanom granted by their karnavan.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, the Additional Temporary Subordinate Judge of North Malabar, in Appeal Suit No. 23 of 1918, presented against the decree of K. RARU NAYAR, the Additional District Munsif of Tellicherry, in Original Suit No. 218 of 1914.

The plaintiffs are some of the junior members of a Mappilla tarwad following Marumakkattayam law. They brought this suit for redemption of a kanom granted by a previous karnavathi. They alleged in the plaint that they instituted this suit because the present karnavathi of the tarwad, who was joined as the first defendant, did not file a suit to redeem and that she in fact colluded with the sixteenth defendant, who was the kanomdar. The District Munsif inferred that there was collusion between them, from the fact that the first defendant (the karnavathi) supported the sixteenth defendant, and prayed for the dismissal of the suit. He accordingly held that the suit by the junior members was sustainable, decreed redemption and directed the delivery of possession of the lands on redemption, to the plaintiffs. On appeal by the sixteenth defendant, the Subordinate Judge confirmed the decree and dismissed the appeal, as

* Second Appeal No. 71 of 1919.

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well as the memorandum of objections preferred by the karnavathi (the first defendant) and some other defendants, who claimed that possession of the lands should be delivered to them on redemption of the suit kanom. The sixteenth defendant preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellant.

K. P. M. Menon and *K. P. Kesava Menon* for the first to fourth respondents.

SPENCER, J.

The JUDGMENT of the Court was delivered by SPENCER, J.—This is a suit for redemption, brought by junior members of what is termed a strisothu tarwad, the manager of which is a woman called a karnavathi, and the members of which are governed by Marumakkattayam law. The suit has been decreed, and the first question before us is whether the plaintiffs had a right to maintain it. As laid down in *Vasudevan v. Sankaran*(1) and numerous other decisions, a karnavan is at once the manager and the mouthpiece of the tarwad, or in the words of Mr. Justice HOLLOWAY “a Malabar family speaks through its head, the karnavan, and in Courts of Justice, except in antagonism to that head, can speak in no other way.”

So, although we might be prepared to hold that junior members of such a family were, generally speaking, persons having an interest in tarwad property within the meaning of section 91, Transfer of Property Act, when the individual right of suit from the point of view of the personal law of the parties is in question, we are fully in agreement with the statement of law laid down in *Katherkutti Haji v. Kundan Menon*(2) where it was declared by PHILLIPS and KUMBASWAMI SASTRI, JJ., that only under very special circumstances could the anandravans of a tarwad maintain a suit for redemption of a kanom granted by their karnavan, as such a suit would amount to an act of interference in the karnavan's management of tarwad affairs.

In the present case, the plaintiffs alleged in their plaint that the first defendant was acting in collusion with the sixteenth defendant, the kanomdar, and was ready to do any act prejudicial to the tarwad, and again, that if the possession of the properties was not recovered at once the jenmam title of the

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tarwad would, in course of time, be prejudiced. In her written statement the first defendant denied all the imputations made against her in the plaint.

The onus then clearly lay on the plaintiffs to establish under the first issue that such very special circumstances existed as would justify a suit being brought by them without the concurrence of the karnavathi. They adduced no oral evidence at all, and there is nothing on the record to show that the first defendant had so misbehaved as to make it imperative to take the conduct of the affairs of the tarwad, in such matters as the institution of suits, etc., out of her hands. The District Munsif assumed that the first defendant was colluding with the sixteenth defendant, but apparently his only ground for drawing this inference was that she asked to have the suit dismissed. There may be many reasons why the continuance of the kanom might be beneficial to the tarwad. The terms as to the payment of purapad may be favourable. The tarwad may not have enough money readily available for defraying the large amount due for improvements. The Courts below have not gone into these matters and decided that any “very special circumstances” existed for redeeming the kanom as soon as it became redeemable. In the absence of such proof the plaintiffs cannot maintain this suit. It is unnecessary to deal with the other grounds of appeal. The appeal is allowed and the suit is dismissed without prejudice to the tarwad's right of redemption in a properly instituted suit. The appellant will get his costs throughout from the respondents Nos. 1 to 4. The other respondents will bear their own costs throughout.

K.R.

(1) (1897) I.L.R., 20 Mad., 129.

(2) Second Appeal No. 959 of 1917 (unreported).

APPELLATE CIVIL.

Before Sir John Wallis, Chief Justice, and Mr. Justice
Sadasiva Ayyar.

R. P. GILL (APPELLANT), PLAINTIFF,

v.

L. VARADARAGHAVAYYA AND TWELVE OTHERS
(RESPONDENTS), DEFENDANTS.*

Court Fees Act (VII of 1870), Sch. II, art. 17 (6)—Suit for partition by a tenant-in-common in possession.

A suit for partition of immoveable property, by a person who alleges he is in possession of it as co-tenant on behalf of himself and others is governed by Schedule II, article 17 (6) of the Court Fees Act (VII of 1870).

Referred Case No. 5 of 1894, (1894), 4 M.L.J., 110, not followed; *Tara Chand Mukerji v. Afzal Beg*, (1912) I.L.R., 34 All., 184 and *Ahamuddin v. Tamijuddin Amiruddin*, (1917) 44 I.C., 216 (Calo.), followed.

APPEAL against the order of A. S. KRISHNASWAMI AYYAR, Subordinate Judge of Guntūr, in Original Suit sought to be filed by Mr. G. V. Srinivasa Rao, Vakil, on behalf of Mr. R. P. Gill.

In this case the plaintiff alleged that he was a tenant-in-common with the defendants of certain immoveable properties, and that he was in possession of the same on behalf of himself and the other tenants-in-common, and prayed for partition and delivery to him of his one-fourth share. He valued his share at Rs. 15,000 for purposes of jurisdiction, but paid only Rs. 10 for Court fees under article 17 (6) of the Second Schedule of the Court Fees Act. The Subordinate Judge relying on the authority of *Referred Case No. 5 of 1894*(1), ordered that *ad valorem* Court Fee on Rs. 15,000 should be paid within a week, and rejected the plaint on non-payment of the fee. The plaintiff preferred this Appeal.

P. Narayanamurti for appellant.

K. G. Babu Rao for ninth respondent.

* Appeal No. 280 of 1918.
(1) (1894) 4 M.L.J., 110.

The JUDGMENT of the Court was delivered by

WALLIS, C.J.—In this case the plaintiff sues for partition of certain immoveable property, of which he alleges he is in possession as a co-tenant on behalf of himself and the other co-tenants. This is not a suit to enforce a right to share in the possession of property on the ground that it is joint family property within the meaning of section 7 (iv) (b) of the Court Fees Act (VII of 1870), and therefore the question of the applicability of that subsection to suits for the partition of joint family property, which was decided by a Full Bench of this Court in *Rangiah Chetty v. Subramania Chetty*(1), does not arise.

There is a long course of decisions in Calcutta that a suit, such as the present, for a partition by a plaintiff alleging himself to be already in joint possession is incapable of valuation within the meaning of Schedule II, article 17 (6), and is not governed by clause (v) of section 7; and, though the point was not expressly decided by the Full Bench in *Rangiah Chetty v. Subramania Chetty*(1), the reasoning of all the learned Judges who heard the Reference is in accordance with this view. The same view is taken in *Tara Chand Mukerji v. Afzal Beg*(2).

In these circumstances, we are not prepared to agree with the decision in *Referred Case No. 5 of 1894* (1), that the value of the subject matter of such a suit is not incapable of valuation but easily ascertainable; or with *Dagdu v. Totaram*(3), assuming that the point arose in that case, which is not clear. The balance of authority appears to us to be strongly in favour of the view that such a suit as the present is governed by Schedule II, article 17, clause 6, the latest case being *Ahamuddin Tamijuddin v. Amiruddin*(4), and we must so hold and set aside the order rejecting the plaint and remand the case to the lower Court for disposal according to law.

N.R.

(1) (1911) 21 M.L.J., 21.

(2) (1912) I.L.R., 34 All., 184.

(3) (1909) I.L.R., 33 Bom., 658.

(4) (1918) 44 I.C., 216 (Calo.).

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

1919, November 13. V. BALAKRISHNAYYA AND ANOTHER, APPELLANTS (DEFENDANTS
Nos. 1 AND 2)]

v.

V. VENKATA TRIAMBAKAM AND ANOTHER, RESPONDENTS
(PLAINTIFFS).*

Hindu Law—Partition—Birth of natural son after adoption—Suit for partition by adoptive father and natural son against adopted son—Shares.

In a suit for partition during the lifetime of a Hindu father, the father and a natural born son are entitled to eight shares of the property and the adopted son to one share.

Narasimhappa v. Chinna Kenchappa (1917) 38 I.C. 244 (Mad.) and *Subbarayudu v. Perarazu*, Appeal No. 104 of 1914 (unreported), followed.

SECOND APPEAL against the decree of A. S. KRISHNASWAMI AYYAR, Temporary Subordinate Judge of Guntūr, in Appeal No. 237 of 1917, filed against the decree of P. RAJAGOPALA ACHARIYAR, Additional District Munsif of Tenali, in Original Suit No. 246 of 1915.

The facts are given in the judgment.

A. Krishnaswami Ayyar (with T. M. Ramaswami Ayyar) for the appellant.—A decree should have been given on the basis of the award. An adopted son is under the Hindu Law in the same position as a natural son and has all the rights of the latter. Any rule of law which gives him less rights is only an exception to this general rule and must not be enlarged. The decisions that have till now held that the adopted son is entitled to only a fourth of what the natural son would get out of the patrimony have all been cases of partition after the death of the adoptive father; there is no reason why both of them should not get equal shares when the division is made during the father's lifetime. The general rule that the two sons are equal in the eye of the law has been laid down by the Privy Council in *Pratap Singh Shirsingh v. Agarsingji Rajasangji*(1), *Gangadhar Bogla v.*

* Second Appeal No. 1754 of 1918.
(1) (1919) I.L.R., 43 Bom., 778 (P.C.).

Hira Lal Bogla(1), and *Nagindar Bhagawan Dass v. Bachoo Hurkissondas*(2) which overruled *Bachoo v. Nagendas*(3). There are two cases, *Narasimhappa v. Chinna Kenchappa*(4) and *Subbarayudu v. Perarazu*(5), in this Court which are against my contention; but not only do they refrain from giving any reasons, but they are against the express rulings of the Privy Council in the above cases.

P. Narayanamurthi for the respondent.—The award was disputed by my client and any claim based on the award must be deemed to have been abandoned by the other side, in the lower Court. A vakil is entitled to abandon an issue depending on a question of fact: *Venkatanarasimha Naidu v. Bhashyakarlu Naidu*(6). The parties in this case are Brahmans. Even in the case of Sudras it has now been held in this Court in *Gopalan v. Venkataragavulu*(7), overruling *Raja v. Subbaraya*(8), that on a division after the father's death the adopted son gets only a fourth of what the natural son gets. The same rule must apply even when a division takes place during the father's lifetime. The Privy Council cases quoted relate to collateral succession of the adopted son and the natural son, and the right of the adopted son to represent his father on a partition with the father's coparceners. They do not refer to a case like the present. On principles laid down by the Hindu Law Texts the adopted son must get only the smaller share. In Manu, Chapter IX, verse 163, it is laid down that if a son is born after adoption, the adopted son is entitled to get only maintenance. In Vashishta, Chapter XV, verse 9, it is said that he takes a fourth share; similarly in Baudhayana and Katyayana. Later commentators all enjoin only a fourth share: see *Mitakshara*, Chapter I, section 11, verses 24 and 25; *Smriti Chandrika*, Chapter X, placitum 13; *Dattaka Mimamsa*, section 5, placitum 40 and section X, placitum 1; *Dattaka Chandrika*, section 5, verses 16 and 17; *Dayabhaga*, Chapter X, placitum 9; *Vyavahara Mayukha*, Chapter 5, placitum 25; and *Saraswati Vilasa*,

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(1) (1916) I.L.R., 43 Cal., 944 (P.C.).
(2) (1916) I.L.R., 40 Bom., 270 (P.C.).
(4) (1917) 38 I.C. 244 (Mad.). (3) (1914) I.L.R., 16 Bom. L.R., 268.
(5) Appeal No. 104 of 1914 (unreported).
(6) (1902) I.L.R., 25 Mad., 367 (P.C.).
(7) (1917) I.L.R., 40 Mad., 632. (8) (1884) I.L.R., 7 Mad., 263.

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placitum 379. The scheme of the Mitakshara in dealing with this matter in Chapter I, section 11, following sections 4 to 11 all of which deal with matters which would be applicable equally to partition between sons before and after the father's death, shows that the unequal division of patrimony between the adopted and the natural born son must be adhered to whether the division takes place during or after the father's lifetime. This must be the reason for the two recent decisions of this Court on this matter, in favour of my contention, as section 11 is specifically relied on therein even in case of a division after the father's death.

S. Ramaswami Ayyar in reply.—The wording of the Sanskrit verse on this matter suggests that the division spoken of in this respect is one after the father's death.

The JUDGMENT of the Court was delivered by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—This is a suit for partition. The first plaintiff is the father, and the second plaintiff is his natural born son. The first defendant is his adopted son, and the second defendant is the son of that adopted son. The question for consideration is, what is the share to which the first defendant, the adopted son, is entitled when a suit is brought for partition, and the father is a party to that suit. A question was raised, which is referred to in the written statement, that, as before the birth of a second son there was an award of arbitrators settling the disputes between the first plaintiff and the first defendant, a decree should be passed in pursuance of that award. The first issue related to that contention. The facts relating to that issue are these. The adoption of the first defendant was made in 1887, when the first plaintiff's first wife was alive. She died in 1888. First plaintiff contemplated marrying a second wife. Thereupon the natural father of the first defendant raised disputes, and asked that before the second marriage was performed the share of the first defendant should be set apart. It is said that in consequence of this objection by the natural father of the first defendant, the arbitrators settled the shares of the first plaintiff and the first defendant. The District Munsif was of opinion that, as the award was not made a decree of Court, and as it was not registered, it was not receiveable in evidence; but he gave the two plaintiffs and the first defendant a third share each in the property. He relied upon

Raja v. Subbaraya(1), which has since been overruled by *Gopalam v. Venkataragavulu*(2). The Munsif also stated in his judgment that the genuineness of the award was not admitted by the plaintiffs. Against the decree of the Munsif there was an appeal to the Subordinate Judge. A memorandum of objections was also filed by the defendants. In that memorandum there is no claim that they should be given a half share under the award. The Subordinate Judge came to the conclusion that the share to which the first defendant was entitled was one-ninth of the property. Against this finding this Second Appeal has been preferred by the defendants.

Mr. Krishnaswami Ayyar argued that the conclusion come to by the lower Courts, that the award is not receiveable in evidence, was wrong and that his clients were entitled to a finding whether the award was genuine or not, and to a decree in pursuance of that award. He conceded that the appellants could not claim one-half of that property, as there was no memorandum of objections in the lower Appellate Court, but argued that he is entitled to rely upon the award for the purpose of supporting the decree of the District Munsif. We have come to the conclusion that it is not open to the appellants to rely upon that award. The genuineness was disputed. There was no attempt made in the lower Appellate Court to base any claim upon the award. We have no affidavit before us by the appellants, or by their pleader, that this question was argued in the lower Appellate Court. Under these circumstances, we are of opinion that the defendants gave up their right under the first issue. As was held by the Judicial Committee in *Venkatanarasimha Naidu v. Bhashyakartu Naidu* (3), on a question of a disputed fact it is within the competence of the pleader, or the parties, to give up an issue; that is what seems to have happened in the lower Court. We are not prepared to remit the issue for a finding as to whether this award was genuine or not.

Now, we come to the main question in the case, and that is what is the share to which the first defendant is entitled where a suit is brought during the lifetime of his adoptive father for settling the shares. There can be no doubt that if Manu's text

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(1) (1884) I.L.R., 7 Mad., 263. (2) (1917) I.L.R., 40 Mad., 682.
(3) (1902) I.L.R., 25 Mad., 267 (P.C.).

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in Chapter IX, sloka 163, is to be applied literally, the first defendant will be entitled to nothing more than maintenance. But Vignanaswara, in commenting upon Yagnavalkya's text, points out that this rule must be restricted to cases where the adopted son is not a good man. Since that time, three Smrithi writers at least have laid down the rule as regards the shares of the adopted son—Vasishta, Katyayana and Bodhayana. All of them say that the adopted son, if a son is born to the adoptive father after the adoption, is entitled to one-fourth share. In this Court it has been consistently been held that the meaning of that text is that the property should be divided into five shares, four of which will be taken by the *aurasa* son and one will be taken by the adopted son. The contention of Mr. Krishnaswami Ayyar was, that this rule being a restriction upon the natural rights of a son should be confined to cases where there is a partition between the brothers—between the adopted son and the natural born son—and should not be applied to cases where a suit is brought by the father to divide the property. He relied for this contention upon the latest pronouncement of the Judicial Committee in *Pratap Singh Shivsingh v. Agarsingji Rajasangji*(1), where their Lordships point out that the adopted son, ordinarily speaking, is in the same position as a natural born son. That observation was made with regard to the right of maintenance, and it was held that the fact that a person is adopted will not deprive him of the right. The learned vakil also relied upon two other cases. *Nagindar Bhagawan Dass v. Bachoo Hurkissondas*(2) was a case where the question was, what was the share to which the adopted son was entitled in cases of collateral succession. The adopted son and the natural born son were the only two heirs who were alive when the succession opened, and it was held that the text of Vasishta was not applicable to such cases, and that both the sons were entitled to the inheritance in equal moieties. In *Gangadhar Bogla v. Hira Lal Bogla*(3), which related to the stridhanam of a step-mother, both WOODROFFE and MOOKERJEE, JJ., point out that the exception should be confined within proper limits and should not be extended to cases of stridhanam succession. From these

(1) (1919) I.L.R., 43 Bom., 778 (P.C.).

(2) (1916) I.L.R., 40 Bom., 270 (P.C.).

(3) (1916) I.L.R., 43 Cal., 944 (P.C.).

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observations Mr. Krishnasami Ayyar contended that the injunction of Vasishta should be confined to cases where the suit is brought by a natural born son against the adopted son, or vice versa, and should not be extended to cases where the suit is instituted in the lifetime of the father. On principle, there is no reason why such a limited application should be given to the texts of Vasishta or Bodhayana or Karthyayana. In two cases of this Court, it seems to have been taken for granted that even if such a suit is brought during the lifetime of the father, the text of Vasishta will be applicable; *Narasimhappa v. Chinna Kenchappa*(1), and *Subbarayudu v. Perarazu*(2). But in those cases there was no discussion upon this point. And naturally, the learned vakil for the appellant contended that the decisions are not binding upon him. We have therefore considered the text of the Hindu Law with some care, and we are glad to say that our conclusion is in accordance with the decision come to in the two cases already cited. As was pointed out by Mr. Narayanamurthi for the respondents, in this portion of Mitakshara, in section 1, the whole discussion begins with a definition of Daya. The author says that properties are of two kinds, obstructed property and unobstructed property. First of all he deals with unobstructed property, and then deals with obstructed property. The rules relating to partition are all contained in the sections dealing with unobstructed property. Here again, we must observe that the sections are not to be found in Vignaneswara's commentary, but they were imported by Mr. Colebrooke who has very carefully analysed the commentary and has given headings which he thought were appropriate for the subject-matter discussed. In the first clause of section 2, the rules relating to partition during the lifetime of the father are considered. In section 3, the rules relating to partition after the death of the father are considered, and the other sections 4, 5, 6, 7, 8, 9 and 10 deal with matters which would be applicable to both classes of partition—partition during the lifetime of the father and partition after his death.

Section 11, in which the question as to the right of the adopted son when he is in competition with a natural born son is dealt with, must also be regarded as belonging to the same

(1) (1917) 38 I.C., 244 (Mad.). (2) Appeal No. 104 of 1914 (unreported).

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category as sections 4 to 10, which all have a general application without reference either to the question of partition after the death of the father or partition before his death. There is no reason for saying that the text applies only to cases of partition after the death of the father. No doubt the language in Sanskrit, to which Mr. Ramaswami Ayyar drew our attention in reply, suggests that the commentator contemplated a state of things existing after the death of the father. But that would not show that this text is solely to be applied to cases where partition takes place after the death of the father and not during his lifetime. After dealing with this portion of Yagnavalkya's text, Vignaneswara begins the next head of discussion, namely, obstructed properties. What has been laid down in the cases decided by the Judicial Committee and by the Calcutta High Court relates to the second head of discussion, obstructed property. It was held in these cases that there is no reason for applying section 11 to subjects covered by Chapter 2. In our opinion, we will be doing no violence to the canon of interpretation suggested by the Judicial Committee and by the learned Judges of the Calcutta High Court by applying the rule in section 11 to cases of partition during the lifetime of the father, because section 11 is germane to the discussion relating to unobstructed property. In the Dattaka Chandrika, the Dattaka Mimamsa, and the Saraswathi Vilasa, the rule of Vasishtha is quoted as of general application to all cases of partition. The principle underlying these texts is that in the partition of the patrimony *inter se* between the members of the family, the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. According to Bodhayana Sutram the adopted child has to give and provide at the time of adoption that he would not claim more than a fourth share of his father's property if a natural son is born. For these reasons we are of opinion that the lower Courts were right in holding that Vasishtha's text is applicable to the present case. Applying that rule, the father and the natural son would between them be entitled to eight shares and the adopted son to one share in the property.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

CHEKKUR PUTHALUTH POOTHATHI EDATHIL KUNHI
SANKARAN NAMBIAR (SECOND DEFENDANT), APPELLANT,

1918,
November,
14 and 19.

v.

PONNIATH AKATHOOTHU NARAYANAN TIRUMUNPU
AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS.
1, 3 AND 4), RESPONDENTS.*

Registration Act XVI of 1908—Mortgage-bond—Interpolation by mortgagor—Adding another item belonging to mortgagor for convenience of registration—Registration—Fraud on registration law—Document, whether properly executed, attested and registered.

A document mortgaging only one item of property, was duly executed, and attested, and another item of his property was interpolated by the mortgagor with the knowledge and consent of the mortgagee in the presence of the same attesting witnesses. The mortgagor registered the deed in the Sub-Registrar's office within whose jurisdiction the latter item was situated. It appeared that the object of adding the second item was not so much to give an additional security to the mortgagee, as to enable the mortgagor to get the document registered near the place where he was living and thus prevent delay in registering the deed.

Held, that there had been no fraud on the registration law and that the document was duly executed, attested and registered with regard to both items of property.

Harendra Lal Roy Chowdhuri v. Haridasi Debi, (1914) I.L.R., 41 Cal., 972 (P.C.), distinguished.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, the Additional Temporary Subordinate Judge of North Malabar, in Appeal Suit No. 185 of 1918, preferred against the decree of U. RAMAPPA, the District Munsif of Kuthuparamba, in Original Suit No. 303 of 1916.

The facts are stated in the judgment.

C. Madhava Nair for the appellant.

K. P. M. Menon and B. Pocker for the first respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—This is a suit on a mortgage. The first defendant, the owner of the property, executed Exhibit A to the third defendant in 1908. The third defendant assigned it to the plaintiff. The defence is that the mortgage is invalid for want of proper execution, proper attestation, and proper registration.

SESHAGIRI
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The first item of the plaint property was the only property originally intended to be mortgaged. The deed was engrossed and signed by the first defendant and attested by two witnesses, with this intention. Subsequently, the second item of property was included. The finding is that this was done with the knowledge and consent of the mortgagor and in the presence of the attesting witnesses.

The lower Courts have expressed themselves somewhat loosely in giving findings upon this part of the case. Both the Courts are agreed that there was no fraud either against the registration laws or against any of the parties to the contract, in making this interpolation. It is also clear, from what both the lower Courts say, that the object of adding the second item was not so much to give an additional security to the mortgagee as it was to enable the mortgagor to get the document registered near the place where he was living. The evidence makes it clear that it was to serve the convenience of both the parties to the transaction that this item was included, because the aim was to avoid delay in registering the deed. On these facts, we feel no hesitation in holding that the deed does not offend the rule enunciated in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1), if it is otherwise valid. The object of the interpolation was not to effect a fraud upon the registration law. Whatever might have been the original intention of the parties, they deliberately included the second item in the mortgage.

The contentions raised by Mr. Madhavan Nair are these: the document was not executed by the mortgagor with reference to the second item; it was not attested by the witnesses with respect to that item, therefore, although the document might be valid so far as the execution and attestation of the first item of property is concerned, the whole document is inoperative as the document could not have been validly registered in the sub-district where it was registered, if the second item had not been included.

There is no authority directly bearing on this question. There is a decision—*David Yule v. Ram Khalwan Sahai*(2)—which on the face of it, supports the respondent. In that case a document was signed by the executant before the body of the

document was written up. The learned Judges held that it was not open to the executant to dispute its validity. As Mr. Madhavan Nair pointed out, it was an *obiter dictum*; and we doubt very much, whether this decision is right.

In *Burgis v. Constantine*(1), it was held that where a material part of the document was left blank the document should not be regarded as valid. The principle is thus summarized in 10 Halsbury, paragraph 687:

“A deed must be written before it is sealed. If, therefore, a man seal and deliver a writing which is left blank in some material part, that is void for uncertainty and is not his deed and it cannot be made his deed merely by filling up the blanks after his execution of it.”

Therefore, we are not prepared to rest our decision upon the *obiter dictum* contained in *David Yule v. Ram Khalwan Sahai*(2). But it seems to us that the present case comes within the principle of *Hall v. Chandless*(3). There were blanks, in that case, which were subsequently filled up and some of the interpolations were of material character. In that case it was held that, where after the execution of the deed by some of the parties, the deed is altered with the consent and privity of the promisee, the document is not vitiated. The alteration in that case was the deletion of the property which was included by mistake. Such an omission was held not to affect the validity of the deed. In *Doe. d. Lewis v. Bingham*(4), where there were material alterations by filling up the blanks left in the body of the document after it was executed, the learned Judges held that the document was enforceable. BAYLEY, J., said,

“I am of opinion that any alteration made *in the progress of the transaction* (the italics are ours) still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood.”

ABBOT, C.J., HOLBOYD, J., and BEST, J., agreed with this view. In the language of BAYLEY, J., it can be said of the present case that the alteration was made in the progress of the transaction, to give validity to the document which had not yet been registered; before the document was taken for registra-

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(1) [1908] 2 K.B., 484.
(3) (1927) 4 Bing., 123.

(2) (1901) 6 C.W.N., 329.
(4) (1821) 4 B. & Ald., 672.

(1) (1914) I.L.R., 41 Cal., 972 (P.C.). (2) (1901) 6 C.W.N., 329.

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tion, with the consent of all the parties this interpolation was made. Applying the principle in *Doe. d Lewis v. Bingham*(1), we are of opinion that the interpolation does not affect the validity of the document.

In *Tupper v. Foulkes*(2), the defendant had authorized his son to execute the document. After its execution, he accepted it as his own. Subsequently in an action on the bond, he pleaded *non est factum*. EARLE, C.J., held,

"I am clearly of opinion that the admission of the defendant is always evidence to prove everything that he intended to admit."

WILLIAMS, J., and KEATING, J., agreed with the Chief Justice. KEATING, J., expressed himself very strongly on the point. He said:

"First, there was an admission by the defendant that he had given authority to his son to execute the deed in his name. . . . The deed being present and seen by the defendant, he deliberately adopts the act of his son. But the evidence does not stop there. It was proved that the defendant afterwards took an active part in directing the proceedings under this very deed. It was clear from his statement and his acts that he intended to acknowledge the deed as his deed. That amounts to delivery in law, and is evidence upon *non est factum*."

In the present case, it is in evidence that the defendant himself inserted in the body of the deed the words which he complains to have vitiated it. He subsequently had it registered. This is therefore an *a fortiori* case.

We may also refer to the case of *Adsetts v. Hives*(3). No doubt, there it was held that an immaterial alteration which was intended to supply formal defects did not vitiate the deed. We cite this case because Sir John Romilly refers with approval to *Doe. d Lewis v. Bingham*(1).

On the authority of the above cases, we are of opinion that by the fact of himself inserting the interpolation and presenting the altered document for registration, the defendant must be deemed to have executed the document not only with reference to the first item, but also with reference to the second item.

The second question is, whether it can be said that there was proper attestation in respect of the document as altered. The

(1) (1921) B. & Ald., 672.

(2) (1861) 9 C.B. (N.S.), 797.

(3) (1868) 83 Beav. 52.

interpolation is found to have been made in the presence of the attesting witnesses. Reliance was placed by Mr. Madhavan Nair upon *Shamu Pattar v. Abdul Kadir Routhan*(1), for the proposition that unless the attesting witnesses see the execution by the party, there can be no valid attestation. The difficulty felt in *Shamu Pattar v. Abdul Kadir Routhan*(1) does not arise in this case. The attesting witnesses were present when the mortgagor put his signature to the document, and they were also present when the mortgagor made the interpolation; they must therefore be deemed to have agreed to regard their attestation as applicable not only to the first item of the property comprised in the document, but to the second item as well. This is not a case where the attestors did not see the signature of the executant but only relied on his acknowledgment. The only other authority which need be referred to is *Muniappa Chettiar v. Vellachamy Hannadi*(2). In that case, two persons intended to execute a document. One alone executed it, and then the attestors attested. Then the document was taken to the second executant who signed it. It was held that the attestation would not cover the execution by the second party. This conclusion follows directly from *Shamu Pattar v. Abdul Kadir Routhan*(1). The attestors did not see the second executant sign the document and therefore, so far as that party was concerned, there was no valid attestation.

We may briefly notice the last argument addressed to us by the learned counsel for the appellant regarding registration. There are two decisions, one of the Allahabad High Court, *Pahladi Lal v. Musammatt Laraiti*(3), and the other of the Patna High Court, *Ramdei v. Chunder Bali Bibi*(4), cited by Mr. Menon in support of his contention. In both the cases, property over which the mortgagor had no power of disposition was included with a view to facilitate registration in a particular sub-district, and it was held that there was no fraud upon the Registration Law, and that *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(5) did not apply.

(1) (1912) I.L.R., 35 Mad., 607.

(2) (1918) M.W.N., 853.

(3) (1919) I.L.R., 41 All., 22.

(4) (1918) 44 I.C., 399.

(5) (1914) I.L.R., 41 Calc., 972 (P.C.).

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If we did not hold that there was valid execution and attestation, we would have felt considerable doubts on this part of the case. Where a party who has no disposing power over a property includes it for the purpose of getting the document registered within a particular jurisdiction, as at present advised we are not satisfied that there would not be a fraud upon the registration law within the language of the judicial committee in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1), but, as we have held that there was valid execution and attestation, we need not pursue this question any further. In our opinion, the decision of the Courts below is right and this Second Appeal must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

VEERAMACHANENI RAMASWAMY AND THIRTEEN OTHERS
(DEFENDANTS NOS. 3 TO 16), APPELLANTS,

v.

SOMA PITCHAYYA AND FIVE OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Specific Relief Act (I of 1877), sec. 42—Temple property—Permanent lease—Invalidity of lease—Suit for declaration by worshippers—Maintainability of suit.

Worshippers of a temple can maintain a suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid.

APPEAL against the decree of C. RANGANAYAKULU, the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 66 of 1917.

The material facts appear from the judgment.

P. Narayanamurti for appellants.

C. Rama Rao for

V. Ramadoss and V. Krishna Mohan for respondents.

P. R. Ganapathi Ayyar for third respondent.

The JUDGMENT of the Court was delivered by

ABDUR RAHIM, J.—The question is whether the worshippers of a temple can bring a suit for the declaration that a permanent

(1) (1914) I.L.R., 41, Cal., 972 (P.C.).

* Appeal No. 819 of 1918.

lease granted to the defendants, who are Archakas in possession of the property, is maintainable under Order 1, rule 8 of the Code of Civil Procedure.

The objection urged by the appellants is, that a suit for a declaration must conform to the terms of section 42 of the Specific Relief Act; and since the worshippers as a body or their representatives under Order 1, rule 8, cannot be said to have any right as to property within the meaning of section 42 of the Specific Relief Act, the suit is not maintainable. No authority has been cited for the appellants in support of this proposition: on the other hand the ruling of the Privy Council in *Robert Fisher v. The Secretary of State for India in Council*(1) suggests that section 42 of the Specific Relief Act is not exhaustive of cases in which declaratory suits may be maintained, and it was held by a Full Bench of this Court, in *Venkataramana Ayyangar v. Kasturiranga Ayyangar*(2), that such a suit as this is maintainable, though the question whether it came within the provision of section 42, Specific Relief Act, not was raised then. There is also a ruling of this Court—*Chidambaranatha Thambiran v. Nallasiva Mudaliar*(3)—where a suit by the disciples of a mutt was held to be maintainable under Order 1, rule 8, for a declaration as to the invalidity of an alienation of the mutt property. We hold that the suit was maintainable.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

W. H. LOCKLEY, PRISONER, APPELLANT.*

v.

KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), ss. 256 and 257—Right of accused after charge to recall prosecution witness for further cross-examination—Absolute or qualified right—Applicability of section 256 to witnesses not present before Court—Waiver by counsel, whether binding on accused—Entering upon defence, meaning of—Evidence Act (I of 1872), sec. 33—Deposition of

(1) (1899) I.L.R., 22 Mad., 270 (P.C.).

(2) (1917) I.L.R., 40 Mad., 212 (F.B.). (3) (1918) I.L.R., 41 Mad., 124.

* Criminal Appeal No. 554 of 1919.

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November,
27.

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November, 27
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prosecution witness cross-examined before charge—No opportunity for further cross-examination after charge—Deposition whether admissible at the trial.
Section 256, Criminal Procedure Code, confers an absolute and unqualified right on the accused to recall for further cross-examination only such of the witness as are still before the Court and have not been discharged from further attendance. After the charge had been framed the accused pleaded not guilty and mentioned to the Court that he had witnesses to examine; held that he had entered upon his defence and an application for further cross-examination of a witness discharged from attendance must be deemed to have been made under section 257. Waiver by Counsel of further cross-examination in case a charge is framed cannot prejudice the right of the accused under sections 256 and 257, Criminal Procedure Code.

A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross-examining him before the charge and there was no opportunity for further cross-examination after charge.

Appeal against the conviction and sentence of S. N. V. RAJACHAR, the Senior Presidency Magistrate, Georgetown, Madras, in Calendar Case No. 1780 of 1919.

T. Richmond (instructed by *Grant and Greator*) for the appellant.

The Crown Prosecutor on behalf of the Crown.

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SESHAGIRI AYYAR, J.—The accused has been convicted of the offence of cheating. He was employed in Messrs. Oakes & Co. as Works Manager. Mr. Wilson was employed in the same firm in a slightly higher capacity. The case for the prosecution is that the accused received Rs. 3,000 from Mr. Wilson, on the representation that the money was required for paying for certain articles purchased for the firm from the Chief Engineer of S. S. Ural, but that he only paid Rs. 2,000 to the Chief Engineer and misappropriated the balance.

The arguments in appeal were mainly devoted to attacking the procedure followed by the Magistrate. Mr. Richmond's first complaint was that there was a misjoinder of charges. The facts on which this contention was based are these :—

The original charge against the accused was that he received stolen property from the Chief Engineer. After the prosecution evidence was closed, an alternative charge under section 420, Indian Penal Code, was added. The learned counsel contended that a charge for receiving stolen property should not have been joined with a charge for cheating. I fail to see the force of this objection. The request to Mr. Wilson for the payment of

Rs. 3,000 was in furtherance of the purpose of concluding the purchase from the Chief Engineer. It was said that as the articles were handed over to the accused, the negotiations for the purchase had terminated, and that the subsequent receipt of money which was misappropriated had therefore no connection with receipt of the articles.

Section 235, Criminal Procedure Code, speaks of a series of acts forming part of the same transaction. There can be little doubt, that in arranging with the Chief Engineer for the purchase, the accused intended that the purchase should be effectuated by inducing Mr. Wilson to give him money for it. The true test of a series of acts forming the same transaction is that there should be a continuous operation of acts leading to the same end, and a common purpose should run through all the acts; see *Emperor v. Sherufalli* (1). For misappropriating Rs. 1,000, the first act was to arrange for the bargain, and the second act was to obtain the money. Both these are connected together and have the same community of purpose. I must therefore reject the contention that there has been a misjoinder of charges.

The next contention related to the refusal of the Presidency Magistrate to adjourn the case to enable the accused to further examine Mr. Wilson. The facts relating to this part of the case are these: Mr. Wilson was examined for the prosecution and was cross-examined at some length by the counsel for the defence. The witness had made arrangements for leaving India. Thereupon the Magistrate asked counsel for the defence whether he would insist upon the presence of Mr. Wilson any further. We find this note made by him:

"Mr. Grant has given up the re-cross-examination of Mr. Wilson, even in case a charge is framed."

After this statement by counsel, Mr. Wilson left India. It is argued that this waiver by counsel does not disentitle the accused from claiming that, on the framing of a charge, the witness should be recalled. It was first contended that the waiver, if any, was only with reference to the charges originally framed and not to the alternative charge added. The counsel who conducted the case before the Presidency Magistrate must have known that evidence as to cheating was being tendered by

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the prosecution. Mr. Wilson himself gave that evidence and he was subjected to cross-examination upon that matter. Therefore this suggestion cannot be accepted. I however agree that a waiver like this cannot prejudice the right of the accused under sections 256 and 257 of the Code of Criminal Procedure—vide *Kokil Ghose v. Kasimuddi Malita*(1).

I shall now see whether in the circumstances of this case, the right claimed is an absolute one. There has been some conflict of views upon the interpretation of sections 256 and 257 of the Code of Criminal Procedure. Therefore, I shall first of all deal with the language of the sections before dealing with the decided cases.

The procedure prescribed for trial is this: Where an accused is not discharged, a charge is to be framed. Section 255 lays down that the charge shall be read to the accused and that he shall be asked whether he is guilty or has any defence to make. Section 256 says that, if the accused claims to be tried,

'he shall be required to state whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be *recalled* and after cross-examination and re-examination, if any, they shall be *discharged*.'

This language seems to indicate that the witnesses are still in Court, because when we come to section 257, there we find mention of processes being issued for compelling the attendance of witnesses to be further examined; there is no such mention in section 256. And the further provision that the witnesses shall be *discharged* has reference to the ordinary practice in Criminal Courts, of witnesses being bound over to attend Court *de die in diem*; it is on the framing of the charge and after ascertaining the wishes of the accused, that they are ordinarily discharged. There is no injustice done to the accused by such a procedure, because a further right is given him of summoning the witnesses for the prosecution who might have been discharged. Therefore, in my opinion, the right referred to in section 256, which is absolute and unqualified, is intended to apply only where the witnesses are still before the Court and before they have been discharged from further attendance. In my opinion, in the present case, the

(1) (1902) 6 C.W.N., 424.

application to further examine Mr. Wilson is not covered by section 256, but comes under section 257. The Calcutta High Court in *Iswar Chunder Raut v. Kali Kumar Dass*(1) appears to have taken the view that even in cases where the witnesses are not before the Court, the accused has the absolute privilege of demanding that they should be summoned. *Zamunia v. Ram Tahal*(2) takes the same view. Vide also *Inder Rai v. Brown*(3). The view taken in Allahabad is different. See *Mulua v. Sheoraj Singh*(4). In this conflict of authorities I am free to express my opinion upon an examination of the language of the sections, and my conclusion is that in the present instance the privilege claimed by the accused is not an absolute one. I am clear that this will not prejudice the accused. If his legal advisers keep their eyes open, he is not likely to suffer by holding that section 256 only applies to cases of witnesses actually before the Court when the charge is read out. An accused has the right to cross-examine the witnesses before the charge is framed; he has a right of re-cross-examining the witnesses present in Court after the charge is framed; he has a further right subject to certain conditions of re-summoning the prosecution witnesses after entering upon his defence. These are ample safeguards, and I do not think that to confine section 256 to the category of cases mentioned by me is likely to affect the accused in his defence.

The next question relates to the construction of section 257. In the first portion of that section, it is stated:

"if the accused, after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for purpose of examination, etc., the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing."

Some arguments were addressed to us as to whether the stage of entering upon the defence was reached when the Magistrate refused to adjourn the case for further examination of Mr. Wilson. From the record it is clear that after the charge was framed, a list of witnesses was given by the accused and the

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(1) (1900) 4 C.W.N., 351.

(3) (1910) I.L.R., 37 Cal., 236.

(2) (1900) I.L.R., 27 Cal., 370.

(4) (1911) 11 I.C., 1007.

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case was adjourned for the examination of the defence witnesses. No doubt the proper procedure to have adopted was to have asked the accused whether he insisted upon the cross-examination of any of the witnesses for the prosecution, who may have been present in Court; but it does not appear that any such witnesses were present, or that any such right was claimed. Therefore, I must hold that the accused entered upon his defence by pleading not guilty and by mentioning that he had witnesses to examine. It is true that the application for re-summoning Mr. Wilson was made at once, but that would not show that the stage of entering upon the defence had not been reached when the accused, through his counsel, informed the Magistrate that he had witnesses to examine.

I have now to see whether the Magistrate has recorded his reasons in writing for refusing to re-summon Mr. Wilson. He has mentioned them in his judgment; the matter itself came before the High Court on an application made to postpone the hearing pending the arrival of Mr. Wilson. The Magistrate should no doubt have put on paper his reasons for the refusal. However, that is an irregularity which does not vitiate the case, having regard specially to the fact that he has given full reasons in his judgment, and the matter has been fully gone into in this Court on a previous occasion.

Another question is whether the refusal to adjourn was justifiable. If I understood Mr. Richmond aright, the facts which were expected to be elicited from the further examination of Mr. Wilson were intended to show that that witness himself was a party to the misappropriation. Mr. Richmond said that it could be elicited from the witness that it is the custom among merchants, at least among the employees of Oakes & Co., to take money from the firm, with a view to profiting personally from the bargain that may be concluded in the name of the firm. The disingenuousness of such a plea is apparent on the face of it. Moreover, when Mr. Wilson was in the witness box no such question was put to him and no witness was summoned from Oakes & Co., or from any other firm to prove such a pernicious practice. It seems to me therefore that the object in asking for an adjournment was not really to advance justice but to delay it. I am therefore of opinion that the refusal to adjourn the case was justifiable under section 257 of the Code of Criminal Procedure.

The last question to be considered is whether the evidence already given by Mr. Wilson is inadmissible because a further opportunity was not given to cross-examine him. I agree with the contention of the learned Crown Prosecutor that the evidence is admissible. Under section 33 of the Evidence Act, evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same proceeding the truth of the fact which it states, when the presence of the witness cannot be obtained without an amount of delay or expense which the Court considers unreasonable, provided the adverse party in the first proceeding had a right and opportunity to cross-examine. The evidence of Mr. Wilson was given at the earlier stage of the present proceedings. From the statement of the learned Crown Prosecutor as well as of Mr. Richmond, it is not known when and whether Mr. Wilson will come to India. It is also clear that the accused had the opportunity to cross-examine, and exercised that right at the first stage. Mr. Richmond suggested that the accused had a further right under section 257, and that until that right was exercised, the evidence could not be admitted. Whatever may be the value to be attached to the evidence, I agree with the contention of the learned Crown Prosecutor that once the opportunity to cross-examine had been exercised, the evidence then taken becomes complete for the purpose of being admitted in a later proceeding. The mere fact that the witness could have been subjected to a further cross-examination in the exercise of the further right is not a ground for holding the evidence to be inadmissible. I am therefore of opinion that Mr. Wilson's evidence, given before the charge was framed, is admissible in the case.

On the merits, Mr. Richmond argued that no criminal intention was proved, as the accused admitted the receipt of money and pleaded that he applied a portion of it for his own use in what he considered to be the usual practice in such matters. I am wholly unable to accept this argument as sound. The Magistrate is right in holding that a clear case of misappropriation has been made out. I confirm the conviction and sentence.

PHILLIPS, J.—As this case raises a question of some importance which has not been decided before in this Court, I think it advisable to deliver a separate though concurring judgment.

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The accused has been convicted under section 420, Indian Penal Code, by the Georgetown Presidency Magistrate. The case is that he purchased certain machinery for Messrs. Oakes & Co. for Rs. 2,000, but represented to the Managing Director Mr. Wilson, that the amount was Rs. 3,000, and consequently obtained a cheque from Mr. Wilson for the latter amount. No doubt, the accused was not originally charged under section 420. The charge sheet was laid under section 411 or 414, Indian Penal Code, but it is clear from the examination and cross-examination of Mr. Wilson, and other witnesses, that the possibility of the charge under section 420 was before the mind not only of the Court, but also of the accused, and it cannot be said that the accused was in any way taken by surprise by such a charge being framed on the facts laid before the Court. After Mr. Wilson's examination was concluded, the accused's counsel stated that Mr. Wilson would not be required for re-cross-examination, and apparently on the strength of that, Mr. Wilson was allowed to proceed to England whence he has not yet returned, and it is unknown when he will return. Very soon after the charge was framed, an application was made for re-cross-examining Mr. Wilson and the case was adjourned with a view to secure his attendance. After several adjournments, the Magistrate refused to adjourn the case any further, as the attendance of the witness could not be secured, and apparently acting under section 257, Criminal Procedure Code, he proceeded to dispose of the case without hearing any further examination of Mr. Wilson. He has recorded his reasons for doing so in his judgment and the question we have to decide is whether he was right in acting under section 257, or whether the accused had not an absolute right under section 256 to recall Mr. Wilson before the case was closed.

Under section 256, the accused is given the right of recalling any of the prosecution witnesses as soon as the charge is framed, and after such re-examination, the accused is to be called upon to enter on his defence. It has been held in Allahabad by Knox, J., in *Mulua v. Sheoraj Singh*(1), that this absolute right of the accused extends only to the recalling of such witnesses as are present in Court. No doubt, it is ordinarily the duty of the

(1) (1911) 11 I.C., 1007.

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Magistrate to retain the prosecution witnesses in Court until the accused has had an opportunity of exercising his right. The Calcutta view is somewhat different. In *Iswar Chunder Raut v. Kali Kumar Dass*(1) the accused was held to be entitled as a matter of right to re-summon one of the prosecution witnesses. The question as to whether there is any difference between the provisions of sections 256 and 257, or what that difference is, was not discussed. The other Calcutta cases cited, namely, *Zamunia v. Ram Tahal*(2) and *Inder Rai v. Brown*(3), take the same view, but in the former case it is further laid down that when an accused has entered upon his defence his right to re-cross-examine witnesses is governed by section 257, Criminal Procedure Code. I however think it significant that the word 'recall' alone is used in section 256, and that it means a mere calling in of the witnesses who may be present in or about the Court precincts, for, if it also includes the re-summoning of witnesses, the procedure in all cases would be most cumbersome. First of all, a charge will have to be framed, then the prosecution witnesses will have to be re-summoned and further cross-examined, and then the accused will have to be called upon to enter on his defence, and yet another adjournment will be necessary for the defence witnesses. This appears to me to be an undue prolongation of the trial, and as another interpretation of the section is possible and has been adopted in the Allahabad High Court, I think that that interpretation is correct. If the Court has allowed the witnesses to depart without re-cross-examination, then no doubt the Magistrate would not refuse to re-summon under section 257 unless there were some special circumstances to justify the refusal. But if, as in this case, a witness has been allowed to depart on the representation of the accused that he was not required, I think that any further application to re-cross-examine him must be deemed to be one under section 257. Under that section, the Magistrate is empowered to refuse the application for grounds given in the section, one of which is that it would defeat the ends of justice. The Magistrate in this case framed a charge, and admittedly the prosecution witnesses were not then present, and the accused had

(1) (1900) 4 C.W.N., 351.

(2) (1900) I.L.R., 27 Calo., 870.

(3) (1910) I.L.R., 37 Calo., 238.

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therefore no opportunity of re-calling them. He was, therefore, called upon to enter on his defence, and stated that he had witnesses to examine and promised to put in a written statement of his case. That being so, he had entered upon his defence and I think the Magistrate was justified in asking him to do so. The subsequent application to recall Mr. Wilson must therefore be deemed to have been under section 257, which gives the Magistrate discretion in the matter. I cannot therefore hold that he has acted with any illegality in refusing to adjourn the case for the re-examination of Mr. Wilson.

The second question then arises as to whether the Magistrate properly exercised his discretion. It is suggested for the defence that Mr. Wilson, when he gave a cheque for Rs. 3,000, was perfectly aware of the fact that the accused was only going to pay Rs. 2,000 for the goods purchased, and acquiesced in his retaining the additional Rs. 1,000, as a sort of 'secret commission,' as it is called. What the so-called secret commission really amounts to is a sum obtained from the company, who employed the accused and Mr. Wilson, by fraud. The company was made to pay more than the proper price for the goods, the balance going into the pocket of the accused. If, therefore, Mr. Wilson were to admit that he was aware of this secret commission, he would be declaring himself a party to this fraud; and apart from the unlikelihood of his making any such admission, it is very strange that no such question was put to him in his cross-examination which was fairly detailed and made at a time when the accused must have known that this was one of his defences. In view of the fact that this defence was put forward afterwards, it is impossible to say that the ends of justice require the attendance of Mr. Wilson for further examination. The fraud was not that the accused obtained this money from Mr. Wilson personally, but as Directing Manager of Messrs. Oakes & Co's. Engineering works. I therefore think that the Presidency Magistrate exercised his discretion properly, and I reject this ground of appeal. As regards the plea of misjoinder, it seems to me that the case is clearly governed by section 235, Criminal Procedure Code. On the evidence on record, the charge under section 420 is clearly made out, and therefore the accused's appeal must be dismissed and his conviction and sentence confirmed.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Krishnan.

KANDASAMI GOUNDAN (PLAINTIFF), APPELLANT,

v.

KUPPU MOOPPAN AND FIVE OTHERS (DEPENDANTS, NOS. 2, 3, 4, 5, 6 and 1), RESPONDENTS.*

1919,
December,
2 and 3.

Hindu Law—Mortgage by father, not for necessary purpose—Conditional decree—Personal decree against father and against ancestral properties of father and sons—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.

A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone. The Courts found that it was not for any purpose binding upon the sons;

Held, that the mortgagee was entitled to a conditional decree, under Order XXXIV, rule 6, Civil Procedure Code, against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance, in case the sale-proceeds of the father's share of the mortgaged property was insufficient.

SECOND APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU Garu, the Subordinate Judge of Coimbatore, in Appeal Suit No. 70 of 1918, preferred against the decree of N. KAILASAM AYYAR, the Principal District Munsif of Coimbatore, in Original Suit No. 47 of 1918.

The material facts appear from the judgment.

N. Sivaramakrishna Ayyar for T. M. Krishnaswami Ayyar, for the appellant.

K. R. Rangaswami Ayyangar for first to fourth respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—The lower Courts have found that the suit mortgage was neither executed for an antecedent debt, nor for any necessary purpose binding on the sons. It is therefore clear that the mortgage as a mortgage is not enforceable against the sons' shares in the property mortgaged, and no mortgage decree for sale of those shares can be passed against them. This is not controverted by the appellant.

It is, however, claimed for the appellant that a conditional decree for the recovery of any balance left in case the net

* Second Appeal No. 305 of 1919.

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proceeds of the sale of the father's share of the mortgaged property is found to be insufficient to pay the amount due to him should have been passed under Order XXXIV, rule 6, Civil Procedure Code, against the first defendant, the mortgagor, personally and against the ancestral properties of himself and his sons, as prayed for by him in his plaint.

That a conditional decree under section 90 of the Transfer of Property Act can be passed in the mortgage suit itself, without waiting for the mortgaged property to be sold to ascertain if any balance will be left over, is clear from the observations of the Privy Council in *Musammatt Jenna Bahu v. Rai Parmeshwar Narayan Mahtha Rai Bahadur*(1). We think the same rule will apply under Order XXXIV, rule 6. In the present case it is not denied that the present claim against the mortgagor under the mortgage deed is within time and is legally enforceable against him. A conditional personal decree for any balance should therefore have been passed against him in this suit.

Such a personal decree is in the nature of an ordinary money decree for a debt due by the father; and for such a decree unless the debt is shown to be of an illegal or immoral character the ancestral property in the hands of the sons will be liable on the basis of their pious obligation to pay their father's just debts. It was recognized by the Privy Council itself in *Suraj Buns' case*(2), that in execution of a money decree against a Hindu father for a debt due by him joint ancestral property of himself and his sons can be sold and the purchaser will get a valid title to the sons' shares as well, unless they show that the debt is of an illegal or immoral character. See page 171. It has also been decided in this Court that a creditor could join the sons in the suit on the father's debt and obtain a decree making their shares in the family property liable: see *Ramasami Nadan v. Ulaganatha Goundan*(3). This view was further developed in a later Full Bench in *Mallesam Naidu v. Jugala Panda*(4), where it was held that the cause of action against the father and the sons on the debt was one and

(1) (1919) 36 M.L.J., 215 (P.C.).

(2) (1880) I.L.R., 5 Cal., 148 (P.C.).

(3) (1899) I.L.R., 22 Mad., 49 (F.B.). (4) (1900) I.L.R., 23 Mad., 392 (F.B.).

the same. After these decisions it has been the practice to give decrees in suits against Hindu fathers on money claims not only personally against them but also against the joint family property of themselves and their undivided sons, where such sons are made parties and do not allege and prove the illegality or immorality of such claims. That a similar decree could be given in mortgage suits under section 90 of the Transfer of Property Act corresponding to the present Order XXXIV, rule 6, Civil Procedure Code, was expressly decided in *Kishun Pershad Chowdhry v. Tipan Pershad Singh*(1); a similar view was taken in *Addaika Pattar v. Natesa Pillai*(2), and an observation in support of it is also found in *Sami Ayyangar v. Ponnammal*(3).

It is argued however for the respondents that the recent decision of the Privy Council in *Sahu Ram's case*(4), has entirely altered the law on the point and the observations of their Lordships on page 444 have been relied on. This Court has considered the effect of this ruling in two cases recently, in *Peda Venkanna v. Sreenivasa Deeshatulu*(5), and in the Full Bench, *Armugham Chetty v. Muthu Koundan*(6); and it was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay, even though the mortgage as a transfer of an interest in joint ancestral property failed. The mortgage as an alienation of property may fail if there was no necessity for it and there was no debt really antecedent to the mortgage transaction; but the sons will nevertheless be under a pious obligation to pay the mortgage debt qua debt unless it is an illegal or immoral one. We are bound by these views, and must hold that the observations in *Sahu Ram's case*(4) do not alter the law on the point we are considering, and we must follow the rule in the earlier cases. In fact such a point was not raised at all before the Privy Council; the point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them.

(1) (1907) I.L.R., 34 Cal., 735.

(3) (1898) I.L.R., 21 Mad., 28.

(5) (1918) I.L.R., 41 Mad., 136.

(2) (1907) 17 M.L.J., 287.

(4) (1917) I.L.R., 39 All., 437 (P.C.).

(6) (1919) I.L.R., 42 Mad., 711 (F.B.).

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In the present case though the plaintiff prayed expressly for a decree under Order XXXIV, rule 6, against the ancestral property the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose. The plaintiff is therefore entitled to a decree as he asks for under rule 6 against the first defendant personally and against the ancestral property of himself and his sons.

The further point raised in this case is that the father's share liable for the mortgage decree is a one-fourth share and not a one-fifth share as one of his sons now on record, the fifth defendant, was born after the mortgage was executed. This is not denied and therefore the decrees of the lower Courts should be modified by also stating that a one-fourth share of the mortgaged property is saleable under the mortgage decree. With the above modifications the second appeal is dismissed but without costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1919,
December, 8.

HARI KRISHNAMURTI (FIFTH DEFENDANT AND SIXTH
COUNTER-PETITIONER), APPELLANT,

v.

AKELLA SURYANARAYANAMURTI AND TWO OTHERS
(PETITIONERS NOS. 1 AND 2 AND SECOND COUNTER-PETITIONER),
RESPONDENTS.*

Limitation Act (IX of 1908), Art. 182, cl. 5—Application for execution of decree by transferee—Injunction against transferee—Subsequent application by persons entitled to execute decree—Limitation—Bar, whether saved by previous application.

An application for execution of a decree, made by a transferee of the decree after he has been restrained by injunction from "executing it or otherwise realizing the decree-debt," will operate to save the bar of limitation in respect of a later application for execution made by persons held to be legally entitled to execute the decree.

APPEAL against appellate order of T. VARADARAJULU NAYUDU Garu, the Acting District Judge of Gōdāvari, in Appeal Suit No. 207 of 1917, preferred against the order of MIRZA HASAN ALI ISPAHANI SAHIB BAHADUR, the Temporary District Munsif of Razole at

* Appeal against Appellate Order No. 84 of 1918.

Amalapur, in E.P. No. 1460 of 1916 (in Original Suit No. 55 of 1904 on the file of the Principal District Munsif's Court, Amalapur).

One Narayanamurti instituted this suit (Original Suit No. 55 of 1904) on a mortgage bond, but died without issue during the pendency of the suit. His widow Ramalakshamma was brought on record as his legal representative and a preliminary decree for sale was passed in her favour on 15th December 1904. She transferred the decree on 4th February 1911 to one Narasayya, who filed an execution petition on 16th June 1911 for recognition of the transfer and for sale of the property. After notice to the judgment-debtors and the grandsons of Narayanamurti, who claimed to be entitled to the decree under the will of the latter, the transfer was recognized on 30th September 1911, and a final decree on the mortgage was passed in his favour on 30th January 1912. Against this order the grandsons preferred an appeal which was dismissed as incompetent. Thereupon, the grandsons filed a suit against the transferee (Narasayya) and the transferor, but the judgment-debtors were not made parties to the suit. A decree was passed on 14th April 1914 in favour of the plaintiffs (grandsons) declaring the right of the plaintiffs to execute the decree in Original Suit No. 55 of 1904 and restraining the transferee as well as the transferor by an injunction from "executing the decree or otherwise realizing the decree-debt." However, the transferee filed two execution petitions on 18th June 1914 and 22nd October 1914, and they were dismissed by the Court after notice to the judgment-debtors, as the transferee took no further steps. The grandsons filed the present application for execution on 23rd March 1916 in Original Suit No. 55 of 1904. The sixth defendant in the said suit, who was a puisne mortgagee, objected on the ground that the present application was barred by limitation. The District Munsif dismissed the application as barred; on appeal, the Subordinate Judge held that the application was not barred by limitation and remanded the application for due disposal. The sixth defendant (who was one of the judgment-debtors) preferred this Civil Miscellaneous Second Appeal.

C. Rama Rao for P. Narayanamurti, for the appellant.

V. Ramesam for N. Rama Rao for the respondent.

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SPENCER, J.

SPENCER, J.—The question is whether the execution petition filed on 23rd March 1916 to execute the decree in Original Suit No. 55 of 1904 is in time and the answer to this question depends on whether the execution petitions filed on 18th June 1914 and 22nd October 1914 by the transferee decree-holder, M. Narasayya, were made in accordance with law. It is true that on those dates Narasayya was restrained from executing the decree or otherwise realizing the decree debt by reason of the decree obtained by the plaintiffs in Original Suit No. 835 of 1911, who are respondents in this appeal, and it is argued that as no execution could take place without an execution petition being presented to the Court, the restraint order would render any application made in that connexion by Narasayya illegal, as being in contravention of a decree of Court.

On the other hand, it is clear that the only person competent at that date to apply for execution was the transferee decree-holder, Narasayya, whose transfer had been recognized on 30th September 1911 in proceedings to which the grandsons of Narayanamurti, who are the respondents in this appeal, were parties. The respondents' prior application to be added as supplemental decree-holders had failed by the dismissal of their execution petition on 23rd October 1910, and they did not again apply to be placed on the record till 23rd March 1916. So that at the date when Narasayya filed his two execution petitions he was on the face of the decree the only person competent to execute it. The executing Court not having notice of the result of Original Suit No. 835 of 1911, had no concern with the rights of any other person other than the right of the person appearing on the face of the decree as the decree-holder, as it did not then appear that any other person had taken the decree-holder's place; see *Jasoda Dey v. Kistibash Dass* (1). As the Court was not then in a position to refuse to admit Narasayya's application, and as he acted in the interest of whosoever might ultimately be found entitled to execute the decree in the litigation then pending which terminated in the High Court's decree, dated 15th August 1917 in appeal against the decree in Original Suit No. 835 of 1911, I am of opinion that his application was a bona fide one made in accordance with law, and that the

(1) (1891) L.L.R., 18 Cal., 639.

District Judge was right in treating the present application of the respondents as saved thereby from becoming barred by limitation. As my learned brother is of the same opinion, the Lower Appellate Court's order returning the executing petition to the first Court for execution is confirmed, and the appeal will be dismissed with costs.

SESHAGIRI AYYAR, J.—The facts which have given rise to the question of law are these: One Narayanamurti, whom I shall hereafter call the testator, brought Civil Suit No. 55 of 1904 on a mortgage; he died *pendente lite*; his widow was placed on the record and obtained a preliminary decree. The testator left more than one will. There was litigation respecting the genuineness of these testamentary instruments, between the widow on the one hand and her daughters' sons who claimed as residuary legatees subject to the payment of a fixed sum to the widow. In the meantime, the widow transferred the decree to one Narasayya. On his application the final decree was passed on the 30th January 1912; he then applied to execute the decree but was resisted by the grandsons. The objection was overruled. The grandsons preferred an appeal against the order permitting Narasayya to execute the decree. It was dismissed *in limine* on the ground that as they were not on the record of the suit as legal representatives of the testator, they had no *locus standi* to prefer the appeal. This order is conclusive of the contention that they were also co-nominee parties to the decree by virtue of a previous infructuous application. After the dismissal of the appeal, the grandsons brought a regular suit in 1911 to which the widow and Narasayya were parties but not the judgment-debtor in the first suit. The prayers in the grandsons' suit were for a declaration that they alone were entitled to execute the decree and that Narasayya should be restrained by an injunction from executing it. This suit was decided in favour of the grandsons. The terms of the decree are important. It was in these terms:

"This Court doth order and declare that the defendants, or either of them, have no right to execute the decree in O.S. No. 55 of 1904 on the file of the Amalapur District Munsif's Court, that the plaintiffs are entitled to recover the said mortgage decree debt by executing the decree, and restrain the defendants by means of an

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injunction from executing the decree or otherwise realizing the decree amount."

This was passed on the 14th of April 1914. Against the decree in favour of the grandsons, Narasayya appealed to the High Court. Pending the decision in appeal and apprehending that the decree in the mortgage suit may become barred, he applied for execution on 18th June 1914 and on 22nd of October 1914 to the Court which passed the decree. They were dismissed and no money was realized by Narasayya. The grandsons applied on 23rd March 1916 to execute the mortgage decree. It was pleaded that the application was barred by limitation. The bar was sought to be saved by the two applications made by Narasayya in June and October 1914. The question is whether it is open to the grandsons, who are the respondents before us, to take advantage of these applications as steps in aid of execution. The point is free of authority. I am inclined to agree with Mr. Ramesam that the two applications saved limitation. It is common ground that there was no injunction directed to the Court which passed the decree nor against the judgment-debtor. Can it be said that the personal injunction against Narasayya rendered his applications illegal? Clause (5) of Article 182 of the Limitation Act provides that the application should be to the proper Court and should be in accordance with law. The applications were certainly to the proper Court, because the Munsif was not prohibited from executing the decree. They were in accordance with law, because there was no prohibition against applying to take a step in aid of execution. The decree in the respondents' suit which I have set out only prevented them from realizing moneys. The language is "from executing or otherwise realizing the moneys." The word 'executing' must be read *ejusdem generis* with realizing; and the word 'otherwise' makes this clear. The prohibition should be understood as applying to the recovery of the money and not as interdicting applications which had the effect of saving limitation.

The authorities quoted by Mr. Ramesam, namely, *Jasoda Deye v. Kistibash Dass*(1) and *Monmotho Nath Mitter v. Bakkal*

(1) (1891) I.L.R., 18 Cal., 639.

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Chandra Jewary(1), show that so long as there is a person on the record as decree-holder, the Court is bound to entertain his application for execution. There has been no order removing Narasayya from this position until March 1916. In my opinion, therefore, the decree was alive in March 1916, and the application of the respondents was in time. Mr. Rama Rao argued that the personal restraint made the applications of Narasayya illegal. To whatever disabilities Narasayya might have exposed himself by applying, certainly the applications made by him were such as the executing Court was bound to entertain; therefore they were not illegal. In my opinion the civil miscellaneous second appeal should be dismissed with costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

M. P. M. R. M. N. RAMANATHAN CHETTIAR (PLAINTIFF),
APPELLANT,

v.

K. R. S. V. MUTHIAH CHETTY AND FIVE OTHERS (DEFENDANTS),
RESPONDENTS.*

1919,
December,
2 and 3.

Minor—Guardian—Agent appointed by guardian—Liability of agent to account to minor—Settlement of accounts by arbitrator or mediator—Whether liable to be re-opened.

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts even though he received properties belonging to the minor.

A settlement of account by arbitrators or mediators cannot be re-opened except on the ground of fraud.

APPEAL against the decree of K. A. KANNAN, the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 98 of 1914.

The material facts appear from the Judgment of ABDUR RAHIM, J.

The Hon'ble the Advocate-General (*S. Srinivasa Ayyanar*) and *T. V. Muttukrishna Ayyar* for the appellant.

(1) [1909] 10 O.L.J., 396 at p. 406.

* Appeal No. 97 of 1917.

RAMANATHAN CHETTIAR v. K. V. Krishnaswami Ayyar and C. A. Seshagiri Sastri, for the first respondent.

MUTHIAH CHETTY. v. E. Vinayaka Rao for R. Krishna Rao, for the fifth and sixth respondents.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—There were two brothers belonging to the Nattukottai Chetti community, namely, Narayana Chettiar and Muthia Chettiar. The plaintiff is the son of the former and defendants Nos. 4 to 6 are sons of the latter. The two brothers carried on money lending business in the name of M.P.M.R.M. They had business in various places. Narayana Chettiar died fifteen years ago, and Muthia Chettiar died about ten years previous to the suit. At the time of the latter's death, plaintiff and defendants Nos. 4 to 6 were all minors and the family was undivided. The first defendant in the suit is the maternal uncle of defendants Nos. 4 to 6. He was appointed as agent by the mother of these defendants to manage and look after their share in the family property and the business. The second defendant who is the maternal uncle of the plaintiff was similarly appointed by the plaintiff's mother. The suit was instituted by the plaintiff, who attained majority in 1911, for a decree directing defendants Nos. 1 and 2 to render an account to him of their management of the affairs of the family of the plaintiff and the defendants during his minority and for other reliefs.

The first question that arises is whether the suit is maintainable. It is to be noted that the mothers of plaintiff and defendants Nos. 4 to 6 who appointed defendants Nos. 1 and 2 as agents have not been made parties. It is contended by the learned Advocate-General on behalf of the appellant (plaintiff) that defendants Nos. 1 and 2 must be treated as trustees *de son tort* and as such liable to account to the plaintiff. His argument is that the guardians of the plaintiff and defendants Nos. 4 to 6 occupied the position of trustees and defendants Nos. 1 and 2 having intermeddled with the estate of the minor and having received the properties of the minor are liable to account to him. He has cited a number of rulings, but it is sufficient to point out that all those rulings relate to the liability either of trustees, or of persons accountable as trustees, for intermeddling or for being connected with breaches of trust of the trust property. The leading authority on the point

is the case of *Barnes v. Addy*(1). The other cases cited by the Advocate-General, *Mara v. Browne*(2), *In re Barney*, *Barney v. Barney*(3), simply follow the principle laid down in that case at page 251. There, Lord SELBORNE states the principle in these words:

"Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a Court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. But on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees and are not to have the character of trustees constructive imposed upon them, then the transactions of mankind can safely be carried through: and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees."

And Lord Justice JAMES added:

"I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree injudicious. I do not think it is for the good of *cestuis que trust*, or for the good of the world, that those cases should be extended."

The learned Advocate-General admitted that there is no authority for the proposition, that an agent appointed by the guardian of a minor is liable to account to the minor as if he was a trustee *de son tort*, because he received property

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(1) [1874] 9 Ch., App. 244.

(2) [1896] 1 Ch., 199.

(3) [1892] 2 Chan., 265.

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belonging to the minor. On the other hand there is a ruling of this Court which seems to be opposed to such a proposition: *Chidambaram Chetty v. Pichappa Chetty* (1). There, it was held that an agent appointed by the administrator of an estate as such cannot be proceeded against on such contract of agency by the person entitled to the estate, and it makes no difference that the administrator obtained the grant as the attorney of the mother and guardian of the person entitled.

The learned Advocate-General however drew our attention to a passage in the judgment to the effect that no claim was made against the defendant on the ground of his possession of property belonging to the plaintiff, and he argued that where such an agent is in possession of the property, the law makes a difference. But we do not think that in the absence of any clear authority, it would be safe to hold that an agent appointed by the guardian of the minor is liable to account to the minor for his acts as an agent on the principle applicable to trustees or persons intermeddling with the trust estate. If there were any force in the contention of the appellant, one might reasonably expect that there would have been some authority forthcoming in support of it. It would be unsafe to extend the rule laid down with respect to trustees *de son tort* to the persons in the position of agents of the guardian of the minor. Under the ordinary law an agent is liable to the principal. The state of accounts between an agent and a principal, and the liabilities of the agent to the principal, would be on a very different footing from the account which a trustee or a person intermeddling with the trust estate has to render to the *cestuis que trust*. Besides, as mentioned above, in this case, the mothers who appointed defendants Nos. 1 and 2 agents have not been made parties, and any decree in this case would not exempt the agents from their liability to their principals. The conclusion of the learned Subordinate Judge on this point is right.

The second point relates to a sum of Rs. 14,000 and odd which the plaintiff paid to the first defendant on behalf of defendants Nos. 4 to 6. The Subordinate Judge has found that this was settled by arbitration and the question cannot be reopened.

(1) [1907] I.L.R., 30 Mad., 242.

On the other hand the case of the plaintiff is that it is a matter of stated and settled accounts and if he is able to show errors in the account, he is entitled to reopen the question. Exhibit III makes it clear that the settlement was made by arbitrators or mediators. Such a settlement is not liable to be reopened, except on the ground of fraud which is not alleged in this case.

The appeal fails on all the points and must be dismissed with costs.

AYLING, J.—I agree.

AYLING, J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

KADIR MASTAN ROWTHER (PLAINTIFF), APPELLANT,

v.

SENGAMMAL (FIRST DEFENDANT), RESPONDENT.*

1919,
December
4.

Trust lands—Permanent lease not void ab initio.

A permanent lease of trust lands is not void *ab initio*; it is only voidable.

SECOND APPEAL against the decree of F. A. COLERIDGE, District Judge of Madura, in Appeal No. 316 of 1917 filed against the decree of N. SUNDARAM AYYAR, Principal District Munsif of Madura, in Original Suit No. 656 of 1911.

The facts are given in the judgment.

W. Kodandaramayya for the appellant.

A. Narayanaswami Ayyar for the respondent.

SPENCER, J.—This is a suit brought by the assignee of a permanent lease granted by the trustee of a trust called Lala Dharmam to recover possession of the suit site from the tenant in occupation. The suit was dismissed in the District Munsif's Court, on the ground that the trustee had no power to alienate the trust property and that his alienation was void and conveyed no title to the plaintiff; and on appeal the District Judge has confirmed this decision and dismissed the appeal.

* Second Appeal No. 105 of 1919.

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SPENCER, J.

It is contended before us that the grant of a permanent lease represented not a void but a voidable transaction and that it has not yet been avoided. In *Venkataramana Ayyangar v. Kasturiranga Ayyangar*(1) my learned brother stated :

"It is now settled law that ordinarily a permanent alienation of trust properties is ultra vires of the powers of a trustee," and the respondent's pleader asks us to treat this expression 'ultra vires' as meaning void; but it does not necessarily have that signification. There is also an expression by ABDUR RAHIM, Officiating Chief Justice, in the Full Bench Opinion in the same case that the alienation of the right of making collections for the temple "was void and did not bind the temple in any way." When the learned Judge used the word 'void' in this context he was not using it as opposed to voidable, as no argument was before him on the point of voidability.

In *Palaniappa Chetty v. Sreemath Devusikamony Pandara Sannadhi*(2) the Judicial Committee of the Privy Council observed "the grant of a lease in perpetuity of *debottar* lands at a fixed rent required to be justified by unavoidable necessity." Such an expression would not have been used if the lease was itself a void transaction. Their Lordships compared the position of a *shebait* or trustee with that of a guardian of an infant as regards the management and control of immoveable property. It is well settled that if a guardian exceeds his powers in dealing with the property of an infant his acts are voidable and not void. In *Abhiram Goswami v. Shyama Charan Nandi*(3), the Privy Council were dealing with a *Mokurari pattah* which corresponds to a lease in perpetuity, and they held that such a lease of *debottar* property given by a Mahant was good for the life-time of the Mahant who granted it. It would have been impossible for them to come to this conclusion if the grant had been void *ab initio*. In *Kadir Ibrahi Rowthen v. Arunachellam Chettiar*(4), it was held that a lease by a trustee for a period exceeding 21 years was not void but only voidable at the instance of the *cestui que trust*. This was no doubt a decision based upon section 36 of the Indian Trusts Act (II of 1882) which applies only to private trusts. But in this

(1) (1917) I.L.R., 40 Mad., 212.

(3) (1909) I.L.R., 36 Cal., 1003. (P.C.).

(2) (1917) I.L.R., 40 Mad., 709 (P.C.).

(4) (1910) I.L.R., 33 Mad., 897.

respect the principle appears to be the same, namely, that a lease of trust property which is in excess of the trustee's powers is not void but only voidable. I am therefore of opinion that the lower Courts were wrong in deciding the case upon this point and the appeal must be allowed and the suit remanded to the Court of first instance for trial upon the other issues in the case. Costs will abide and follow the result.

SESHAGIRI AYYAR, J.—I agree. The position of the defendant must be regarded as that of a trespasser. His title has not been gone into, and therefore it must be taken that he resisted the suit on the ground that the plaintiff must show a better title than he himself possessed.

The position taken by the lower Courts, and which was pressed upon us by the learned vakil for the respondent, amounts to saying that the alienation by a trustee is void *ab initio*, like an alienation which is opposed to public policy or one made illegally. This position to my mind is untenable. As my learned brother has pointed out, the Judicial Committee have held that a trustee has in certain circumstances power to dispose of the trust property; he can sell it and he can lease the property provided a necessity for doing so has been made out. If that is the true position of a trustee, in granting a permanent lease, if no necessity is proved, he will only be exceeding the powers he possesses. Consequently the transaction, although it may be avoided by persons who could sue on behalf of the trust, would still give the alienee a right until it is avoided. This is the principle which the Judicial Committee must be taken to have enunciated in *Abhiram Goswami v. Shyama Charan Nandi*(1), where they say that the alienation was good during the life-time of the grantor. Mr. Justice BENMAN, in *Mahamadgans v. Rajabaksha*(2), interprets the decision of the Privy Council in *Abhiram Goswami v. Shyama Charan Nandi*(1) as holding that an alienation by a trustee is not void altogether but only voidable. The Privy Council have further held that the power of a trustee of a temple is analogous to that of a manager of a Hindu joint family or the guardian of an infant. As regards the manager

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(1) (1909) I.L.R., 36 Cal., 1003 (P.C.). (2) (1913) I.L.R., 37 Bom., 224.

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of a Hindu family it has never been held that an alienation by him is void *ab initio* it is only voidable. Similarly in the case of an alienation by a guardian of an infant, section 30 of the Guardians and Wards Act (Act VIII of 1890) declares in express terms that it is only voidable. It is also pointed out in *Kadir Ibrahi Rowthen v. Arunachallam Chettiar*(1) that the transaction of a private trustee granting a lease beyond 21 years, which the law permits him to grant, is only voidable. Applying the analogy of these legislative provisions I agree with my learned brother that an alienation by a trustee cannot be held to be void.

The result is that if the defendant can show a better title than the plaintiff he will be allowed to retain the property; if, on the other hand, he has no title, he is not entitled to resist the suit brought by the plaintiff until the trustee, or somebody interested in the trust, takes steps to avoid the transaction. He has clearly a title which he can enforce as against a trespasser.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

GOKARAKONDA NARASIMHA RAO (PLAINTIFF),
APPELLANT,

v.

GOKARAKONDA PAPUNNA AND EIGHT OTHERS
(DEFENDANTS), RESPONDENTS.*

Registration Law, fraud on—Sale-deed—Including a cent of land to enable a Sub-Registrar to register—Item of land, real and owned by vendor—No intention to pass title to vendee—Registration, whether valid.

The inclusion of an item of property belonging to the vendor in a sale-deed without any intention of passing title in it and purely for the purpose of making the deed available for registration in a particular place is a fraud upon the registration law, and such sale-deed must be deemed not to have been properly registered.

SECOND APPEAL against the decree of T. RAJARAM RAO, the Temporary Subordinate Judge of Rajahmundry, in Appeal Suit

(1) (1910) I.L.R., 33 Mad., 367.

* Second Appeal No. 1522 of 1918.

No. 180 of 1917, preferred against the decree of A. VENKATARAMA AYYAR, the First Additional District Munsif of Rajahmundry, in Original Suit No. 344 of 1916.

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This Second Appeal arises out of a suit for partition of family properties, and a declaration that the sale of some of those ancestral properties was not valid. The plaintiff alleged that the sale-deed included one cent of land in Amalapur purely for the purpose of getting it registered by the Sub-Registrar of that place; it was found by the lower Appellate Court that there was land corresponding to the one cent of land belonging to the vendors but that there was no intention to pass title therein to the vendee. It held that the registration was invalid but that the suit regarding the lands comprised in the sale-deed was barred by limitation under article 44 of the Limitation Act, and decreed partition as regards other properties included in the suit. The plaintiff having preferred a Second Appeal as regards the lands sold, the High Court called for a definite finding on the following issue, viz., 'whether the suit sale-deed is not valid for want of proper registration'; the Sub-Judge returned findings to the effect already stated. After receipt of the findings the case was posted for final disposal.

N. Rama Rao for the appellant.

K. Kamanna for P. Narayanamurti for the eighth respondent.

The JUDGMENT of the court was delivered by

KRISHNAN, J.—We must accept the finding of the Subordinate Judge that the one cent of land in Amalapur was included in the sale-deed, Exhibit A, purely for the purpose of getting the deed registered by the Sub-Registrar of that place without any intention of passing title in it to the vendee. That finding is supported by the evidence and no valid objection has been urged against it. On that finding we must hold, following *Rama Naik v. Nagamuthu Nachiar* (1), that the present case falls within the principle enunciated by the Privy Council in *Harendra Lal Roy Chowdhuri v. Haridasi Debi* (2). The action of the parties in this case was a fraud on the registration law. The fact that there was land corresponding to the one cent included

(1) (1918) 43 I.C., 515; s.c., 23 M.L.T., 516.

(2) (1914) I.L.R., 41 Calc., 972 (P.C.).

NARASIMHA RAO v. PAPUNNA. In the deed, belonging to the vendor is not sufficient to take it out of that principle as the finding is that it was not intended that the deed should affect the land in any way.

KRISHNAN, J. On this view the sale-deed, Exhibit A, must be taken to have not been properly registered; and the title to A Schedule properties was therefore not validly conveyed to the eighth defendant.

The next question is as to limitation. Article 44 does not apply as there was no sale at all in law to be set aside. See *Narayanan v. Lakshmanan* (1) and *Petherperumal Chetty v. Muniandy Servai* (2). The article really applicable is article 144 but the period required for it has not expired yet. There is thus no bar by limitation.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

VELAYUDA MUDALI AND OTHERS, ACCUSED
(PETITIONERS),

v.

KING-EMPEROR.*

Madras City Police Act (III of 1888), sec. 76—Breach of condition of license by servants of license-holder—Conviction not only of license-holder but of servants also, propriety of.

Under section 76 of the Madras City Police Act, a licensee under the Act is liable to punishment for a breach of the conditions of the license, whether committed by himself or his servants. But the section does not contemplate proceedings against the servant or agent of the licensee.

CRIMINAL REVISION PETITIONS under sections 435 and 439 of the Criminal Procedure Code to revise the convictions and sentences passed on five persons by MUHAMMAD IBRAHIM SAHIB, Presidency Magistrate, Madras, under section 76 of the Madras City Police Act.

In these cases one Velayuda Mudali, who was the holder of two licenses issued to him under the Madras City Police Act

(1) (1916) I.L.R., 39 Mad., 456. (2) (1908) I.L.R., 35 Cal., 551 (P.O.).

* Criminal Revision Cases Nos. 654 to 657 of 1919 (Criminal Revision Petitions Nos. 560 to 563 of 1919).

for the purpose of selling arrack and roasted mutton in a building within the City of Madras and four of his servants who were in charge of his shop, were charged under section 76 of the Madras City Police Act with having kept open the shop, and with having sold arrack and mutton, after the hour allowed by the license. The licensee and his servants denied these facts; the licensee pleaded in addition, that even if the facts were as stated in the charge, he was not liable to be convicted as he was not present in the shop at the time and his servants were then in charge of it. The Magistrate found that the shop was kept open and that the sales took place after the hour allowed by the license. He also held that even if the licensee was absent from the shop at the time he was liable under the section. He accordingly convicted the licensee and his four servants. The accused preferred these Revision Petitions.

E. L. Thornton for petitioners.

The Crown Prosecutor for the Crown.

ABDUR RAHIM, J.—One Velayuda Mudali had licensed premises for sale of arrack and mutton in this town, and he and his servants have been found by the Presidency Magistrate, in the four cases that are before us, guilty of having kept open the arrack shop after 8 p.m. and also of carrying on the business of sale of vegetables and mutton after the same hour. We are asked to say in Criminal Revision Case No. 654 that the arrack shop was not open after 8 p.m. but the facts found by the Magistrate are that the Inspector of Police noticed a large crowd in front of the shop, and that when he went in that direction somebody gave the alarm, and people began to disperse, and some six or seven men walked out of the verandah into the street, the street door was locked, and defence witness No. 3, one of the employees of the licensee was watching at the door. He (the Inspector) went in and found thirteen persons concealing themselves in the terrace of the house and five or six more in the latrine. When he entered lights were switched off. Upon these facts it seems to me to be clear that the shop was kept open. The mere fact that it purported to be closed would not make any difference, while a man was kept at the door to open it for any customer to come in. It would be keeping the shop open within the meaning of the law so long as members of the public had access to the shop.

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The Presidency Magistrate found the accused guilty of the charges of keeping open the arrack shop and of conducting sales after 8 p.m. Whether the conducting of the sales after 8 p.m. by itself may be an offence or not the keeping open of the shop is an offence being in breach of the license granted by the Police. I do not see therefore any reason for saying that the offence charged had not been made out.

Similarly as regards the breach of the condition with respect to the shop for selling mutton the Magistrate found that mutton was kept for sale in the same premises where the arrack is sold, and I do not think that we can interfere in revision with that finding.

These being the facts, two questions were argued before us, that under section 76 of the City Police Act, the holder of the license could not be convicted if, as a matter of fact, he was not in the premises when the offence was committed, that is to say, when the shop was kept open for selling mutton or when mutton was exposed for sale after the fixed hour; and that only his servants who were in charge of the premises at the time could be convicted under that section. The section undoubtedly is most unhappily worded and it is very difficult to construe it. It says—

“For any breach of any of the conditions of a license granted under this Act, the offenders shall be liable on conviction to fine not exceeding one hundred rupees and such fine may be recovered from the person licensed, notwithstanding that such breach may have been owing to the default or carelessness of his servant or agent in charge of the shop or place. Any person so convicted shall also be liable to the forfeiture of his license at the discretion of the Commissioner.”

The Act previous to this Act (Act III of 1888) was VIII of 1867, and the section of the old Act corresponding to section 76 of the present Act was 29. That section was in these words:—

“A breach of any of the conditions of a license granted under the last preceding section shall be punishable by a fine not exceeding one hundred rupees and such fine shall be recovered from the person licensed notwithstanding that such breach may have been owing to the default or carelessness of the servant or other person in charge of the shop or place of sale. Any person so convicted shall also be liable to the forfeiture of his license at the discretion of the Magistrate or of the Commissioner of Police.”

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It would seem that under section 29 of the old Act only the licence-holder was liable to be convicted and that the fine was to be recovered from him. It may be that it was not necessary to provide that the fine was to be recovered from him although the breach was caused by the default or carelessness of the servants. But it is not to be necessarily inferred therefore that any person other than the licensee could be proceeded against under this section. The last sentence strongly suggests the construction that only the licence-holder was the person aimed at, because the section speaks of the person so convicted being also liable to the forfeiture of his licence. It cannot be said that the servant or agent of a licence-holder has any licence to forfeit. In section 76 of the present Act the language is different in two respects. First of all the word ‘offenders’ is used; and instead of saying that the fine shall be recovered as in section 29 of the old Act it says that the fine may be recovered from the persons licensed. As regards the first it may be pointed out that here as in section 29 of the old Act the last sentence speaks of “any person so convicted,” and does not use the plural, and by saying that the fine may be recovered instead of shall be recovered as in section 29 of the previous Act the legislature cannot be said necessarily to have implied that persons other than the holder of the licence could be convicted under section 76. If it was the intention of the legislature to depart in this respect from what was previously the law, it might be expected that it would have made its meaning clear. We must further remember that what is punishable under the Police Act is the breach of the conditions of the licence which would really be a breach of a contract with the licensing authority. The licence is granted to the licence-holder and it is he that is responsible for the observance of the conditions of the licence. The licence-holder, often, if not invariably carries on business through the agency of servants, or agents, but it is he (the licence-holder) that undertakes to conform to the conditions of the licence.

We were referred to section 64 of the Abkari Act of 1886 which was enacted two years prior to the Police Act of 1888, with which we are now dealing. That section expressly makes the holder of the licence as well as the agent or servant who

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actually commits a breach of the conditions of a licence punishable and section 55 which is referred to in section 64 also clearly proceeds on the same basis. But we cannot presume therefore that the legislature in enacting section 76 of the Police Act intended to proceed on the same lines as section 64 of the Abkārī Act. On the other hand the inference should be the reverse.

There is another difficulty in holding that under section 76 both the holder of the licence and his agents and servants may be convicted and punished, for it is easy to imagine cases in which the distribution of fines among the licensees and the servants or agents engaged by him in the business would give rise to considerable difficulties.

On the whole the proper interpretation of section 76 would appear to be that only the licence-holder is liable to punishment for breach of the conditions of a licence. The result is that I would uphold the conviction and sentences in Criminal Revision Cases Nos. 654 and 656 of 1919 and set aside the conviction and sentences in Criminal Revision Cases Nos. 655 and 657 of 1919. The fines if paid in the latter cases will be refunded.

SPENCER, J. SPENCER, J.—I agree with my learned brother that there is evidence upon which the Presidency Magistrate in these cases was entitled to come to the conclusion that the arrack shop was kept open and that business was being done in the mutton shop after closing hours, and therefore acting as a court of revision we should not interfere with the finding of guilty on the evidence. On the question of law I am also in agreement. In my opinion if a shop is kept open after a prohibited hour by a licensee or by persons under his control and if he has a number of servants there is nevertheless only one breach of the covenant in the licence and therefore it would be unreasonable if both the licensee and all his servants were to be convicted and separately fined as if each had committed a separate offence. The difficulty in applying section 76 of the City Police Act has arisen out of the use of the word 'offenders' in the plural in the section, but the section goes on to provide that the 'fine' in the singular may be recovered from the person licensed and it also provides that any person (in the singular) so convicted should be 'liable to the forfeiture of his licence.' As my learned brother has pointed out, as there is no licence issued to the servant, it cannot

be said that he would be liable to the forfeiture of his licence. This is an indication that it was in the contemplation of the legislature that only the licensee should be tried for the offence of breaking his licence. Section 29 of the previous Act of 1867 also confirms this impression. It speaks of the breach being punishable, not of any particular person being liable to be punished, and it provides that the fine should be recovered from the person licensed notwithstanding that the default was due to the act of the servant or other person in charge. Where the legislature intends to provide for one or more persons being punished for a single offence under this Act it provides in clear terms for that being done—see sections 45, 71 and 72. For instance under section 45, the owner of a common gaming house and his assistants are made liable to be punished separately. Similarly in the Abkārī Act (Madras Act I of 1886), the holder of a licence is declared by section 64 to be punishable for such breaches of the licence as are mentioned in section 55, as well as the actual offender; if the actual offender is in his employ and he fails to prove that he has done his best to avoid any breach of his licence.

I agree with my learned brother that the convictions should be upheld in Criminal Revision Cases Nos. 654 and 656 and reversed in the other two cases and that the fines in Criminal Revision Cases Nos. 655 and 657 should be refunded.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

HUSSAINA BEARI, PETITIONER (ACCUSED),

v.

KING-EMPEROR, RESPONDENT.*

Indian Penal Code (XIV of 1860), Section 211—Complaint, under section 1 of the Breach of Contract Act (XIII of 1859), withdrawn before passing of any order under section 2—Whether a 'criminal proceeding' within section 211, Indian Penal Code.

A complaint under section 1 of the Breach of Contract Act (XIII of 1859) which is withdrawn before any order is made by the Magistrate under section 2

* Criminal Revision Case No. 711 of 1919 (Criminal Revision Petition No. 603 of 1919).

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of the Act, either for a refund of the advance paid or for specific performance of the contract, is not a 'criminal proceeding' within the meaning of section 211, Indian Penal Code.

In the matter of Anusoori Sanyasi (1905) I.L.R., 28 Mad., 37, and *Derby Corporation v. Derbyshire County Council* [1897] A.C., 550, referred to.

CRIMINAL Revision petition under sections 435 and 439 of the Criminal Procedure Code against the conviction and sentence of the accused by NARAYANA NAMBIYAR, Sessions Judge of South Kanara, in Criminal Appeal No. 19 of 1919, filed against the conviction and sentence of the accused by ANANTAN NAYAR, Sub-divisional Magistrate of Coondapoor, in Calendar Case No. 33 of 1918.

The accused filed a complaint in December 1915, before the Second-class Magistrate of Buntwal, against one Angara Mukari, under section 1 of the Workmen's Breach of Contract Act, stating that the latter took an advance of Rs. 40 for some work in connexion with a firewood depot kept by the accused, that he signed an agreement to that effect, and that he thereafter refused to fulfil the agreement. On the day of hearing, the accused withdrew the complaint at the outset. Thereupon Angari Mukari obtained sanction to prosecute the accused, and filed a complaint against him under section 211, Indian Penal Code. Both the lower Courts convicted the accused. The accused preferred this Revision Petition.

B. Sitarama Rao for the petitioner.

V. L. Ethiraj for the Public Prosecutor for the Crown.

The ORDER of the Court was delivered by

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—In this case the accused was charged under section 211 of the Indian Penal Code with making a false charge against one Angara Mukari, under section 1 of the Workmen's Breach of Contract Act, XIII of 1859. In order to determine the point at issue, which is one of considerable interest, it is necessary to examine both the wording of section 211 of the Indian Penal Code, under which the accused was convicted, and the wording of the Workmen's Breach of Contract Act. Section 211 of the Penal Code is as follows:

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an

offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished, etc." By the Workmen's Breach of Contract Act, section 1, it is enacted as follows:—

"When any artificer, workman or labourer shall have received from any master or employer, resident or carrying on business in any Presidency-town, or from any person acting on behalf of such master or employer, an advance of money on account of any work which he shall have contracted to perform, or to get performed by any other artificers, workmen or labourers, shall wilfully and without lawful or reasonable excuse neglect or refuse to perform, or get performed, such work according to the terms of his contract, such master or employer or any such person as aforesaid may complain to a Magistrate of Police, and the Magistrate shall thereupon issue a summons or a warrant, as he shall think proper, for bringing before him such artificer, workman or labourer, and shall hear and determine the case."

And section 2 enacts:

"If it shall be proved to the satisfaction of the Magistrate that such artificer, workman or labourer has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected or refused to perform or get performed the same according to the terms of his contract, the Magistrate shall, at the option of the complainant, either order such artificer, workman or labourer to repay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform, or get performed, such work according to the terms of his contract; and, if such artificer, workman or labourer shall fail to comply with the said order, the Magistrate may sentence him to be imprisoned with hard labour for a term not exceeding three months."

It was proved in the lower Court, and it is not contested here, that the proceedings launched under section 1 of Workmen's Breach of Contract Act were in fact falsely brought and that the charge was a baseless one, and indeed it was withdrawn almost immediately the case came on. The employer has been convicted under section 211 for falsely bringing those proceedings. The only point he takes before us here is that the proceedings under the Workmen's Breach of Contract Act are not criminal proceedings within the meaning of section 211, Indian Penal Code.

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There has been a good deal of argument as to what the dividing line is in matters of this kind between criminal and civil proceedings and various analogies were suggested on one side or the other of the line. But we think that this matter has been clearly decided by a ruling of the House of Lords in England on a very analogous set of statutory provisions, so that it is needless to indulge in wide speculations as to the precise differentia of criminal from civil proceedings in general. If one looks at the Act, the preamble of it would certainly lend colour to the idea that the Act regarded some portion at any rate of the proceedings as criminal because the preamble recites that much loss and inconvenience are sustained by employers from fraudulent breach of contract on the part of workmen who have received advances and actually recites the inadequacy of the remedy by a suit in the Civil Courts and adds that

"it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment;" and it goes on to enact the provisions which have been already set out.

It was argued on behalf of the respondent that the offence referred to in the Act must be regarded as the original offence of breach of contract, because that is the thing which in the terms of this preamble the Act sets out to punish or, at any rate, to prevent. There have been decisions of this Court to the effect that the offence created by the Act is, not the original breach of contract on the part of the workman but his subsequent disobedience to what we may call the order for specific performance which entails the punishment by imprisonment. That opinion was expressed by a Bench of three Judges of this Court, Sir ARNOLD WHITE, C.J., DAVIES and BENSON, JJ., in, *In the matter of Anusoori Sanyasi*(1); and Sir ARNOLD WHITE says:

"The offence created by the Act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman repay the money advanced or perform the contract."

There is a similar ruling in *King-Emperor v. Takasi Muk-ayya*(2). Perhaps logically the offence is something that

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comprehends both those elements. The offence is completed when the workman who has broken the contract and who has had an order under section 2 made against him fails to obey that order of the Magistrate. The necessary ingredients in the offence are: he must have broken a contract; an order under section 2, must have been passed and he must have disobeyed that order. When those elements are present, there is an offence as it would be defined for statutory purposes, e.g., for insertion in a criminal code. To that the argument is that the whole proceedings must be regarded as one and that as the offence, as we have defined it, when completed, culminates in a liability to punishment by imprisonment which of course obviously savours of a criminal proceeding, every step from the inception must be regarded as a step in a criminal proceeding, and it is said that you cannot split up a statutory procedure into two parts, one of which you are prepared to call criminal and the other civil. That argument to our minds is disposed of by the case of *Derby Corporation v. Derbyshire County Council*(1). In that case there had been a proceeding under the Rivers Pollution Prevention Act of 1876. The Act in its general scheme provided something very much of the nature of the remedy in this case. The proceedings by the Act are laid in the County Court, the Civil Court of the district. By the Act, the County Council is enabled to bring proceedings against persons who are alleged to have offended against the Act by polluting rivers. Thereupon, the County Court Judge has power to pass orders (if he finds that there was pollution) either in the nature of an injunction or by allowing a limited time for new measures to be taken or a new scheme carried out to obviate or abate the pollution. After the time limited by the order has expired, it is competent to the local authority to apply to the County Court Judge for a penal order levying a sum of money for every day that the defendant continues in default. In this case, the County Council had started proceedings for an order against the Derby Corporation. In the course of those proceedings they applied to the learned County Court Judge for an order for discovery of documents. They said that it was impossible for them to put before the Court the proper materials

(1) [1897] A.C., 550.

(1) [1905] I.L.R., 28 Mad., 37. (2) (1901) I.L.R., 24 Mad., 660.

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with regard to the methods of disposal of sewage and so forth carried out by the Corporation unless the Corporation were compelled to make discovery of documents, plans, maps and so forth. That was resisted on the ground that the nature of the proceedings was penal or criminal because the proceedings that were commenced were a step towards the recovery of a penalty, and reliance was placed in argument upon the case of *R. v. Whitechurch*(1), to which I shall refer presently. The House of Lords held, that discovery could be ordered because the initial stage of the proceedings was not criminal or penal at all. Lord HERSCHELL at page 552 says :

"I will deal with the first objection, namely, that this is a penal proceeding, a proceeding which may end in a penalty. It seems to me nothing of the kind. This proceeding never can end in a penalty. All it can end in is an order under such terms and conditions as the County Court Judge thinks reasonable to prevent or abate a nuisance. The Legislature has provided that if that order is disobeyed then the County Court Judge may impose a penalty not exceeding £50 a day, as he thinks reasonable, payable to such persons as he thinks right, upon the authority or person who has disobeyed the order. My Lords, that is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed. The proceeding itself is no more a proceeding that may subject the present appellants to a penalty than is every proceeding which is ever taken in a court of justice."

Their Lordships held, that where you have a remedial power vested in the Court in the first instance, followed by a penalty on disobedience of the order made in the first instance, it is the second proceeding alone that is penal in character and the first has no penal character whatever.

The case of *R. v. Whitechurch*(1) was a proceeding under the Public Health Act of 1875. Section 94 of that Act vests in the various local authorities, as defined by the Act, the power to serve notice on a person by whose act any nuisance cognizable by the local authority is caused, requiring the person on whom the notice is served to abate the nuisance within the time specified by the authority and carry out the works required for the purpose. Then by section 93, on non-compliance with the

(1) [1881] 7 Q.B.D., 534.



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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11, EXPLANATION V AND O.I., 2, 8—

Res judicata—Private right claimed in common by several persons—Suit by some, others being impleaded as defendants—*Bona fide* litigation—Decision, whether binding on representative of deceased defendant, not brought on record.] Explanation V to section 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under Order I, rule 2, but also to cases where some of the persons claiming a private right in common with others litigate *bona fide* on behalf of themselves and such others. A decision in a suit, instituted and conducted *bona fide* by some only of the *agraharamdars* of a village against the *samindar* and the other *agraharamdars*, for a declaration as to the *kattubadi* payable by them to the *zamindar*, is *res judicata* against the representative of an *agraharamdar* who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the Appeal or the Second Appeal. Rangamma v. Narasimha Charyulu, (1916) 81 M.L.J., 26, followed. Gopalacharyulu v. Subbamma ... (1920) I.L.R., 43 Mad., 467

O. XXI, 2.—Adjustment of partition decree—Adjustment as to partition of immoveable property—Necessity for certification by decree-holder—Sale by one decree-holder to another of his share in some of the lands decreed—Sale, not certified to Court, effect of—Subsequent application in execution by vendor for partition of lands sold and for other reliefs—Bar of execution.] Order XXI, rule 2, Civil Procedure Code, applies to partition decrees which provide for the payment of money as well as for other relief, such as a partition of immoveable

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property, and to adjustments with regard to such property. Such an adjustment cannot be recognized, unless certified or recorded as required by the rule. Abdul Lathif Sahab v. Bathula Bibi Ammal, (1914) 15 M.L.T., 338, and Sethurama Sahab v. Ohota Raja Sahab, (1917) M.W.N., 327, followed; Kelu Nair v. Meenakshi, (1913) 25 M.L.J., 586, not followed.

Ramakrishna Rao v. Balakrishna Rao ... (1920) I.L.R., 43 Mad., 476

CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 107, 350, PROVISIO (1)—Transfer of Magistrate—Trial *de novo*—Right of accused.] Section 350 (1), proviso (a), Criminal Procedure Code, applies to proceedings under section 107, Criminal Procedure Code, and the accused is entitled in a security case to a trial *de novo* on the Magistrate being transferred.

Venkatachinnayya v. King-Emperor ... (1920) I.L.R., 43 Mad., 511

ss. 110 (a) to (f), 112 AND 117 (c)—Necessity of setting out substance of information received, in order under section 112—Trial of accused on charges under clauses (a) and (f) of section 110—Evidence of general repute—Inadmissibility to prove charge under clause (f)—Evidence to prove charge under clause (a).] Where an order under section 112, Criminal Procedure Code, which does not clearly disclose the substance of the information received by the Magistrate, the proceedings cannot be regarded as legal. Kripasindhu Naiko v. Emperor, (1918), 47 I.C., 277, followed. To prove a charge under clauses (a) to (e) of section 110, Criminal Procedure Code, evidence of repute is admissible. Per SESHAGIRI AYYAR, J.—Such evidence must relate to particular instances which have come to the knowledge of the deponent and must be specific. Mere belief and opinions without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within the meaning of section 117, clause 2. Per MOORE, J.—The evidence that is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of the accused's reputation. It must be the general opinion and not merely the repetition of what certain persons have said to the witnesses. To prove a charge under clause (f) of section 110, Criminal Procedure Code, evidence of repute is inadmissible. The evidence must be of definite acts and instances. Where a person is tried jointly under clause (f) and any of the other clauses of section 110, evidence of repute admitted with regard to the latter cannot be taken into consideration in deciding the charge under clause (f).

Ranga Reddi v. King-Emperor ... (1920) I.L.R., 43 Mad., 450

HINDU LAW—Non-congenital insanity, whether a ground of deprivation of right of survivorship.] Insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital. Deo Kishen v. Budh Prakash (1883) I.L.R., 5 All., 509 (F.B.), and Murari Gokuldas v. Parvatibai, (1876) I.L.R., 1 Bom., 177, followed. Sanku v. Puttamma, (1891) I.L.R., 14 Mad., 289, dissented from. The right of a member of a Hindu joint family to share in ancestral property comes into existence at birth, and is not lost but is only in abeyance by reason of a disqualification. It subsists all through,

although it is incapable of enforcement at the time of partition, if the disqualification then exists. Hence, if on the death of all the other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship.

Muthuswami Gurukkal v. Meenammal ... (1920) I.L.R., 43 Mad., 484

INCOME-TAX ACT (VII OF 1908), SEC. 24, PROVISIO 2, 39 (d), 40 AND 41.—*Failure to produce accounts—Prosecution under sec. 39 (d)—Penal assessment—Levy of, whether a bar to prosecution—Bar under sec. 24, proviso 2, whether applicable.* Section 24, proviso 2, of the Indian Income-tax Act, does not bar the prosecution of an accused for an offence under section 39 (d) of the Act for failure to produce accounts, when penal assessment had been levied on him, under section 24, in consequence of his making a false return of his income.

King-Emperor, v. Hoosanally & Co. ... (1920) I.L.R., 43 Mad., 498

LANDLORD AND TENANT.—*Denial of landlord's title—Forfeiture of tenancy—Denial that landlord's title was subsisting—Adverse possession—Kudima tenure, nature of—Part of future services—Resumption of lands—Right to eject on denial of title.* A denial by the tenant of his landlord's title must, in order to work a forfeiture of the tenancy, be brought home to the knowledge of the landlord and it must be unequivocal and clear. The receipt and retention by the tenant of a document of sub-lease in which he is spoken of as the *jaami* of the lands demised, cannot operate as a denial of the landlord's title so as to cause a forfeiture of the tenancy. If a tenant denies subsisting title in the landlord and claims that the property became vested in him by *adverse* possession, such conduct amounts to denial of landlord's title prior to suit. Lands granted on *kudima* tenure for past services are not resumable. But if granted for future services they are resumable on a refusal to perform service. A denial by such tenant of the landlord's title is tantamount to refusal to render service.

Raman Nair v. Mariamma ... (1920) I.L.R., 43 Mad., 480

MULGENI LEASE.—*Covenant against alienation—Breach—Assignment, validity of.* In the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, an assignment of the lease by the lessee in breach of his covenant not to assign is perfectly valid. *Parameshwari v. Vittappa Shanbaga* (1903) I.L.R., 28 Mad., 157, explained. *Per SESHAGIRI AYYAR, J.*—The same principle would apply even in the case of a mulgeni lease executed subsequent to the Transfer of Property Act. *Tamaya v. Timaya Ganpaya* (1893) I.L.R., 7 Bom., 264, *Basarat Ali Khan v. Manirulla* (1900) I.L.R., 36 Cal., 745 and *1904mode Ramana Ghose v. Aswini Kumar Nag* (1914) 18 C.W.N., 1138, followed.

Udipi Seshagiri v. Seshamma ... (1920) I.L.R., 43 Mad., 508

notice, the local authority can lay a complaint before a justice of the peace and he can issue a summons requiring the person named in the complaint to appear before a Court of summary jurisdiction and the Court of summary jurisdiction is enabled by section 96 to make an order for the execution of the works, and may also by the same order impose a penalty on the person on whom the order was made. It is obvious that the analogy of that case cannot be applied to the present one. The proceeding by the local authority corresponds to the first proceeding in the second section of the Workmen's Breach of Contract Act where the magistrate in the first instance makes an order in the nature of an order for specific performance. In the Public Health Act that power is not vested in a Court but is left to the local authority in the first instance, which goes very strongly to show that you cannot regard that part of the proceedings which is not even in a Court as in any way criminal. Then, when the matter comes before the magistrate he has jurisdiction from the very outset, without any further default being made, to impose a penalty, as Lord DAVEY pointed out in *Derby Corporation v. Derbyshire County Council*(1).

We are of opinion, that the authority of the House of Lords finally establishes that in cases of an analogous kind the initial proceedings which can only end in the nature of an order for specific performance must be separated from the final proceedings which will issue on disobedience of that order. It is the latter portion of these proceedings alone that can in any way be described as criminal proceedings and may come under section 211, Indian Penal Code. In the present instance, the only proceedings that were launched were under the preliminary portion of the section for execution of the work or for repayment of the advance, and we are of opinion that those not being criminal proceedings the present conviction cannot be sustained and must be quashed.

N.B.

(1) [1897] A.C., 550.

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APPELLATE CRIMINAL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

1919,
October, 28
and 29.

K. RANGA REDDI (PETITIONER), ACCUSED,

v.

KING-EMPEROR (RESPONDENT).*

Criminal Procedure Code (V of 1898), ss. 110 (a) to (f), 112 and 117 (e)—Necessity of setting out substance of information received, in order under section 112—Trial of accused on charges under clauses (a) and (f) of section 110—Evidence of general repute—Inadmissibility to prove charge under clause (f)—Evidence to prove charge under clause (a).

Where an order under section 112, Criminal Procedure Code, does not clearly disclose the substance of the information received by the Magistrate, the proceedings cannot be regarded as legal.

Kripasindhu Naiko v. Emperor, (1918) 47 I.C., 277, followed.

To prove a charge under clauses (a) to (e) of section 110, Criminal Procedure Code, evidence of repute is admissible.

Per SESHAGIRI AYYAR, J.—Such evidence must relate to particular instances which have come to the knowledge of the deponent and must be specific. Mere belief and opinions without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within the meaning of section 117, clause 3.

Per MOORE, J.—The evidence that is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of the accused's reputation. It must be the general opinion and not merely the repetition of what certain persons have said to the witnesses.

To prove a charge under clause (f) of section 110, Criminal Procedure Code, evidence of repute is inadmissible. The evidence must be of definite acts and instances. Where a person is tried jointly under clause (f) and any of the other clauses of section 110, evidence of repute admitted with regard to the latter cannot be taken into consideration in deciding the charge under clause (f).

CRIMINAL Revision Petition under sections 435 and 439 of the Criminal Procedure Code, filed against the order of T. RAGHAVAYYA, District Magistrate of Anantapur, in Criminal Appeal No. 6 of 1918, preferred against the order of P. APPA RAO, Sub-divisional Magistrate of Gooty, in Miscellaneous Case No. 13 of 1917.

* CrI. R.C. No. 860 of 1919.

The Inspector of Police of Gooty filed an application before RANGA REDDI the First-class Magistrate of Gooty to take security for good behaviour from one Ranga Reddi under clauses (a) and (f) of section 110 of the Code of Criminal Procedure. The Magistrate made an order as prayed for. On appeal the District Magistrate confirmed the order. Against that the accused filed this Revision Petition to the High Court. Further facts are to be found in the judgment.

T. Richmond for petitioner.

V. L. Ethiraj for Public Prosecutor.

SESHAGIRI AYYAR, J.—This is an application to revise the order of the District Magistrate of Anantapur, confirming the proceedings taken by the Deputy Magistrate of Gooty, calling upon the petitioner to enter into a bond for Rs. 5,000, with two sureties in a like sum. The first Magistrate was moved to take action under section 110 (a) and (f) of the Code of Criminal Procedure. He examined a large number of witnesses, thirty-eight for the prosecution and forty-one for the defence. He came to the conclusion that the petitioner should be bound over. In confirming that order, the District Magistrate refers to a defect in the procedure of the trial Magistrate, namely, that in recording and reading out the preliminary order under section 112, there was no attempt made to inform the accused of the substance of the information received, which led to the taking of action against him. The District Magistrate says, that the accused had ample opportunities in the course of the hearing to know what evidence was being given against him, and as he did not object to the legality of the preliminary order in the lower Court, the objection should be overruled. Although I do not propose to set aside the order on the sole ground that the information communicated to the accused under section 112 was not sufficient to comply with the requirements of the Code, I must point out that it is of the utmost importance in cases of this description that the first information should be clear and specific. The accused is to be put on his trial on information received behind his back. In the case of a complaint, the accused may be entitled to a copy, if he applies for it, but in the case of an information of this kind, which *ex necessitate* is a confidential one, the accused is entitled to be told the nature

RANGA REDDI and extent of the information on which the Magistrate intends to base the action against him. It is that communication that is expected to enable the accused to summon witnesses on his side. Therefore, if the substance of the report made to the Magistrate is not clearly disclosed, and the accused is not informed of the charges, of the nature of the evidence that he is to rebut, the proceedings cannot be regarded as legal. I entirely agree with the observations of my learned brother KUMARASWAMI SASTRI, J., on this question in *Kripasindhu Naiko v. Emperor*(1).

I now proceed to deal with the merits of the case. Objection was taken in this Court, by the learned Counsel for the petitioner, that most, if not the whole, of the evidence let in on the side of the prosecution, was irrelevant and inadmissible in evidence. The District Magistrate classifies in paragraph 4 of his judgment the evidence that has been given. He refers first of all to what he considers to be the reputation evidence. As regards that, he says, that if the order rested solely on it he would have set it aside. What I understand him to mean is, that the evidence of repute against and for the accused is so evenly balanced that, in the opinion of the appellate Magistrate, it would be unsafe to base the proceedings solely upon it. There was a large volume of evidence adduced by the petitioner which showed that, in the opinion of a considerable number of the people in and round the place, the accused is a man of good character. If that is the view taken by the District Magistrate, there is nothing to be said against it. But I am not sure whether he does not, to some extent, confuse the issue, by holding that evidence of repute is altogether inadmissible.

It is desirable to point out here in what cases evidence of repute may be permitted in proceedings of this character and in what cases it should be avoided altogether. Under section 110, there are six categories of offences: the first five relate to habitual misconduct: and the sixth, to the accused being desperate and dangerous. Section 117, clause (3), provides that a person is a habitual offender may be proved by evidence of general repute or otherwise. This language is not very happy, and Courts have been often at pains to understand the

(1) (1918) 47 I.C., 277 (Mad.).

idea which led the legislature to enact this clause. The expression "habitual offender," I believe, covers all the first five categories of offences mentioned in section 110. One thing at least is clear, that to bring home the charge under section 110, clause (f), evidence of general repute is not admissible. According to the ordinary rules of evidence, evidence is not admissible to prove that a man is of a bad character. Therefore, clause 3 of section 117 must be taken to have been introduced by way of exception to the general law. If that is so, the exception must be limited to the particular offences referred to in it. That I understand to have been the view taken by Justice SANKARAN NAYAR in *Muthu Pillai v. Emperor*(1). In that case it was contended for the Crown that, by admitting evidence of general repute for proving the first five categories of offences in section 110, Courts can subsequently utilize it for showing that the accused is of a desperate character. The learned Judge rightly overruled this suggestion, because it would be enabling the Crown to let in evidence indirectly, which it cannot directly do. I am clear that it is not open to the Magistrate to look into evidence of general repute for finding that a man is dangerous and is a desperate character within section 110 (f) of the Code of Criminal Procedure. Mr. Justice BANNERJEE in *Emperor v. Bidhyapati*(2), pointed out that it is only for the purpose of establishing charges under section 110, clauses (a) to (e), that repute evidence is admissible. I am in entire agreement with the pronouncement of SANKARAN NAYAR, J., and BANNERJEE, J., on this matter.

The evidence let in in this case, would have, therefore, to be excluded to a considerable extent. The District Magistrate divides the rest of the evidence into two classes, the evidence of official witnesses of sufficient standing, and the evidence of witnesses who speak of particular acts of criminality on the part of the accused. Under the first heading, he relies mainly upon the evidence of a Deputy Superintendent of Police, two Inspectors of Police, and some Sub-Inspectors of Police. One caution which the learned Magistrate has not kept in view is, that in proceedings of this kind as far as possible the evidence of official witnesses, like Superintendents of Police and Inspectors

(1) (1911) I.L.R., 34 Mad., 255.

(2) (1903) I.L.R., 25 All., 273.

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of Police, should be eschewed. Their minds are naturally biased by the reports that they receive from their subordinates regarding the movements and antecedents of the accused whom they report to the Magistrate should be bound over. Therefore, their evidence would in the nature of things ordinarily exhibit bias against the accused. This was pointed out in *Abdul Khaliq v. Emperor*(1) and *Kumeda Charan v. Asutosh*(2). It is a very salutary principle and although there is no rule of law which prohibits a Magistrate from admitting Police evidence, it should, if not wholly discarded, influence his judgment as little as possible. Bearing this in mind, I shall now examine the evidence given by the Superintendent of Police. He says that he knew the accused's reputation, and straightaway speaks of having heard of the accused being concerned in the getting up of dacoities. Then he says, as regards one of the cases the accused is said to have engineered :

"I sent the Head Constable to Tadpatri and found the allegations to be true."

This is both opinion and hearsay evidence. Then he refers to the entries in his diary, of his having been convinced that one of the articles found on a search of the house of the accused was stolen property. If that was the conviction of this witness, why did he not charge the accused before a criminal Court? The whole of this evidence, however much it may express the honest opinion of the officer, is either hearsay or rumour, or a *priori* conclusion. Not a single fact is spoken to excepting that relating to the ear-ring. As regards the identity of the ear-ring, the owner has not been examined to prove that it was his property and was stolen from him. The whole of this evidence, namely, that of prosecution witness No. 18, must be rejected.

Then I turn to another witness, prosecution witness No. 31. He is the Circle Inspector. He first refers to the accused having been entered in the surveillance register, then to a letter from the Superintendent of Anantapur to another Superintendent, which the witness was permitted to look into, in which it was mentioned that the accused-organized a gang of dacoits. Then he refers to his having heard that some Jutur

men were members of a gang. Then he refers to an entry in his diary that the accused paid an advance of Rs. 50 for purchasing a ticket and so on. In cross-examination he said "I made no inquiries regarding the purchase of tickets". The whole of this evidence must be set aside. The same remark applies to the evidence of the 7th witness. He says that he once went to the house of the accused to check his presence. The accused refused to give him information. "I wrote in my note book what took place." Why this evidence was recorded and how the trial magistrate considered it relevant, I cannot understand.

The evidence of the other Police witnesses is of the same description as that to which I have referred. It seems to me that this evidence should be regarded as inadmissible, even if it was given by a private party. They are further vitiated by the fact that it is a record of opinions, rumours and hearsays, which, as Police officers, they entered in their notebooks.

Then I turn to the evidence of the second class. The District Magistrate specially refers to the evidence of prosecution witness No. 16, and prosecution witness No. 17. As regards prosecution witness No. 16, in my opinion, it is very irrelevant, to say the least. The vakil says that he heard from somebody that a dacoity was about to be committed in the house of a client of his and that he warned that client. How is this evidence against the accused? The learned Public Prosecutor said that this evidence must be read with that of Prosecution witness No. 17. Prosecution witness No. 17 says :

"I knew the accused. He bears a bad reputation and he is given to committing burglary, dacoity and has bad associates."

Such a general statement can be of no assistance to a Court. It is against all principles to record such vague statements, without calling upon the witness to give specific instances which could be scrutinized and which the accused will be in a position to rebut. He says, later on, "the dacoits were expected to proceed from Jutur and from the house of the accused". He admits, as a matter of fact, that owing to his vigilance and the vigilance of his friend, no dacoity took place. This very unsatisfactory evidence should not have been allowed to influence the mind of the Magistrate against the accused. Prosecution witness No. 12

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(1) (1915) 28 I.C., 329 (All.).

(2) (1912) 16 C.L.J., 232.

RANGA REDDI only says that the accused and his men returned on a particular occasion to their houses saying that Subba Reddi escaped. The 18th witness deposed that about four months back the accused was talking of murdering Subba Reddi. He said, he went to the house, where he heard the conversation, as a coolie to do work for the owner; but he did not inform anybody about the intended murder, and that nothing afterwards happened.

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This kind of evidence can be manufactured against any individual, respectable or otherwise, and no man's reputation can be safe, if evidence like this were to influence the proceedings of a Magistrate. I felt considerable doubt as to whether evidence as regards clauses (a) to (e) of section 110 should not relate to something in the nature of previous convictions. The learned Public Prosecutor drew our attention to *In re Pedda Siva Reddi*(1), wherein the learned Judges say:

"Although, when witnesses are examined as to *general character*, their testimony is not of much value as to the habits of a suspected person, unless they can, in support of their opinion, adduce instances of the misconduct imputed, when the question is only as to his *repute*, the evidence of witnesses, if reliable, is not without value, though they may not be able to connect suspected person with the actual commission of crime."

I am not sure that I understand this judgment. Section 110, clauses (a) to (e), speak of a man being a habitual robber, a habitual receiver of stolen property and a habitual harbourer of thieves, a habitual extortioner, or a habitual committer of breach of the peace. In my opinion, the evidence on which the Magistrate has to base his conclusion must relate to particular instances which have come to the knowledge of the deponent and so must be specific. Evidence relating to mere beliefs and opinions, without reference to acts or instances which have induced the witnesses to form the opinion, can hardly be regarded as evidence of *repute* within section 117, clause (3). Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions. At any rate, Courts ought to discard such evidence as much as possible. *Emperor v. Sheikh Abdul*(2), *Chintamon Singh v. Emperor*(3), and *Kalai Haldar v.*

(1) (1881) I.L.R., 8 Mad., 238.

(2) (1916) I.L.R., 43 Cal., 1128.

(3) (1908) I.L.R., 35 Cal., 243.

Emperor(1), seem to lay down this view, and I respectfully follow these decisions. Therefore the evidence of prosecution witness No. 18, which speaks generally of the reputation of the accused without reference to specific acts, is not, in my opinion, sufficient to bring the charge home to the accused.

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The petitioner is a young man of 30 years of age and is in fairly well-to-do circumstances. It is said that he has property worth a lakh of rupees and debts to the extent of thirty thousand rupees. These debts have all been purchased by prosecution witness No. 22, a distant relation of the accused. It is he that moved the Police to take action in the matter. He has put pressure to bear upon the accused by purchasing litigation. There has not been a single instance in which the accused has been convicted of an offence. Under these circumstances, having regard to the nature of the offence charged, and to the character of the evidence let in, I feel no doubt that the proceedings should be set aside altogether. The bond executed by the petitioner and by his sureties must be cancelled and given up.

MOORE, J.—The petitioner has been ordered, under section 118 of the Code of Criminal Procedure, to enter into a bond for Rs. 5,000 with two sureties for a like amount to be of good behaviour for a period of three years.

The facts of the case are unusual. The petitioner is a Reddi owning landed property and paying an assessment of Rs. 1,000. The Police moved the Subdivisional Magistrate of Gooty for security being taken from the petitioner under section 110, clauses (a) and (f), of the Code of Criminal Procedure, on the ground (1) that he was by habit a robber, house-breaker and thief, and (2) that he was so desperate and dangerous as to render his being at large hazardous to the community. The Subdivisional Magistrate in the preliminary order, which he issued under section 112 of the Code of Criminal Procedure, did not set out the substance of the information contained in the Police charge-sheet. The order merely reproduces the language of clauses (a) and (f) of section 110 of the Code of Criminal Procedure. This was clearly irregular.

(1) (1902) I.L.R., 29 Cal., 779.

RANGA REDDI v. KING-EMPEROR. MOORE, J. "A notice under section 110 of the Code of Criminal Procedure must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged, and sufficient details to enable the accused to know what facts he has to meet."

As stated by KUMARASWAMI SASTRI, J., in *Kripasindhu Naiko v. Emperor*(1). However, I agree with the District Magistrate that this defect is not a sufficient ground for quashing the proceedings, as it is not shown that the petitioner was prejudiced by the defect.

After a protracted inquiry, the Subdivisional Magistrate passed an order requiring the petitioner to give security and on appeal the order was confirmed by the District Magistrate. The first objection taken by Mr. Richmond, for the petitioner, is that a charge under clause (f) of section 110 of the Code of Criminal Procedure cannot be proved by evidence of repute, but must be proved by definite evidence; and reliance is placed on *Muthu Pillai v. Emperor* (2). In that case, Mr. Justice SANKARAN NAYAR held, following *Kalai Haldar v. Emperor*(3), that when a person is solely charged under section 110 (f) of the Code of Criminal Procedure, evidence of general repute is not admissible to prove that he is a desperate and dangerous character. That is clear from the wording of section 117 (3), of the Code of Criminal Procedure, which says that for the purposes of this section the fact that a person is an habitual offender may be proved by evidence of repute or otherwise. The learned Judge did not, however, express any opinion on the question whether when a person is tried jointly for charges under clause (f) and any other clause of section 110 of the Code of Criminal Procedure, a finding that he is an habitual offender can be taken into consideration in deciding the charge under clause (f). The lower Courts have not in my opinion kept in view the distinction between evidence as to general repute, which was undoubtedly admissible to prove that the petitioner was an habitual offender, and the evidence requisite to prove a charge under clause (f), which must be of a definite character. The Subdivisional Magistrate, for instance, says that the witnesses speak of

(1) (1918) 47 I.C., 277 (Mad.).

(2) (1911) I.L.R., 34 Mad., 255.

(3) (1902) I.L.R., 29 Cal., 779.

RANGA REDDI v. KING-EMPEROR. MOORE, J. "specific acts of misconduct attributed to the accused, which in fact form the basis for their information and impressions. The evidence against the accused is so general and overwhelming that there is not the slightest doubt that he associates and intrigues with criminals and bad characters, and has been in the habit of committing dacoities, house-breakings, and thefts or other offences of the kind specified."

Finally, the Subdivisional Magistrate says:

"I am perfectly satisfied from all the foregoing that the accused is by habit a robber, house-breaker, thief, and that his being at large without security is hazardous to the community."

The District Magistrate has fallen into the same error. He states that:

"Most of the evidence on either side concerns the reputation of the appellant . . . while many of the witnesses for the prosecution say that the appellant has a reputation for habitually engineering dacoities, robberies and thefts, and that he is dangerous to society."

The next objection taken by Mr. Richmond is, that the Magistrate erred in admitting a large body of irrelevant hearsay evidence, in the belief that it was admissible as evidence of repute. This objection is, I think, well founded. Hearsay evidence amounts to evidence of repute and is admissible for the purpose of section 110 of the Code of Criminal Procedure, and this provision of the law being an exception to the general rule of evidence, in such cases evidence of repute though hearsay is admissible: *Emperor v. Raoji*(1) and *In the matter of Pedda Siva Reddi*(2). But, as was pointed out in *Rai Ieri Pershad v. Queen Empress*(3), a case which is frequently quoted—

"It is hardly necessary to say that evidence of rumour is mere hearsay evidence and hearsay evidence of a particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is of that character. On the other hand, if the state of things is that the body of his fellow townsmen, who know him, look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character, but to say that because there are rumours in a particular place among a

(1) (1882) 6 Bom. L.R., 34.

(2) (1881) I.L.R., 3 Mad., 238.

(3) (1896) I.L.R., 23 Cal., 621.

RANGA REDDI certain class of people that a man has done particular acts or has characteristics of a certain kind, those rumours are in themselves evidence under this section is to say what the law does not justify us in saying."

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When it is sought to prove the reputation of a person, the evidence which is required is that of respectable persons who are acquainted with the accused, and live in the neighbourhood, and are aware of his reputation. The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused, and it should at the least be the opinion of a considerable number of persons. It must not be merely the repetition of what certain persons have said to the witnesses.

Coming now to the facts of the present case, the evidence of the accused's general repute and bad livelihood, when examined, is very weak and largely hearsay. For instance, prosecution witness No. 8, who acted for a short time as Village Munsif of Jutur, the petitioner's village, says

"The accused is reputed to be a thief. He never had thefts committed in my village."

The witness gives the names of three persons who consider the accused to be a thief and says:

"I consider the accused as a man of bad character on the strength of what these persons told me. My individual opinion is that the accused is a bad man having some people to commit thefts."

Such evidence which is based on rumours should not have been admitted. Prosecution witness No. 10, a resident of Jutur, begins his deposition by saying:

"I know the accused who is a man of bad character. He is a murderer and dacoit. His reputation is such."

In cross-examination, prosecution witness No. 10 states:

"I cannot say who said that the accused was a dacoit and a murderer. The whole village said so."

The witness is not a man of any position, has been convicted of gambling, and is admittedly an enemy of the petitioner. Prosecution witness No. 21, who belongs to another village, states:

"I know the accused for six or seven years. He bears the reputation for committing dacoity and murder."

When asked to justify this statement, the witness had to admit in cross-examination that he could not say who told

him of the accused's bad reputation. I am surprised that RANGA REDDI the Subdivisional Magistrate should have allowed such evidence, which was calculated to seriously prejudice the accused, to go in. Prosecution witness No. 17 is a vakil, practising in Gooty. In examination-in-chief he stated, that he knew the accused, that he bore a bad reputation, was given to commit burglary and dacoity, and that he had bad associates. It was elicited, however, in cross-examination that the witness was a friend of prosecution witness No. 22 (a wealthy and influential man and a bitter enemy of the petitioner), that during the past five years he had very rarely gone to Jutur, had never seen the petitioner there, and that prosecution witness No. 22 and others told him about the reputation of the petitioner. The statement of the District Magistrate, that the witness has known the accused "long and well," does not appear to be correct. There is undoubtedly a good deal of evidence that the petitioner is suspected of planning dacoities, but it is not clear why a man in the position of the petitioner should have earned this unenviable reputation. Prosecution witness No. 24, for instance, says:

"The accused is a man of large property. I do not know why such a man attempted to commit dacoity."

After reading the voluminous evidence of the prosecution witnesses, I am inclined to think that there is a good deal behind the case, and that the charge is the outcome of family feuds among the Reddis. For instance, prosecution witness No. 32, who was Village Munsif of Jutur and is a dayadi of the accused, states that the accused is a man of bad character, committing thefts and dacoities and that he has sent several reports regarding the bad character of the accused and his absence from the village. In cross-examination, however, he admitted that he had been at enmity with the accused from the time of his father, that he was on friendly terms with prosecution witness No. 22, his father's cousin, that there had been long standing ill-feeling between prosecution witness No. 22 and the accused, and that there are two parties, one headed by prosecution witness No. 22 and the other by the accused. Finally, he admitted that his opinion that the accused was a dacoit and robber was based solely on what his gumastah told him, and that he did not know personally that accused

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RANGA REDDI associated with bad characters. The only other non-official witness to whose evidence it is necessary to refer is prosecution witness No. 34. He pays an assessment of Rs. 300. He deposed that he had heard of dacoities said to have been committed by the gangs of the accused and his brother-in-law Chinna Reddi. He made an extraordinary statement, that one Muni Reddi owed the accused Rs. 8,000, and a suit was filed and compromised after payment of booty in dacoity. The whole of this evidence is hearsay. The witness had to admit that he could not say from what source he got his information or give the names of his informants, and also that there had been civil suits between accused's father-in-law and himself. There is also the evidence of a number of police officers, prosecution witnesses Nos. 1, 2, 3, 4, 7, 18, 19, 20, 25 and 31, that the petitioner is a registered suspect, that he and his brother-in-law are reputed to organize dacoities, and that his house has been more than once searched. I have read the evidence of these witnesses and I do not think that much weight can be attached to it. The witnesses admit that the accused has never been charged in any case. The evidence of the Police witnesses amounts to this, that rumours are current in the Police circle that the petitioner organizes dacoities and is an associate of bad characters and that his movements have been watched. For the foregoing reasons, I consider that there is not sufficient evidence to support the charge under section 110 (a) of the Code of Criminal Procedure, that the petitioner is by habit a thief or a dacoit.

As regards the charge under section 110 (f), it has been held in *Kalai Halidar v. Emperor* (1) that to prove a charge that an accused person is so desperate and dangerous as to render his being at large without security hazardous to the community there should be proof of specific acts showing that he is a desperate and dangerous character. I respectfully agree with this decision. Practically the only evidence on this part of the case is that of prosecution witnesses Nos. 16, 17, 12, 13 and 22.

Prosecution witness No. 16, a High Court Vakil, practising in Cuddapah, says that five years ago he sent a telegram to prosecution witness No. 22 warning him that a dacoity was likely to be committed in his house. The witness cannot even

remember the names of the persons who were planning the dacoity. Prosecution witness No. 17 says that he was with prosecution witness No. 16 when he sent the telegram and that the information he got was that the dacoits were expected to come from the accused's house in Jutur.

The District Magistrate says that prosecution witnesses Nos. 12 and 13 refer to "definite attempts made by the accused to bring about the murder of prosecution witness No. 22," but this is hardly correct. Prosecution witness No. 12 states that he met the accused and four or five others, that they asked him whether prosecution witness No. 22 had gone that way, that they returned saying that prosecution witness No. 22 had escaped and that he informed prosecution witness No. 22 two or three days afterwards. The accused gave evidence against this witness's son in a murder case. Prosecution witness No. 13 tells a ridiculous story of his having overheard a conversation between the accused and two other persons, in one Narasimha Reddi's house, and that they talked about murdering Pedda Subba Reddi. The evidence of these witnesses is worthless, and the District Magistrate was not inclined to attach much weight to it. Prosecution witness No. 22 is a wealthy man and a District Board member. He is a cousin of the petitioner, and they are admittedly enemies. He says that he had been warned by prosecution witnesses Nos. 12 and 13 that the accused was threatening to murder him and that he sent a petition to the police. It appears to be clear that it was at the instance of this witness that these security proceedings were instituted.

I am unable to agree with the District Magistrate that there is a large body of evidence "regarding the petitioner's bad life, his habit of engineering crimes and his general desperate character." The evidence on record does not warrant any such conclusion. The District Magistrate also says that there is evidence of witnesses who speak to "definite acts of criminality on the part of the petitioner." But I cannot find any definite evidence of any specific acts of violence committed by the petitioner. In my opinion the order requiring the petitioner to furnish security to be of good behaviour cannot be supported, and should be set aside.

N.B.

(1) (1902) I.L.R., 29 Cal., 779.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Moore.

MUTHUSAMI GURUKKAL (PLAINTIFF), APPELLANT,

v.

MEENAMMAL AND SIX OTHERS, DEFENDANTS, Nos. 1 TO 4 AND Nos. 6 TO 8. (RESPONDENTS).*

1918,
November
8 and
October 24,
27, 28 and
November 5.

Hindu Law—Non-congenital insanity, whether a ground of deprivation of right of survivorship.

Insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital.

Deo Kishen v. Budh Prakash (1888) I.L.R., 5 All., 509 (F.B.), and *Muraji Gokuldas v. Parvatibai* (1876) I.L.R., 1 Bom., 177, followed; *Sanku v. Puttamma* (1891) I.L.R., 14 Mad., 239, dissented from.

The right of a member of a Hindu joint family to share in ancestral property comes into existence at birth, and is not lost but is only in abeyance by reason of a disqualification. It subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification then exists. Hence, if on the death of all the other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship.

SECOND APPEAL from the decree of F. A. COLERIDGE, District Judge of Madura, in Appeal No. 364 of 1916 preferred against the decree of M.R. SANKARA AYYAR, Principal District Munsif of Dindigul, in Original Suit No. 1332 of 1912.

One Gangadhara Gurukkal was entitled to an Archaka office in a temple. Though he was born sane, he became insane after his son Subbayya attained his majority. During the period of his father's insanity Subbayya was doing the Archaka service. Subbayya died in 1874. Gangadhara continued to be insane until his death, which took place in 1880. Subbayya's widow died in 1911 and Gangadhara's widow died in 1912. The plaintiff as the reversioner of Subbayya, the son, brought this suit against the daughter and daughter's son of Gangadhara, for a declaration of his right to, and for possession of, the office of Archaka. The defendants contended that Gangadhara was the last owner of the office, that his widow alone was doing the

* Second Appeal No. 2294 of 1917.

duties of the office from 1880 until her death in 1912, and that the plaintiff was not entitled to the office. The plaintiff stated in addition that the widow of Subbayya was doing the duties of the office and enjoying its emoluments for more than 12 years. The plaintiff also set up an alternative case that both the widows were doing the work of the office by turns, that Subbayya's widow had acquired a right to a half share of the office by adverse possession, and that that half share descended to the plaintiff. Without framing issues on these points and without deciding them, both the lower Courts dismissed the suit, holding that as Gangadhara survived his son, he got the entire office by survivorship and that he did not lose his right thereto by reason of his insanity. The plaintiff preferred this Second Appeal.

R. Srinivasa Ayyangar, S. Viswanatha Ayyar and P. N. Nageswara Ayyar for appellant.

T. R. Venkatarama Sastriyar for the respondents.

The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The judgment of the District Judge proceeds on the footing that the son predeceased the father; and then he discusses the question of law on the assumption that the father was insane for years and died a madman. Mr. Srinivasa Ayyangar argues, that if the assumption is well-founded, the view of the law taken by the District Judge is wrong. Mr. Venkatarama Sastri on the other hand argues, that unless the nature of the father's insanity is distinctly found, the question of law would not arise. The plaintiff ought to have asked for an issue on this question, but, as the judgment appealed against, proceeds on the assumption that the father was insane, we think it desirable that a distinct issue as to the nature of the insanity should be tried, before dealing with the question of law. As it was the fault of the plaintiff that such an issue was not raised earlier, we think he ought to pay all the costs of the defendants in any event in the Court of First Instance, as well as the costs of the inquiry we are now directing. We must ask the District Judge to return findings on these questions:—

(a) Was Gangadhara insane?

(b) If so, for how long and till when?

(c) Was the insanity of such a nature as to disqualify him from holding property under the Hindu Law?

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(d) Was the son's widow in enjoyment of the office and emoluments after her husband's death, as his heir?

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In compliance with the order contained in the above judgment, the District Judge of Madura submitted the following

FINDINGS.

- "(a) That Gangadhara was insane.
(b) He was insane before his son's death and 10 to 12 years before his own death.
(c) The insanity was not of such a nature as to disqualify him from holding property under the Hindu Law.
(d) The son's widow did not enjoy the office and emoluments after her husband's death, as his heir."

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The JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The facts on which we have to give our decision are now undisputed. Gangadhara was entitled to an Archaka service in a temple. He was sane at birth, but subsequently became insane. He had an only son, Subbayya. After the son attained majority, the father became insane and died in 1880 without recovering sanity. Subbayya, during this period, was in sole possession of the Archaka office. He predeceased his father. (It is said that he died in 1874.) Subbayya left a widow, Kuppammal, who died in 1911. Gangadhara's widow, Pappammal, died in 1912. Plaintiff sues as reversioner of Subbayya, the son. Defendants are the daughter and grandsons of Gangadhara. They are sister and sister's sons of Subbayya. If the property belonged to Subbayya, the defendants being only the sister and sister's sons of the owner will be excluded by the plaintiff. If, on the other hand, Gangadhara was the owner at the time of his death, the defendants, as his daughter and daughter's sons, would exclude the plaintiff. The principal question for decision is whether Gangadhara having become insane, Subbayya became the sole owner by survivorship, to the exclusion of his father.

A subsidiary question is whether the two widows, mother-in-law and daughter-in-law, enjoyed the property in such a manner and with such intention as to have prescribed, for a half share each.

The main point for consideration is practically one of first impression. We have to examine the texts of Hindu Law for arriving at a decision. The case was argued with conspicuous ability on both sides, as may be expected of the learned vakils engaged on either side.

I shall first dispose of the extreme contention put forward by Mr. Venkatarama Sastriyar for the respondent. He contended that unless insanity is congenital, there is no exclusion from inheritance. On this question there is direct authority. In *Deo Kishen v. Budh Prakash*(1), a Bench of five Judges, after examining the texts of Hindu Law, decided that insanity need not be congenital. In *Murariji Gokuldas v. Parvatibai*(2), the same view was expressed. Before the Judicial Committee, in *Baboo Bodhnarain Singh v. Baboo Omrah Singh*(3), the position was taken for granted, that insanity need not be congenital. As against these decisions, we have *Sanku v. Puttamma*(4). The learned Judges, one of whom was Mr. Justice MUTTUSWAMI AYYAR, very summarily dealt with the question. They do not quote the cases I have referred to, nor do they discuss the texts of Hindu Law. *Raghava Mudaliar v. Narayanasami Mudaliar*(5), a later decision of this Court, is not consistent with *Sanku v. Puttamma*(4). However, as there is a direct decision of this Court on the point, I shall deal with the texts relating to it. Mr. Venkatarama Sastriyar conceded that the word in Manu's text, Chapter IX, Sloka 201, 'Unmatha' (mad) was not qualified by the word 'Jathi' (from birth) which governs *Antha vadhira*n (the blind and the deaf). This is indicative of the view that other defects considered in the text need not be congenital. Mr. Justice SADASIVA AYYAR has held, regarding blindness, mentioned in the same text, that the rule is obsolete. I am unfortunately unable to apply that principle to the present case. Courts here and the Judicial Committee have regarded this injunction of law as a living principle. I must perforce give effect to it. The argument of the learned vakil for the respondent was directed to showing that of the three disqualifications mentioned together under this head (namely, idiocy, insanity, and

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(1) (1883) I.L.R., 5 All., 509 (F.B.). (2) (1876) I.L.R., 1 Bom., 177.
(3) (1870) 13 M.I.A., 519. (4) (1891) I.L.R., 14 Mad., 289, 2.
(5) (1894) 4 M.L.J., 88.

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dumbness), the first and the last must necessarily be congenital; and that consequently, the middle one must have been included by the sage as partaking of the same character. In the first place, it is not clear that *Mukatva* (dumbness) would operate as an exclusion, only if it is congenital. It is true that it has been held in some cases that the text under discussion must be restricted to congenital dumbness. From a decided case to impute to the text writer that he regarded that dumbness can never be anything but congenital is not an easy process. The learned vakil suggested that a dumbness that supervenes was not really what Manu meant; such supervening dumbness may not exclude the person from inheritance, but I am not prepared to say that it cannot be permanent, if it is not congenital. I must therefore hold that it has not been proved that all the three instances classed together by the author are examples of congenital defects. No doubt idiocy is not a supervening disease. We have therefore this situation. Three disqualifications are enumerated. One of them is *prima facie* congenital: another need not be: the third is more often than not a supervening disease. In these circumstances can it be contended that the author by referring to them as a class intended to indicate that as these disqualifications *ex necessitate* must relate to what exists from birth, it was superfluous to prefix them with the adjectival clause, *Jathi* 'from birth,' as he did with regard to another category of disqualifications? I am not prepared to take this view. According to Mimamsa rules of interpretation, an adjective qualifying one clause should not by implication qualify a different clause. In this view, the word '*Jathi*' does not govern '*Unmatha*.' The learned vakil for the respondent quoted the opinion of Sarbhadbhikari, at page 962 of his book, in favour of his contention. The author does not express any definite conclusion. Nor is Colebrook's Digest, Vol. II, 432, a considered opinion. I am not prepared to disagree with the view of the Full Bench of the Allahabad High Court in *Deo Kishen v. Budh Prakash*(1) on this question.

I shall now deal with the main question. The portion relating to exclusion from inheritance finds a place in Chapter II, section 10, of Mitakshara. It need hardly be mentioned that

(1) (1882) I.L.R., 5 All., 509 (F.B.).

Chapters, sections, and placita owe their existence to Mr. MUTHUSAMI GURUKKAL v. MEENAMMAL. SESHAGIRI ATTAR, J. Colebrook's labours and not to any arrangement by the Commentator himself. Vignaneswara only makes a running commentary on the texts of Yagnavalkya, which he quotes as he proceeds. The whole discussion, on this part of the subject, begins with a discussion of the meaning and attributes of *Daya*. I shall not attempt its definition here. The preamble to section 10 (which has been described as placitum 1) states,

"The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the reunited parcener."

Then follows the Yagnavalkya text, Sloka 140. Then definitions of the various expressions in the text are given. *Unmatha* 'a madman', is thus defined—

"affected by any of the various sorts of insanity proceeding from air, bile, or phlegm, from delirium, or from evil spirits."

This is in placitum 2. Placita 3, 4 and 5 further explain the text. Then we come to placitum 6. . . .

"They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment."

Placitum 7 refers to cases in which the disqualification subsequently disappears. The Commentator says that such cases will be regulated by the same principle by which sons born after a partition are provided with a share. Placitum 9 is important. The Commentator begins the examination of the next text of the Smṛithi with this preamble—"The disinherison of the persons above described seeming to imply disinherison of their sons," the author adds and then quotes the text which is in these terms:—

"But their sons whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects,"

and comments on it in the 10th placitum onwards. Placitum 10 says,

"The sons of these persons, whether they be legitimate offspring, or issue of the wife, are entitled to allotments, or are rightful partakers of shares, provided they be faultless or free from defects which should bar their participation, such as impotency, etc."

This corresponds to Manu, Chapter IX, Sloka 203. These are the only citations relevant for the purpose. A few general

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observations may be made here before examining the contention of the learned vakils.

(a) The rules enunciated in this Chapter are exceptions to the general principles of inheritance. Consequently they should be construed strictly. As far as possible, deducing by analogy a class of exceptions not clearly covered by the words, should be avoided. The Hindu Law is no exception to the rule that it would lead Courts into a false position to hold that every rule must be given its logical extension. This caution is specially necessary in regard to suggestions to multiply exceptions.

(b) The rules are expositions, partly from usage and partly from an attempt to reconcile conflicting Smrithi texts, of the views of the Commentator. He found a state of society which demanded change. To satisfy this demand, while doing lip service to the inviolability of the written word, he not unfrequently takes liberty with the text. Therefore, care should be taken not to confuse the original injunction with its subsequent emendations. For example, the analogy of the after-born son is not in the particular text of Yagnavalkya relating to this subject. What Vignaneswara did was to find a pretext for obviating an injustice. He found in Sloka 123 of the Smrithi a rule relating to after-born sons. He introduced that as a good and reasonable solution of the problem relating to the recovery of normal health by the disqualified heir. This analogy in some cases has been pushed too far in some decisions and by some writers on Hindu Law. It is at least doubtful whether Vignaneswara intended that his rule should be subjected to a searching examination by the importation of all the difficulties with which the rule about the share of the after-born son bristles.

(c) Ideas which we find imported into the discussion of this question by speaking of the inheritances 'vesting,' of 'being divested,' 'of the succession opening on the death of the father,' etc., which may have meaning when applied to Jeemutha Vahana's exposition of Hindu Law are not correctly applied to Vignaneswara's School of law. The reiteration by the latter that property is by birth should be carefully borne in mind. This last observation is specially applicable to dicta in some of the decided cases. It appears to me that in these decisions instances relating to survivorship have been considered as if they were cases of pure inheritance and of collateral succession

Now I shall proceed to consider the two theories advanced. Mr. K. Srinivasa Ayyangar's contention amounts to saying, that a son of a Mitakshara father has only the potentiality of taking a share, and that that potentiality is lost by his being subject to any of the disqualifications enumerated. The moment that the disqualification, patent or latent, exhibits itself, he must be put aside subject only to his having the right of maintenance; on his emerging free from the disqualification, the potentiality revives; and if he is alive at the time of partition in this reformed condition, he will take a share.

Mr. Venkatarama Sastriyar's contention, on the other hand, is that the son is a sharer or share-taker from the moment of his birth. He ceases to be the share-enjoyer when he is subject to the disqualification. His right is not lost, but is only in abeyance; and the provision for maintenance is not a deprivation of the inherent right but a beneficent provision for management of the property so long as the disqualification lasts.

A great deal has been said, and can be said, in favour of either of these contentions. I do not think that an examination of the reasons for the exclusion would help us much in deciding the question. I might briefly refer to it, as it has some bearing on the point. Visvarupa, a Commentator of the Yagnavalkya Smrithi (and who wrote his dissertation before Vignaneswara), seems to have been very sceptic about the reasonableness of the process of exclusion. He refutes the idea that exclusion is based on the theory of sin in the previous birth, and cites instances to show that heirs of whom it can safely be predicted that they were sinners are among those to whom unqualified inheritance is given. He also rejects the theory that inability to perform religious rites in this birth might have been the ground for exclusion. Here again he quotes instances. His view seems to be 'We find the exclusion there and we must perforce accept it.'

If the exclusion is not based on original sin or subsequent incapacity to offer oblations and the like, the suggestion that it was due to a belief in the inability of the heir to manage temporal affairs appears more plausible. Very likely the rule is an outcome of a hazy notion that the property should be preserved for the disqualified person by those who are related to him. The law as to guardianship has developed much in later days. Even now

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it is not perfect. It looks as if the old law-givers by providing for maintenance did not intend to deprive the heir of his inheritance, but only to provide for its management during incapacity.

Mr. Srinivasa Ayyangar in analysing the placita relating to the periods of partition contended that the right to a share is only predicated on the contingency of the heir existing in a normal condition, at the time partition is made. It is true that if the sharer dies undivided before the actual partition takes place, the property will be distributed as if he was not born at all. In answer to the suggestion that this theory is inconsistent with giving rights to his son or grandson in the father's share, the learned vakil argued that these persons are specially mentioned. It seems to me that the rule in placitum 6, section 10, that a person is excluded if he is disqualified at the time of partition, is not a pronouncement that the right ripens and is capable of enforcement only then, but a principle indicating who should be allotted shares at the division. The principle of *right by birth*, which Vignaneswara insistently enunciates, would become nugatory if a bare potentiality is assigned to that right.

The other view receives considerable support from *Saraswati Vilasa*, a treatise which is a binding authority in this part of India. The author quotes Manu in placitum 148, and then comments on it in placita 149 to 157. He says :

"From this coupling together, it follows that they have shares, but that they should, though having shares, be supported as they could marry."

The view is that, if any of the excluded persons is capable of marriage and of begetting children, their shares should be managed for their benefit, and they should be given maintenance. This seems to follow from Manu, Chapter IX, Sloka 203. The Professors of the Science of Eugenics may rightly protest against this tacit assumption by the ancient sages that an insane person can marry; but so long as the State does not prohibit such marriages the law cannot be abrogated. The ancient law-givers even provided for the begetting of children on the wife of the incapacitated person. They seem to have been as anxious for giving facilities for the procreation of children as some of the sanest publicists and the heads of States after the Great War, are to recognize and encourage the rearing up of offspring however begotten. However that may be, the view of the

author of *Saraswati Vilasa* is more in consonance with the view that the right exists, but is only obscured for the time being. Mr. Srinivasa Ayyangar suggested that the parenthetical clause about capacity for marriage, suggested by the author of the *Saraswati Vilasa*, does not destroy the root doctrine that the right is enforceable only, if and when there is full mental capacity at the date of partition. But the author distinctly says that the share should be managed because of the possibility of marriage, thereby indicating that it exists and is not lost altogether. My conclusion, therefore, is that the right comes into existence at birth, subsists all through, although it is incapable of enforcement at the time of partition, because of the disqualification then existing.

Mr. Srinivasa Ayyangar drew our attention to the statement in Steel's Law of Custom, in which the author says that the custom is to regard the insane man as entitled to a share, although he is not given the enjoyment of it.

Coming to the decided cases: in *Raghava Mudaliar v. Narayanasami Mudaliar*(1), there is an *obiter dictum* to the effect that if a Hindu father dies leaving ancestral property and a son, insane at the time of his death, the son is not entitled to take the property. The dictum was not necessary for the case, and curiously enough, *Sanku v. Puttamma*(2) where a contrary view was taken was not considered in this judgment. In this latter case, which relates to the inheritance of an Aliyasantana family in South Kanara, it was decided that the surviving member, who was a female and was insane, was the owner of the property. I have dissented from this judgment in so far as it relates to the question that insanity should be congenital. *Krishna v. Sami*(3) does not affect this case directly. That was a case relating to a right of the sons of a deaf and dumb member. It was held, that the fact that the father was disqualified and that the sons were born after the death of their grandfather did not disentitle them to take their father's share. The learned Judges after examining the texts seemed inclined to hold that property vested on the birth of the heir. However the present question was not considered in that case. These are all the Madras authorities. There are some cases in Calcutta which

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(1) (1894) 4 M.L.J., 88.

(2) (1891) I.L.R., 14 Mad., 289.

(3) (1886) I.L.R., 9 Mad., 64 (F.B.).

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are not quite reconcilable with each other. The earliest of them is *Balgobinda v. Lol Buhadoor*(1). The case related to the lunacy of one Ramsahai. He seems to have given his name to a number of cases on this point. It is clear from this case that a committee was appointed to manage his share. This decision impliedly supports the view that insanity does not operate as deprivation of the birth right. The next case, in which also the insanity of the same individual was in question, is *Ram Sahye Bhukkut v. Lalla Laljee Sahye*(2). There are conflicting dicta in that judgment which render it valueless as authority. The suit was brought to recover property on behalf of the lunatic. The learned Judges while holding that he had a right to the property refused to disturb the alienees on the ground that if he was to recover the property, he would not be in a position to have it partitioned. Another decision in that same volume, relating to the insanity of the same individual, is *Ram Soonder Roy v. Ram Sahye Bhugut*(3). Both these cases were considered in *Abilakh Bhagat v. Bhekhi Mahto*(4), which again was a case relating to the insanity of the same individual; it was held that the right to property existed, although the right to its enjoyment was unenforceable. PRINSEP, J., was of opinion that the earlier decisions, *Ram Sahye Bhukkut v. Lalla Laljee Sahye*(2) and *Ram Soonder Roy v. Ram Sahye Bhugut*(3), were not good law. These are the Calcutta decisions. In Allahabad, there is a direct decision in *Tirbeni Sahai v. Muhammad Umar*(5), but the learned Judges speak of succession opening on the death of the father, which would not be right in the case of a Mitakshara son. *Ram Singh v. Musammat Bhani*(6) was a case of pure inheritance. In *Man Singh v. Musammat Gaini*(7), the learned Judges took the view enunciated in *Abilakh Bhagat v. Bhekhi Mahto*(4). These are all the cases on the point.

None of them deals with the exact question we have to decide. The dicta in some of them however support the view I have taken.

(1) 1854 Sadar Diwani Adalat, 244.

(2) (1882) I.L.R., 8 Cal., 149.

(4) (1895) I.L.R., 22 Cal., 864.

(6) (1916) I.L.R., 33 All., 117.

(3) (1882) I.L.R., 8 Cal., 919.

(5) (1906) I.L.R., 28 All., 247.

(7) (1918) I.L.R., 40 All., 77.

The next point which Mr. K. Srinivasa Ayyangar pressed upon us is that the Lower Appellate Court has not given a correct finding on the question of prescription, which we asked him to decide. The question arises in this way. After the death of Subbayya, the son, his widow and the wife of Gangadhara were doing the puja service in the temple. There is evidence on both sides which indicates that they were enjoying the worship in equal turns. The District Judge has not discussed this evidence. For example there is the written statement, paragraph 3, which suggests this; paragraph 4 also may be referred to. There are Exhibit I and Exhibits III, T and J. There is the deposition of D. W. I. Although there was no issue about prescription in the first Court as the question there was as to who died first, whether Gangadhara or Subbayya, the point is one which does require adjudication having regard to the view I take of the case. I must therefore reverse the decree of the District Judge and remand this appeal to him for disposal on the question whether the widow of Subbayya had prescribed for a half share in the property after the death of her husband and if so, whether she acquired a right to it at the time of her death. It may be necessary to take fresh evidence in the case, because it is possible that the enjoyment of Subbayya's widow was in lieu of maintenance or it may be that Gangadhara's wife out of affection allowed her to enjoy the turn of worship. These matters have not been elucidated, because there was originally no issue on this question. With these observations I must remand the case for disposal to the Lower Appellate Court. The parties will pay and receive proportionate costs in this Court, and the costs in the Lower Appellate Court will abide the result.

MOORE J.—I agree.

MOORE, J.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1919
April 8,
December,
11.

MAZUMDAR RAMAKRISHNA RAO PANTULU (PETITIONER),
APPELLANT,

v.

MAZUMDAR BALAKRISHNA RAO PANTULU (RESPONDENT),
RESPONDENT. *

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment of partition decree—Adjustment as to partition of immoveable property—Necessity for certification by decree-holder—Sale by one decree-holder to another of his share in some of the lands decreed—Sale, not certified to Court, effect of—Subsequent application in execution by vendor for partition of lands sold and for other reliefs—Bar of execution.

Order XXI, rule 2, Civil Procedure Code, applies to partition decrees which provide for the payment of money as well as for other relief, such as a partition of immoveable property, and to adjustments with regard to such property. Such an adjustment cannot be recognised, unless certified or recorded as required by the rule.

Abdul Latif Sahib v. Bathula Bibi Ammal (1914) 15 M.L.T., 338, and *Sethurama Sahib v. Chota Raja Sahib* (1917) M.W.N. 327 followed; *Kelu Nair v. Meenakshi* (1918) 25 M.L.J. 586 not followed.

APPEAL against the order of B. C. SMITH, the District Judge of Ganjām at Berhampur, in Original Execution Petition No. 50 of 1915, in Original Suit No. 19 of 1909.

In a suit for partition instituted by the appellant and respondent as plaintiffs against their brother as defendant, a decree for partition was passed on an award of arbitrators. The decree was executed by the defendant in respect of his share. The present application for execution was filed by the appellant to recover sums of money as well as partition of the lands, as between himself and the respondent. Prior to this application the appellant had sold his share in some of the lands comprised under the decree to the respondent, but this sale was not certified to the Court, nor satisfaction entered in respect thereof by order of Court. The vendor having applied to execute the decree for partition and recovery of his share in the lands sold to the respondent as well as other lands and for other

reliefs given by the decree, the respondent pleaded *inter alia* that the sale of the lands aforesaid was an adjustment in bar of execution of decree in respect of lands comprised in the sale. The lower Court held that adjustment need not be certified under Order XXI, rule 2, Civil Procedure Code, and excluded the lands comprised in the sale from execution proceedings but allowed execution in other respects. The decree-holder, who sold the lands, preferred this Civil Miscellaneous Appeal to the High Court.

N. Rama Rao for the appellant.

P. J. Kuppanna Rao for the respondent.

OLDFIELD, J.—The lower Court's conclusion as to items 2, 3, 7, 8, 9 is based on petitioner's admission in evidence, and we have been shown no reason for dissent. The appeal on this point fails.

The remaining argument is as to Exhibit I, and the question is whether it constitutes an adjustment and the Court can take notice of it, if it was never certified to it, as required by Order XXI, rule 2, Civil Procedure Code. It was a sale by petitioner to the other decree-holder, respondent, of part of the property, which was to be divided; and we have no doubt that the transfer was an adjustment of the decree. On the question whether Exhibit I should have been certified to the Court, several decisions have been quoted regarding the application of Order XXI, rule 2, to decrees, which, like the case before us, include provision for payment of money as well as for other relief. Of the two cases referred to by the lower Court, it is not clear that the decree in *Krishna Hande v. Padmanabha Hande*(1) contained any provision of the former description, and in *Abdul Latif Sahib v. Bathula Bibi Ammal*(2), Order XXI, rule 2, is applied to all decrees under which money is payable; and there is nothing in it to support the restriction of its application proposed by the lower Court to provisions for payment of money. That interpretation of it was in fact rejected in *Sethurama Sahib v. Chota Raja Sahib*(3). In the latter case a previous unreported decision of my own is referred to *Annamareddi Venkayya v.*

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(1) (1913) 25, M.L.J., 442.

(2) (1914) 15 M.L.T., 338.

(3) (1917) M.W.N., 327.

* Civil Miscellaneous Appeal No. 248 of 1918.

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Annamareddi Ramanna(1) but it was founded on a judgment of SADASIVA AYYAR, J., in *Kelu Nair v. Meenakshi*(2), the principle of which he statedly reconsidered in *Sethurama Sahib v. Chota Raja Sahib*(3). The recent course of decisions of this Court is strongly marked, and in a matter of this nature I should not depart from it except for far stronger reason than is available. In these circumstances, following the case last mentioned, I think that the lower Court should have applied Order XXI, rule 2, to the adjustment evidenced by Exhibit I. It is said, however, that in fact, the decree, so far as the properties dealt with in Exhibit I are concerned, was adjusted at a later date by the presentation by all the parties to it of Execution Application No. 369 of 1913, dated 8th July 1913. That application certainly certifies satisfaction as between the present parties and their brother, the defendant in the suit. But it is not possible to say on the information before us whether it involved any satisfaction as between the present parties, or whether all the properties in Exhibit I being in Schedule A referred to in Execution Application No. 369 of 1913, the division of Schedule A properties between them still has to be effected and the decree in respect thereof remained unexecuted.

Again respondent asks for an opportunity to ascertain whether Exhibit I was certified to the Court within the time allowed by Order XXI, rule 2; and in the absence of any categorical statement by the lower Court on the point, we think that he should be allowed an opportunity to show that there was such certification by production of documentary evidence regarding it.

We therefore call on the lower Court to submit findings on the issues:—

1. "Did Execution Application No. 369 of 1913 effect a valid satisfaction of the decree, so far as it related to immoveable properties, which renders it unnecessary for respondent to prove that Exhibit I was certified to the Court?"

2. "Was Exhibit I ever certified to the Court and, if so, were the provisions of Order XXI, rule 2, complied with?"

Fresh evidence may be taken with reference to the first issue and fresh documentary evidence with reference to the

(1) C.M.S.A. No. 11 of 1915 (unreported).

(2) (1913) 25 M.L.J., 586.

(3) (1917) M.W.N., 327.

second. The finding should be submitted within six weeks after the re-opening of the lower Court after the midsummer vacation and seven days will be allowed for filing objections.

SESHAGIRI AYYAR, J.—As regards Exhibit I, the learned District Judge was right in holding, on the authority of *Kelu Nair v. Meenakshi*(1), that the adjustment relating to the partition of the immoveable properties was not within the mischief of Order XXI, rule 2. But one of the learned Judges who decided that case has receded from the position taken up by him, following the decision of the learned Chief Justice and AYLING J., in *Abdul Latif Sahib v. Bathula Bibi Ammal*(2), and my learned brother, who followed *Kelu Nair v. Meenakshi*(1) in *Annamareddi Venkayya v. Annamareddi Ramanna*(3), is prepared to accept the later view.

If the matter were *res integra* I would have had some hesitation in holding that the words in Order XXI, rule 2, clause (1) "or the decree is otherwise adjusted in whole or in part," related to portions of a decree in respect of which "money is not payable." However, acting on the principle that there should be uniformity on a question of procedure, I follow the two later decisions, namely, *Abdul Latif Sahib v. Bathula Bibi Ammal*(2) and *Sethurama Sahib v. Chota Raja Sahib*(4), and hold that the present case is covered by Order XXI, rule 2, clause (1). I agree with my learned brother in his conclusion and direction on the other points argued before us.

In compliance with the order contained in the above judgment the District Judge of Ganjam at Berhampur submitted findings on the two issues in the negative and the Court delivered the following

JUDGMENT.—The appeal is allowed to the extent that the lower Court's order will be modified by insertion of a direction that the immoveable properties mentioned in Exhibit I should be divided in addition to those already specified. There will be proportionate costs here and in the lower Court.

K.R.

(1) (1913) 25 M.L.J., 586.

(2) (1914) 15 M.L.T., 388.

(3) C.M.S.A. No. 11 of 1915.

(4) (1917) M.W.N., 327.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

KOLANGERETH RAMAN NAIR AND THREE OTHERS,
(PLAINTIFFS), APPELLANTS.

v.

KOLIMATAMULLATHIL MARIYOMMA AND FIVE OTHERS
(DEFENDANTS NOS. 2 TO 7), RESPONDENTS.*

Landlord and tenant—Denial of landlord's title—Forfeiture of tenancy—Denial that landlord's title was subsisting—Adverse possession—Kudima tenure, nature of—Part of future services—Resumption of lands—Right to eject on denial of title.

A denial by the tenant of his landlord's title must, in order to work a forfeiture of the tenancy, be brought home to the knowledge of the landlord and it must be unequivocal and clear. The receipt and retention by the tenant of a document of sub-lease in which he is spoken of as the janmi of the lands demised, cannot operate as a denial of the landlord's title so as to cause a forfeiture of the tenancy.

If a tenant denies a subsisting title in the landlord and claims that the property became vested in him by adverse possession, such conduct amounts to denial of landlord's title prior to suit.

Lands granted on kudima tenure for past services are not resumable. But if granted for future services they are resumable on a refusal to perform service. A denial by such tenant of the landlord's title is tantamount to refusal to render service.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Tellicherry, in Appeal Suit Nos. 465 and 477 of 1916 preferred against the decree of N. GOVINDAN NAYAR, the District Munsif of Kuttuparamba, in Original Suit No. 707 of 1913.

The plaintiffs, who are the Uralers of Tricharamannur devaswam, sued to recover three items of lands from defendants Nos. 1 to 4 who were members of a tarwad, and the other defendants, who were tenants in possession under the former defendants. Plaintiffs' case was that the devaswam granted the plaintiff properties to the tarwad of defendants Nos. 1 to 4 on kudima right, and that defendants Nos. 1 to 4 by denying the title of the devaswam long prior to suit had incurred forfeiture of

* Second Appeal, No. 1825 of 1918.

their tenancy. The plaintiffs instituted the suit to recover the RAMAN NAIR properties. The second defendant, to whose tavazhi the lands were claimed to belong, did not admit the kudima tenure alleged by the plaintiffs. In 1876, when item 1 was attached by a decree-holder in execution of a decree obtained by him against the devaswam, the predecessor-in-title of the second defendant filed a claim petition, Exhibit D, in which the claimant set up that the title of the plaintiff's devaswam in the suit properties had become extinguished, and that the property in these items had become vested in him by virtue of adverse possession against the devaswam. The material portions of Exhibit D, dated 19th June 1876, were as follows:—

EXHIBIT D.

In the Court of the Subordinate Judge of North Malabar.—

Petition presented under section 246 of the Code of

Civil Procedure by, etc.

In the matter of the decree debt in Original Suit No. 30 of 1863 on the file of this Court payable by the defendants Krishnan Nayar and three others to Krishna Pisharoti . . . nilom has been entered as items 1 and 7 in the Proclamation, as if they belonged to the judgment-debtors. Reasons are given hereunder for the release of these items from attachment. The said nilom has been acquired as jenm by our ancestors and the jenm has been confirmed by the Diary in Miscellaneous Petition No. 42 of 1871, on the file of the Tellicherry Munsif. Paramba No. 7 has been got by our ancestors more than sixty years ago on kudima jenm from the devaswam and is now held on kuzhikanums by tenants who have effected considerable kuzhikanum (improvements) and house and cattle-shed and others. On the western side of it there is a shop built by Kunhali and occupied by him with the permission of No. 1 petitioner, and the jenm right of the devaswam on this paramba is barred by limitation.

Therefore it is prayed that evidence may be taken and the two above properties may be released from attachment and our cost given.

The decree-holders referred to in the above petition not opposing, the claim petition was allowed by the order of the Subordinate Judge, dated 30th June 1876.

As regards items 2 and 3, in the present suit, the denial of title relied on by the plaintiffs was said to consist of the statements made in three sub-leases executed to the predecessor-

RAMAN NAIR in-title of the second defendant in 1896, 1896 and 1904, by the
MARIYOMMA. sub-lessees. The three documents, were filed as Exhibits II, III and IV and were similar in their terms. The material portion of Exhibit II was as follows :—

"Marupattam, executed on 4th August 1886, to Biyyathamma and Konhammad by Kandan, etc. I have taken charge from you for twelve years from this date on kuzhikana pattom kadiyiruppu tenure of Yogimadathel paramba described below which is your *jenmom* and was in your possession before and of which possession has now been given to me. The rent fixed to be paid annually, after defraying the expenses of the upkeep of melabhayans consisting of 93 coconut trees, etc., in the said paramba belonging to you the *jenmi*, the usufruct of which I shall enjoy, is Rs. 20.

without paying regularly every year the rent, etc., due, I keep arrears, or if within one year I fail to plant kuzhikana ubhayams or kuzhikhoors, etc., or if I cut away any tree without the *jenmi's* permission and thereby loss is incurred, it is agreed that I can be evicted even before the expiry of the term and that arrears of rent shall carry 12 per cent interest. . . . The well also belongs to you.

(Signed) KANDAN."

The District Munsif held that the three items belonged in *jenm* to the plaintiff's devaswam, that there was forfeiture of the tenancy by reason of the defendants' denying the title of the landlord, and that the landlord's title was not extinguished by limitation, and he accordingly decreed the suit in favour of the plaintiffs. On appeal by the second defendant, the Subordinate Judge held that there was no denial of the landlord's title sufficient in law to cause a forfeiture of the tenancy, and he accordingly reversed the decree of the District Munsif and dismissed the suit. The plaintiffs preferred this Second Appeal.

R. P. M. Menon for the appellant.

Mir Zyn-ud-din for the first respondent.

The JUDGMENT of the Court was delivered by
SESHAGIRI **AYYAR, J.**—The first question in this case is whether there is a denial of title, and if so, does the denial cover all the items in the suit or only some. The second question is, supposing there is a denial, whether, having regard to the nature of the tenure, forfeiture is incurred. On the first question the

Subordinate Judge has made some obvious mistakes which have confused the issue. He is clearly wrong in saying that the denials in Exhibits II, III, and IV are only repetitions of the denial in Exhibit D. Exhibit D relates to item No. I. Exhibits II, III, and IV relate to items 2 and 3, and the nature of the denials in these two sets of documents is altogether different. Exhibit D will be considered later on. As regards the other documents we may first deal with Exhibit II, as observations with regard to one of them would apply to the others as well. Exhibit II is a sub-lease executed to the defendants. In that, the sub-lessee uses the expression with reference to the property demised, "belonging to you the *jenmi*". In another place the language used is, "without the *jenmi's* permission". Mr. Menon argued that as the defendant accepted these documents without raising objection to the language employed, he must be deemed to have tacitly assumed the role of a *jenmi*, and to have denied the title of the plaintiff. This seems to be a very far-fetched suggestion. It is well understood in this Presidency, that the denial must be brought home to the knowledge of the landlord and it must be unequivocal and clear. In *Kemalooti v. Mohamed*(1), and in *Rama Aiyangar v. Anga Gurusami Chetti*(2), this principle was distinctly stated. See also *Venkatachariar v. Narasimha Iyengar*(3). Here, the defendant did no act which can be said to amount to a denial of the title of his landlord. It has not been pointed out to us that the landlord was made aware of any denial of title by the defendant. Under these circumstances the receipt and retention of a document by the defendant in which he is spoken of as the *jenmi* could not operate as a denial of the plaintiff's title. Therefore, so far as items 2 and 3 are concerned, the decision of the lower Appellate Court should be confirmed, though not for the reasons given by it.

The case as regards item 1 is different. The alleged denial is contained in Exhibit D. That was a claim petition presented in the year 1876 by the defendants' predecessor-in-title. The occasion for this claim was an attempted sale of the property in execution of a decree against the plaintiffs' predecessor-in-title. In the claim it was stated that the property should not be sold

(1) (1918) I.L.R., 41 Mad., 629.

(2) (1918) 8 L.W., 109.

(3) (1918) M.W.N., 848.

RAMAN NAIR v. MARIYOMMA. SESHAGIRI AYYAR, J. as the "jenm right of the devaswam on this paramba is barred by limitation". This is in effect denying the title of the jenmi to the property. In *Foa on Landlord and Tenant*, it is stated that the setting up of a prescriptive title would amount to a denial of the landlord's title. The decision in *Neall v. Beadle*(1) is referred to. Although that judgment is not quite explicit on the point, it stands to reason that where a tenant impeaches the title of the landlord on the ground that there is no subsisting title as the property vested in him by virtue of adverse possession, such an attitude should be regarded as amounting to a denial of title.

Now comes the important question, whether having regard to the nature of the estate in the possession of the defendants such a denial would entail forfeiture. It is now well established in this Presidency, following the Privy Council ruling in *Abhiram Goswami v. Shyama Charan Nandi*(2), that a perpetual lease can be forfeited by the tenant denying the title of the landlord. In the present case the defendants' claim that they have been in possession of the property for a very long time and that they have made improvements upon the property. The plaintiffs' allegation is that the properties in suit belong to the devaswam, of which the plaintiffs are Uralers, and that they were leased to the tarwad of the defendants on *kudima jenmam*. As to when it was so leased, and whether it was within the memory of man, does not appear. The findings of the Court below, which may be accepted, are that the property belonged originally to the plaintiffs' devaswam and that the first defendant's predecessors must have come into possession at some time under the devaswam. The contention of the respondents is that a *kudima* or *adima* right is not resumable under any circumstances. There are no considered decisions upon the point. In *Thunkunni Achan v. Manehu Nair*(3), it was held that an assertion of *jenmam* right by the *kudima* will not work a forfeiture so as to enable the landlord to eject him. The decision cited by the learned judges is not applicable to the present case. On the other hand in *Mahomed Hussain Sahib v. Nagaratnam Pillai*(4) BENSON and KRISHNASWAMI AYYAR, JJ., confirmed a judgment of Mr. PHILLIPS

(1) (1912) 107 L.T., 648.
(3) (1915) 2 L.W., 102.

(2) (1909) I.L.R., 36 Cal., 1003.
(4) S.A. No. 1418 of 1918 (unreported).

as District Judge in which he held that an *adima* right can be forfeited by denial of title. The judgment of the High Court simply says: "We think it is a perpetual lease. The second Appeal is dismissed with costs". In *Kunhambu Vazhunavar v. Kunhi Moya*(1) BENSON and WALLIS, JJ., upheld the decision of Mr. VENKATRAMANA PAI, District Judge, who refused to disturb the *kudima* tenant from his holding, although there had been a denial of title. In the judgment of the High Court there was no discussion of the question.

A consideration of the nature of the tenure suggests that this case cannot be disposed of without further inquiry. In Graem's Glossary an *adima* grant is described thus:—

"The *adima* grant of a *paramba* or garden was also often conferred by a superior lord, or *tala Udaya Tamburan*, upon his own *Adiyan* or vassal; but here it was in the nature of an *Inam* or gift, no consideration having been received for it by the proprietor. An annual trifling tribute of superiority is, however, reserved to the proprietor to prevent the garden being entirely alienated. The garden reverts to the proprietor on failure of heirs on the part of the *adiyan*, and if the *adiyan* takes part with the enemies of his patron, the latter may resume the property. Under any other circumstances the *adiyan* cannot be dispossessed, and he has the right of burial within the garden."

"In this (describing a *kudima* grant) the land is made over in perpetuity to the grantee, either unconditionally as a mark of favour, or on condition of certain services being performed. The terms *adima* and *kudima* mean a slave, or one subject to the landlord, the grant being generally made to such persons. A nominal fee of about two fanams a year is payable to the landlord to show that he still retains the proprietary title. Land bestowed as a mark of favour can never be resumed; but where it is granted as remuneration for certain services to be performed, the non-performance of such services, involving the necessity of having them discharged by others, will give the landlord power to recover the land. The non-payment of the annual fee will form no ground for ousting the grantee, but it will be recoverable by action. The hereditary property of Native Princes cannot be conferred on this tenure, the ruling Prince having only the right of enjoyment during life without power to alienate. (Proceedings of the Court of the Sadder Adalat No. 18, dated 5th August 1856.)"

(1) S.A. No. 987 of 1904 (unreported).

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Logan in his Malabar Law accepts the above description as correct. In the report submitted by the Malabar Land Tenures Commission the above quotation is accepted as correctly defining the kudima and adima tenures. The question in this case is whether the grant was made for past services or for future services. If the former, apparently the tenure cannot be resumed. If the latter, there can be no question that for failure to perform the services the lands can be resumed. It may be taken that the denial of title is tantamount to a denial to render services. Therefore, before finally deciding the case, it is necessary to call for a finding whether the devaswam granted the lands in question to the defendants' tarwad for past services or for future services.

A further question must also be considered by the lower Court. Exhibit D is dated 1876. Since its date, it was suggested, the devaswam has received the prescribed rent and has therefore waived its right to enforce the forfeiture. There is no finding whether the devaswam was aware of its right to eject the defendants' tarwad on account of forfeiture for denial of title. The difficult question whether the landlord is entitled to enforce the forfeiture after a considerable period of time, even though he was aware of it and acquiesced in the tenant holding on as if there had been no forfeiture, need not be discussed at this stage. The lower Appellate Court must be asked to return findings on these questions on fresh evidence, if any, tendered within three months from this date. Seven days are allowed for objections.

In obedience to the order contained in the above judgment, the Temporary Subordinate Judge of Tellicherry submitted findings on the following three issues:—

(1) Whether the devaswam granted the lands in question to the defendants' tarwad for past services or for future services.

(2) Whether the devaswam has received the prescribed rent and has thereby waived its right to enforce the forfeiture.

(3) Whether the devaswam was aware of its right to eject the defendants' tarwad on account of forfeiture for denial of title.

His finding on issue (1), was as follows:—

"That the grant in question is not one made for future services and that there is no evidence to show that it is one made for past services."

His findings on issues (2) and (3) were as follows:—

"I, therefore, find issue (2) in the negative and on issue (3), I find that the devaswam became aware of its right to eject on account of forfeiture of the denial of title only in 1912."

This Second Appeal coming on for final hearing after the return of the findings of the lower Appellate Court the Court delivered the following

JUDGMENT.

We accept the finding and dismiss the Second Appeal with costs. (One set.)

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Spencer.

SRIMAN MADABHUSHI GOPALACHARYULU
(TEXTU DEFENDANT), APPELLANT,

v.
EMMANI SUBBAIMA AND SEVENTEEN OTHERS (DEFENDANTS
NOS. 3, 6, 7 TO 9, 11, 12, 14, 15 AND LEGAL REPRESENTATIVES OF
SECOND DEFENDANT AND PLAINTIFF'S LEGAL REPRESENTATIVES),
RESPONDENTS.*

1919,
November 26
and
December
16.

Civil Procedure Code (Act V of 1903), section 11, Explanation V and O. I, r. 8—
Res judicata—Private right claimed in common by several persons—Suit by some, others being impleaded as defendants—Bona fide litigation—Decision, whether binding on representative of deceased defendant, not brought on record.

Explanation V to section 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under Order I, rule 8, but also to cases where some of the persons claiming a private right in common with others litigate bona fide on behalf of themselves and such others.

A decision in a suit, instituted and conducted bona fide by some only of agraaharamdars of a village against the zamindar and the other agraaharamdars

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for a declaration as to the kattubadi payable by them to the zamindar, is res judicata against the representative of an aghaharamdar who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the appeal or the second appeal.

Rangamma v. Narasimha Charyulu, (1916) 81 M.L.J., 26, followed.

SECOND APPEAL against the decree of G. GANGADHARA SOMA-YAJULU, the Temporary Subordinate Judge of Ellore, in Appeal Suit Nos. 391 and 402 of 1915, preferred against the decree of K. KALYANASWAMI, the District Munsif of Tanuku, in Original Suit No. 483 of 1914.

Two of the aghaharamdars of Gopavaram Aghaharam instituted a suit, Original Suit No. 56 of 1901, on the file of the Subordinate Judge's Court at Rajahmundry, against the Receiver of the Nidadavolu Estate and the zamindar who claimed the zamindari, for a declaration that the Receiver was entitled to kattubadi only at the rate of Rs. 550 per annum on Gopavaram Aghaharam. The other aghaharamdars were also impleaded as defendants in the suit. The Receiver contended that the zamindar was entitled to a higher amount of kattubadi, viz., Rs. 714-14-0 per annum. The Subordinate Judge decreed the suit in favour of the plaintiffs. There was an Appeal, Appeal Suit No. 451 of 1905, and a Second Appeal in that case and the High Court remanded the Appeal to the District Judge for fresh disposal. The District Judge, on remand, passed a decree declaring that Rs. 714-14-0 was the correct kattubadi payable on the Gopavaram Aghaharam. A Second Appeal No. 838 of 1911, was preferred against the above decree of the District Judge, but was dismissed by the High Court. One of the aghaharamdars, namely, Prathivadhi Bhayankaram Rukmaniamma, had been joined as the sixth defendant in Original Suit No. 56 of 1901. She was joined as a respondent in Appeal Suit No. 451 of 1905, but she died in March 1903 during the pendency of the appeal in the District Court, but neither in the District Court, nor in Second Appeal to the High Court, was the legal representative of the deceased sixth defendant brought on record, but the name of the deceased sixth respondent was still kept on the record of the Appeal and Second Appeal. The present suit (Original Suit No. 483 of 1914) was instituted by the Receiver of the Nidadavolu Estate for recovering kattubadi due for faslis 1320 to 1322 at the rate

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declared in the previous suit. The suit was brought against the aghaharamdars, one of whom, the tenth defendant, claimed to be the legal representative of Rukmaniamma, who was the sixth defendant in the previous suit as already stated. The plaintiff contended that the decision as to the amount of kattubadi in the previous litigation was res judicata in the present suit; the tenth defendant pleaded that it was not res judicata, as Rukmaniamma, under whom he claimed, died before the remand order in the High Court, and her legal representative was not brought on record in the later proceedings in the previous suit. Both the Lower Courts held that it was res judicata and decreed the suit. The tenth defendant preferred this Second Appeal.

The Hon'ble *T. R. Ramachandra Ayyar* and *T. R. Krishnaswami Ayyar* for the appellant.

P. Venkataramana Rao for the seventeenth respondent.

WALLIS, C.J.—The subject of this suit is the amount of the kattubadi payable to the plaintiff zamindar by the defendants who are aghaharamdars, and the question argued before us is whether this is res judicata against the tenth defendant by reason of the decree in Second Appeal No. 838 of 1911 confirming the decree in Appeal Suit No. 451 of 1905, which decided the question against the aghaharamdars, reversing the decree of the Subordinate Judge in their favour.

In Civil Suit No. 56 of 1901, in the Court of the Additional Subordinate Judge's Court of Rajahmundry, two of the aghaharamdars sued the Receiver of the Nidadavolu Estate and the zamindar for a declaration that the kattubadi was only Rs. 550, joining the other aghaharamdars as defendants.

The Additional Subordinate Judge of Gōdāvari gave the plaintiffs a decree in Civil Suit No. 56 of 1901, which was reversed on 1st December 1910 by the District Judge of Kistna in Appeal Suit No. 451 of 1905. Prathivadhi Bhayankaram Rukmaniamma, one of the aghaharamdars through whom the present appellant (the tenth defendant) claims, was impleaded as the sixth defendant in the former suit and as the fourth respondent in the Appeal to the District Court. She died in March 1908 nearly three years before the disposal of the appeal and the

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appellant, who was the Receiver of the Nidadavolu Estate, failed to bring on her legal representatives, nor were they made parties in the Second Appeal to this Court preferred by the plaintiffs in Second Appeal No. 838 of 1911. The District Judge has found the amount of the kattubadi in the present case to be res judicata against the tenth defendant, Sriman Mudhambusi Gopalacharyulu, on the ground that he was impleaded in the Second Appeal as the representative of the deceased Rukmaniamma, but this appears to be an error as Prathivadhi Bhayanakaram Gopalacharyulu who was impleaded as the fourth respondent in the Second Appeal was the ninth defendant in the original suit and a different person from the present tenth defendant.

We must take it then that no legal representative of Rukmaniamma, through whom the tenth defendant claims, was brought on after her death either by the contesting defendant in his appeal to the District Court or by the plaintiffs in their Second Appeal to this Court. It has none the less been argued before us that the suit is res judicata as against the tenth defendant by virtue of Explanation VI of section 11 of the Code of Civil Procedure, Act V of 1908, which says that

"where persons litigate bona fide in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

It is clear from the judgment of the District Judge in the previous suit, which was confirmed in Second Appeal, that the plaintiffs in the previous suit were litigating on behalf of themselves and the other agraaharamdars, whom they joined as defendants, because they were unwilling to sue as plaintiffs, as regards the amount of kattubadi, and that they obtained a decree in the Munsif's Court which was reversed by the District Judge on the ground that the full amount of kattubadi claimed by the contesting defendant, the Receiver of the Estate, was payable; and the position therefore is that Rukmaniamma, the sixth defendant and her heirs were not represented in the Appeal when the District Judge set aside the decree, which the plaintiffs had obtained on her behalf as well as their own, or in the Second Appeal preferred by the plaintiffs in which that decision was affirmed. If there had been no Appeal to the District Court

from the decree of the Subordinate Judge, the issue as to the kattubadi would apparently have been res judicata in her favour, by virtue of the Explanation, although she had been impleaded only as a defendant and had remained ex parte, because the relief had been claimed on her behalf—see *Somasundara Mudali v. Kulandaivelu Pillai*(1); and equally of course it would have been res judicata against her if her representative had been properly impleaded in the Appeals. The question whether the Explanation is applicable although Rukmaniamma was not represented either in the appeal or in the Second Appeal is of considerable difficulty. The Explanation was first enacted as Explanation V of section 13 of the Code of 1887 in which section 30 (now Order I, rule 8) was first enacted. Section 30 again was taken with an important modification from Order XVI, rule 9, of the new Rules of the Supreme Court which embodied the practice of the Court of Chancery in representative suits, as explained by Lord Eldon in *Cockburn v. Thompson*(2). Order XVI, rule 9, of the Rules of the Supreme Court under the Judicature Act provided that

"where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a Judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested,"

and where a plaintiff properly so sues, the persons whom he represents are bound: *Markt & Co., Limited. v. Knight Steamship Co., Ltd.*(3). This rule was reproduced in section 30 of the Code of 1877, with this important modification that the permission of the Court is required to enable the plaintiff to sue in such a case, whereas under Order XVI, rule 9, no such permission is required in the case of plaintiffs. It therefore follows that in India the legislature considered that a plaintiff ought not to be allowed to represent the other parties interested in the case mentioned in the section without the leave of the Court. Section 11 and the Explanation were enacted at the same time, and must be read together, and it has sometimes been stated that the Explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given

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(1) (1905) I.L.R., 28 Mad., 457, (F.B.).

(2) (1809) 16 Ves., 321.

(3) [1910] 2 K.B., 1021.

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under section 30 : *Thanakoti v. Muniappa*(1), *Baiju Lal Parbatia v. Bulak Lal Pathuk*(2), *Srinivasa Chariar v. Raghava Chariar*(3). The Explanation no doubt applies to such cases, but it is not in terms confined to them. It may be, that if a suit to which section 30 is applicable were brought without the consent of the Court, the plaintiff could not be considered to be litigating bona fide on behalf of the other persons interested, that is, not only honestly but with due care and attention, or in other cases in which he failed to implead parties who ought to have been joined, but it is in terms wide enough to include accidental slips where no real prejudice has been caused, and we should not in my opinion be justified in refusing to apply it to such cases. This is the view taken in *Rangamma v. Narasimhacharyulu*(4), but before coming to that decision it is desirable to refer to the other decisions of this Court which have been cited. In *Varankot Narayanan Namburi v. Varankot Narayanan Nimburi*(5), it was merely held that a decree against the karnavan of a Malabar tarwad was binding on the other members of the tarwad, even though no order under section 30 had been obtained. This proceeded on the ground that the karnavan sufficiently represented the other members of the tarwad without any order under section 30, and even where the section was in terms inapplicable, as where the members of the tarwad are not numerous. Similarly a widow sufficiently represents her husband's estate; and the nearest reversioner, it is now settled, sufficiently represents other reversioners in contesting an adoption which would exclude them all. This case does not seem to me to help us, as the other members of the tarwad were properly represented throughout the litigation by the karnavan. In *Thanakoti v. Muniappa*(1) a ryot had sued for damages to his crops, caused by the defendants' diversion of certain water, which the plaintiff claimed to be entitled to along with the other ryots of the village. The suit was dismissed on the ground that they had not the right claimed, but the Explanation was held not to debar other ryots, not parties to the former suit, from bringing similar suits. This decision proceeded on the ground that the Explanation was inapplicable as the plaintiff in

(1) (1885) I.L.R., 8 Mad., 496.

(3) (1900) I.L.R., 23 Mad., 28.

(5) (1880) I.L.R., 2 Mad., 328.

(2) (1897) I.L.R., 24 Calo., 885.

(4) (1916) 31 M.L.J., 28.

the first suit had not sought any relief for the other ryots, which is in accordance with the subsequent ruling of the Full Bench in *Somasundara Mudali v. Kulandaivelu Pillai*(1), but the judgment also contains the following observations as to the effect of the Explanation :

"Now, unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorized him to make the claim for them (of which there is neither allegation nor evidence), plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of others, except by their authority. Explanation 5 must be read with the provisions of section 30 and the principles to be found in that section. If that section had been followed, which it was not, then the other plaintiffs would be bound."

These observations may be read as meaning that in such a case the other ryots could not have been bound unless they were impleaded in the former suit on an order obtained under section 30. That in my opinion might properly be so, because a plaintiff who sued on their behalf without impleading them could not be considered to be litigating on their behalf bona fide, i.e., with due care and attention, and the Explanation should not be read as setting at nought the ordinary rules as to the joinder of parties. Be that as it may, it is a very different case from the present one. In *Madhavan v. Keshavan*(2) it was held that, where four out of five trustees sued to recover trust property, the trust which was the real plaintiff was sufficiently represented and bound by the decision, and that the fifth trustee was not entitled to sue again on its behalf. The decision was so understood by the Full Bench in *Somasundara Mudali v. Kulandaivelu Pillai*(1) and does not, I think, really help either side. In *Chandu v. Kunhamed*(3) certain members of a Muhammadan family sued to recover their share in certain land joining the other members of the family as defendants, and it was held that a subsequent suit by a plaintiff claiming under one of these defendants for the recovery of that defendant's share was barred under the Explanation, but

(1) (1905) I.L.R., 28 Mad., 457 (F.B.).

(2) (1888) I.L.R., 11 Mad., 191.

(3) (1891) I.L.R., 14 Mad., 324.

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WALLIS, C.J. this decision was afterwards overruled by the Full Bench in *Somasundara Mudali v. Kulandaivelu Pillai*(1), following the Full Bench in *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*(2), on the ground that the plaintiff had not been suing in the first suit on behalf of the other members of the family impleaded as defendants, but merely claiming his own share. *Latchanna v. Saravaya*(3) was to the same effect, and was also overruled by the Full Bench in *Somasundara Mudali v. Kulandaivelu Pillai*(1). It was held by the Full Bench in that case, overruling the decisions just cited, that where a co-sharer sues for his own share impleading the other co-sharers as supplemental defendants but not claiming any relief for them, the decision is not res judicata against them, although they were parties to the suit.

In these cases the Court had not to consider a case where the plaintiff in the second suit had not been impleaded in the first suit or properly represented in it by virtue of an order under Order I, rule 8, or otherwise.

The only decision of this Court governing the present question appears to be *Rangamma v. Narasimhacharyulu*(4), where it was held upon the language of the Explanation that the decision in a suit brought by one aghaharamdar to recover the suit property for himself and the other aghaharamdars, fourteen of whom were impleaded as defendants Nos. 3 to 16 and remained ex parte, was res judicata in a subsequent suit for the same reliefs brought by the fourth defendant so impleaded and another aghaharamdar who for some reason had not been made a defendant in the previous suit. The learned Judges held that the plaintiff in the former suit had been litigating bona fide in respect of a private right claimed in common for himself and others, and that the second plaintiff, though not a party to the suit, was bound by virtue of the Explanation.

The language of the Explanation may seem dangerously general and Edge, C.J., has observed in *Ram Narain v. Bisshishar Prasad*(5), that we should be careful in applying it, and that it should not be applied to any case which does not come within its

(1) (1905) I.L.R., 28 Mad., 457 (F.B.).

(2) (1896) I.L.R., 13 Cal., 352. (3) (1895) I.L.R., 18 Mad., 164.

(4) (1916) 31 M.L.J., 28.

(5) (1898) I.L.R., 10 All., 411.

very wording. I entirely agree, and should certainly hesitate to hold that any litigation had been bona fide, within the meaning of the Explanation, in which there had been a substantial departure from the accepted rules as to the joinder of parties, as for instance by suing without the leave of the Court in a case properly falling under Order I, rule 8, or in suits as regards public rights, without the authority prescribed in sections 91 and 92. At the same time, I cannot say, on the strictest construction, that the plaintiff's litigation in the earlier suit in this case was otherwise than bona fide within the meaning of the section. He impleaded all the other aghaharamdars as defendants, including Rukmaniamma through whom the present tenth defendant claims, and they remained ex parte. When she died after being impleaded as a respondent in the first defendant's Appeal to the District Court and before the hearing of the Appeal, the failure to bring on record her legal representatives was due to the default of the other side. When the plaintiff appealed to this Court from the decree of the District Court, the fact that he did not implead the representative of the deceased sixth defendant who had been ex parte in the first Court, and whose legal representatives had not been brought on by the other side in the District Court, cannot in my opinion be said to constitute such a want of bona fides as to render the Explanation inapplicable. On this ground, therefore, I would support the Subordinate Judge's finding that the tenth defendant in this suit, who claims through the sixth defendant in the previous suit, is bound by res judicata, and would dismiss the Second Appeal with costs.

SPENCER, J.—The question to be decided is whether the decision of the District Judge of Kistna, in Appeal Suit No. 451 of 1905, dated 1st December 1910 (Exhibit A in these proceedings), confirmed in Second Appeal by the High Court in Second Appeal No. 833 of 1911 on 7th August 1913 (Exhibit XVII), is res judicata against the tenth defendant, who is the appellant before us, on the point of Rs. 714-14-0 being the correct amount of kattubadi payable by the aghaharamdars on the Goravaram Aghaharam. It appears that the sixth defendant in that suit, whose name was Prathivadhi Blayankaram Rukmaniamma, was dead at the time when the High Court passed its remand order on 17th September 1909, and when the District Judge delivered

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his judgment on 1st December 1910, although her name was still kept on the record. The Subordinate Judge is of opinion that this defect is cured by the fact that the tenth defendant was on the record as Rukmaniamma's legal representative, when the High Court judgment finally disposing of the Second Appeal was passed on 7th August 1918.

The District Judge's judgment in Appeal Suit No. 451 of 1905 shows the name of Prathivathi Bhayankaram Gopalacharyulu as sixth respondent and the same individual's name appears as fourth respondent in the High Court's judgment.

The tenth defendant's name is Sriman Madhabhushi Gopalacharyulu. The Subordinate Judge therefore appears to be in error in his statement that this tenth defendant was added as the legal representative of Rukmaniamma in the Second Appeal to the High Court.

A suit instituted for settling the amount of kattubadi due to the receiver of the estate upon this agraharam was one in which all the agraharamdars were necessarily interested. In *Venkatasubramaniam v. Rajah of Venkatagiri*(1) it was recently held, by KRISHNAN, J., and myself, that agraharamdars are jointly and severally liable for all the jodi payable on their agraharam. We followed prior decisions of this High Court in *Ellaiya v. Late Collector of Salem*(2), *Ramayya v. Subbarayudu*(3), and *Sobhanadhi Appa Rau v. Gopalkrishnamma*(4).

Under Explanation VI to section 11, Civil Procedure Code, when there is a final decision by a competent Court in respect of a private right claimed in common by parties to the suit and others and the litigation is conducted bona fide, all persons interested in that right are bound by the result of the litigation.

In *Rangamma v. Narasimhacharyulu*(5), it has been held by SADASIVA AYYAR and MOORE, JJ., that this Explanation is not confined to suits brought under Order I, rule 8, by a few persons representing a numerous class after obtaining the Court's permission, and after giving notice to others who may be interested. This decision followed the dictum in *Varankot Narayanan Namburi v. Varankot Narayanan Namburi*(6), under the Code of 1859.

(1) S.A. Nos. 359 and 1789 of 1918 (unreported).

(2) (1866) 1 M.H.C.R., 59.

(3) (1890) I.L.R., 13 Mad., 25.

(4) (1893) I.L.R., 16 Mad., 34.

(5) (1916) 31 M.L.J., 23.

(6) (1880) I.L.R., 2 Mad., 328.

That was a case where a declaratory decree had been obtained against the karnavan of a tarwad. A decree to which a karnavan is a party binds the other members of the tarwad, because he is their recognized representative in suits, as was well settled by a Bench of four Judges, in *Vasudevan v. Sankaran*(1). But *Rangamma v. Narasimha Charyulu*(2), and the case before us are instances of private rights claimed by some individuals in common with others rather than as representatives of a body of persons. *Somasundara Mudali v. Kulandaivelu Pillai*(3), was a Full Bench case under the Code of 1882. The words "claimed in common," occurring in Explanation V to section 13 of that Code, and repeated in Explanation VI of the present Code, are explained therein as referring to rights to relief which would benefit such parties by being granted, and give them such an interest as would enable them to join as co-plaintiffs under section 26 (now Order 1, rule 1).

There can be no doubt that agraharamdars have such a common interest, for as each agraharamdar can be made to pay the whole of the jodi if others do not pay, all are equally interested in the demand being decreased to the lowest possible figure, or at least not being increased.

Judged by this standard, I feel clear that the decision in A.S. No. 451 of 1905 is binding on the parties to this suit, including the tenth defendant, as that litigation was, so far as it appears, conducted bona fide.

But Mr. T. R. Ramachandra Ayyar has sought to draw a distinction in a case where a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record. If such cases are to be made exceptions to the general rule, it would be necessary to import words into Explanation VI to section 11, which are not there. "All persons interested in such right," must then be understood as meaning, "all persons who are not already parties to the suit and are interested in such right."

I see no reason to put such a limited construction on the plain words of the explanation.

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(1) (1897) I.L.R., 20 Mad., p. 129.

(2) (1916) 31 M.L.J., p. 26.

(3) (1905) I.L.R., 28 Mad., 457 (F.B.).

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I agree with my Lord the Chief Justice that the Lower Court's decision is right and that this appeal should be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

KING-EMPEROR (COMPLAINANT), APPELLANT,

v.

MESSRS. A. M. HOOSANALLY & Co., REPRESENTED
BY ALLY MUHAMMAD SAMSUDEEN AND THREE OTHERS
(ACCUSED), RESPONDENTS.*

Income-tax Act (VII of 1908), sec. 24, proviso 2, 39 (d), 40 and 41—Failure to produce accounts—Prosecution under sec. 39 (d)—Penal Assessment—Levy of, whether a bar to prosecution—Bar under sec. 24, proviso 2, whether applicable.

Section 24, proviso 2, of the Indian Income-tax Act, does not bar the prosecution of an accused for an offence under section 39 (d) of the Act, for failure to produce accounts, when penal assessment had been levied on him, under section 24, in consequence of his making a false return of his income.

APPEAL against the order of acquittal of E. H. M. Bower, the Fourth Presidency Magistrate, Egmore, in Calendar Case No. 6850 of 1919 (Georgetown Court).

The respondents, who are a firm of traders in Madras, were called upon by the Collector of Income-tax, Madras, to submit a return of their income for assessment of income-tax. On 12th August 1918, they furnished a return showing an income of Rs. 18,836-12-0. As the Collector was not satisfied with the truth of their return he issued notice to them, under section 18 of the Act, to produce their account books on 4th February 1919. They failed to produce their account books, in pursuance of the notice, nor did they appear before him on a subsequent notice issued to show cause why they should not be prosecuted under section 39 (d) of the Act. The Collector thereupon by an order, dated 13th March 1919, directed their prosecution under the said section and a complaint was accordingly made on 3rd April 1919,

* Criminal Appeal No. 650 of 1919.

before the Presidency Magistrate, Madras. Meanwhile the Collector issued notice to the respondents, on 13th March 1919, to show cause why penal assessment should not be levied, and on 21st March 1919, the Collector passed an order under section 24 of the Act levying penal assessment to the amount of Rs. 2,572, payable in two instalments.

The respondents against whom the complaint was preferred on 3rd April 1919, pleaded *inter alia*, that the prosecution was barred by the provisions of section 24, proviso 2, of the Income-tax Act, as penal assessment had been levied on the same facts by the order previously mentioned. The Presidency Magistrate upheld this contention of the respondents and acquitted them. The Government preferred this criminal appeal.

The Crown Prosecutor for the Crown.

S. Rangaswami Ayyangar for the respondents.

AYLING, J.—The accused in this case were prosecuted for an offence under section 39 (d) of the Indian Income-tax Act, for failure to produce their accounts in obedience to a notice issued by the Collector of Madras.

They have been acquitted by the Fourth Presidency Magistrate on the sole ground that the prosecution is barred by the second proviso to section 24 of the same Act, which runs thus :

"Provided further that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The only question for our decision is whether the Magistrate has rightly interpreted the section as barring the prosecution in this case.

In my opinion he was clearly wrong. Exhibit VIII of 21st March 1919 is the order imposing penal assessment on the accused. It does not state the facts on which it was based, but these must be deduced from the Collector's previous letter, Exhibit V, of 13th March 1919, which runs as follows :—

"In your D return, dated 12th August 1918, you showed your income for 1917-18 as Rs. 18,836-12-0, but you did not produce your accounts before the Special Income-tax Officer when he called upon you to do so. On the best information that I could secure, I have estimated your income at Rs. 60,000 and have assessed you on that figure. I have thus reason to

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suppose that you have deliberately returned your income at less than its real amount. I hereby require you, under section 24 of Act VII of 1918, to appear before me at 12 noon on 19th March 1919, with a written statement showing cause why you should not be required to pay penal assessment at a rate not exceeding double the rate that would otherwise have been payable on the difference between the income of Rs. 18,836-12-0, shown in your return, and Rs. 60,000 on which I have assessed you to income-tax for 1918-19."

Now it is perfectly true that the accused's failure to produce their accounts is set out in the letter, and was, as the Magistrate says, a fact before the Collector at the time he wrote this letter, and when he levied the penal assessment. But it is equally clear that this was not the fact on which the assessment was made. The letter begins by reciting that accused had returned their income at Rs. 18,000 odd. It then adds (1) that they have failed to produce their accounts in support of their return, and (2) that the Collector's independent inquiries disclose the fact that their real income was Rs. 60,000. The Collector then proceeds:—

"I have, thus, reason to suppose that you have deliberately returned your income at less than its real amount."

And, on this, calls on them to show cause why they should not be required to pay penal assessment. The failure to produce accounts may have been one reason why the Collector preferred the result of his own inquiries to the assessee's return; but it is the falsity of the return, not the failure to produce the accounts, which is the fact on which the penal assessment is made.

Indeed, section 24 makes it clear that it is only a return of income below its real amount, which could be the basis of an order for penal assessment. The Collector has to be satisfied that the assessee has returned his income below its real amount, either by concealing particulars of it, or deliberately furnishing inaccurate particulars.

The proviso though couched in general terms appears to be intended to bar a prosecution under section 40 of the Act, not one under section 39, which deals with omissions of a totally distinct nature to the act with which section 24 is concerned.

I would set aside the Magistrate's order and direct him to restore the case to file and dispose of it according to law.

COUTTS TROTTER, J.:—I agree, but as the case is of some public importance, I will state my reasons in my own words. The respondents were prosecuted before the Fourth Presidency Magistrate, under the Indian Income-tax Act (VII of 1918). He acquitted the accused, on the view that the second proviso to section 24 of the Act barred the prosecution. Government appeals against the acquittal.

The facts can be stated very briefly. The respondents are a firm carrying on business in Madras, and they were called upon in the ordinary way by the Collector to furnish a return of their income for purposes of assessment for income-tax. On 12th August 1918, they furnished a return showing an income of Rs. 18,836-12-0. The Collector was not satisfied of the truth of the return, and on 4th February 1919 notice was given to the respondents to produce their account books, under section 18 of the Act. This notice and a subsequent one calling upon the firm to show cause why they should not be prosecuted under section 39 (d) of the Act were disregarded, and the books were not produced. The case of the respondents, on the merits, is that the books required for production were in the hands of partners out of Madras, who could not be communicated with in time; that defence will of course be open to them hereafter.

The Collector had meanwhile given the respondents notice, by a letter, dated 12th March 1919, that he disbelieved the truth of their return, and had estimated their income at Rs. 60,000, and he called upon them to show cause on 19th March why they should not pay a penal assessment on the difference between the figure returned and that found by the Collector to be the true one. On 21st March he passed against the firm an order levying a penal assessment of two annas in the rupee, on the difference between the actual return of Rs. 18,836-12-0 and what he held to be the true figure of Rs. 60,000. This he is empowered to do by section 24 of the Act, and no question arises as to it before us.

Meanwhile, he had on 12th March issued proceedings directing the prosecution of the respondents for failure to produce their books, a power vested in him by section 41 of the Act. This is the case that has been dismissed by the Magistrate on a point of law: and that is the sole matter that is before us.

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The penal section is quite clear (section 39):

"If a person fails without reasonable cause or excuse to produce on or before the date mentioned in a notice under section 189 (which was admittedly duly given) such accounts and documents as are referred to in the notice, he shall be punishable with a fine."

But it is said that these proceedings are barred by the fact that the respondents have already been punished under section 24 of the Act, by the penal assessment made on 21st March. Section 24 enables the Collector to make such an assessment in cases where he finds that the assessee has:

"concealed the particulars of his income, or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount".

Then follows this proviso:

"Provided, that no prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The case for the respondents is that it is sought to punish them doubly, by a penal assessment and a prosecution, on the same facts, and the learned Presidency Magistrate gave effect to that contention. He was clearly led to do so on his view that the Collector's letter, of 12th March 1919 (Exhibit V), treated the withholding of the books as a reason for the penal assessment, which he then threatened. I think this view wholly fallacious. The Collector directed a penal assessment on the only ground open to him under the Act: viz., that the respondents had made a false return. He had three considerations which led him to that conclusion, and has clearly indicated them in his letter, Exhibit V. They had returned a figure of Rs. 18,836-12-0, he had information that their true income was Rs. 60,000, and they had not produced their books which would have established their case if it was a true one. The last fact was merely used as evidence of the falsity of their return. They were not and could not have been penally assessed for non-production of their books. This prosecution is not for a false return of income; they could have been prosecuted for that offence under section 40 of the Act, and then a previous penal assessment would doubtless have been a bar. But they are now prosecuted on a definite allegation of withholding books, which is at most a step to aid a false return to get through; it is not

even a necessary step, because a man may make a false return who has no books either to produce or to withhold. Conversely, a man might withhold his books and render himself liable to punishment under section 39, without taking the further step of sending in a false return. I conceive the policy of the statute to be, to provide by section 39 a punishment for any of the steps likely to be adopted by a fraudulent assessee to impede the Collector in a just estimate of his true income; and to provide an alternative remedy of punishment under section 40, or penal assessment under section 24, for an actual false return. If he commits one of the former offences, he may be punished for it, though he does not commit the latter; if he commits the latter, he may be punished for it in one of two ways, and one only. But if he commits both, he may be separately punished for each. Perhaps the clearest way to put it is by an illustration. Suppose a man to have committed an offence under section 39, by withholding his books, and to have been prosecuted and convicted for it before he made a return of his income, as he clearly might be; suppose that subsequently he returns his income at a figure found to be false—could any one say that his conviction under section 39 was a bar either to his being penally assessed, under section 24, or convicted under section 40?

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

UDIPI SESHAGIRI (PLAINTIFF), APPELLANT,

v.

SESHAMMA SHETTATI AND THREE OTHERS (DEFENDANTS

Nos. 1 TO 3 AND 5), RESPONDENTS.*

Mulgeni lease—Covenant against alienation—Breach—Assignment, validity of.

In the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, an assignment of the lease by the lessee in breach of his covenant not to assign is perfectly valid. *Parameshri v. Vittappa Shanbaga*, (1908), I.L.R., 26 Mad., 157, explained.

* Letters Patent Appeal No. 31 of 1919.

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Tamaya v. Timapa Ganpaya, (1883) I.L.R., 7 Bom. 264, *Basarat Ali Khan v. Manirulla*, (1909) I.L.R., 36 Calc., 745 and *Promode Ranjan Ghosh v. Aswini Kumar Nag* (1914) 18 C.W.N. 1138, followed.

Per SESHAGIRI AYYAR, J.—The same principle would apply even in the case of a mulgeni lease executed subsequent to the Transfer of Property Act.

APPEAL under clause 15 of the Letters Patent against the judgment of BAKEWELL, J., in *Seshagiri v. Seshamma*(1)

By a mulgeni hit, dated 29th December 1876, the plaintiff's predecessors-in-title granted to the predecessors of defendants 4 and 5 a lease in perpetuity of certain agricultural land containing the following clause: 'When you and also your representatives do not require this property, it should be delivered back to us and to our representatives, and you shall have no right to alienate the same to anybody in any way.' By a sale deed, dated 16th January 1907, defendants 4 and 5 assigned their interest to defendants 1 to 3. In 1916 the plaintiff obtained a decree against defendants 4 and 5 for rent due for 1913 to 1915 and then sought to execute this decree against the leasehold property; but defendants 1 to 3 obtained an order in those proceedings recognising their interest in the demised property, and this suit was brought to establish plaintiff's claim against it as the property of defendants 4 and 5.

The lower Courts dismissed the suit and the Second Appeal was heard by BAKEWELL and PHILLIPS, JJ. His Lordship Mr. Justice BAKEWELL construed the clause as meaning that the lessees agreed that if they did not wish to enjoy the demised land themselves they would not transfer it to a third party but would surrender it to the lessors. He further held that if the lessors did not avail themselves of their right of re-entry the grant remained unrestricted and carried with it the right of alienation. His Lordship therefore held that the assignment was operative and that the suit failed. His Lordship Justice PHILLIPS was of a contrary opinion. The appeal was dismissed and thereupon a Letters Patent appeal was preferred.

K. T. Adiga for *Lakshman Rao* for plaintiff.—BAKEWELL, J., held that in spite of the agreement the lessee could alienate.

(1) Second Appeal No. 1172 of 1918 preferred against the decree of L. G. MOORE, the District Judge of South Kanara, in Appeal Suit No. 211 of 1917 against the decree of M. Ananthagiri Rao, the District Munsif of Udipi, in Original Suit No. 68 of 1917.

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His Lordship thought that there is a right of re-entry. This is not the case of either party. I submit that an assignment by the lessee does not pass his interest when the lease contains a covenant as in the present case. *Parameshri v. Vittappa Shanbaga*(1) supports me. See also *Jacki Minezes v. Venkatramana Kamthi*(2) and *Narayana v. Narayana*(3). The latter is a decision exactly in point. *Basarat Ali Khan v. Manirulla*(4) is against me, but it was dissented from in *Jacki Minezes v. Venkatramana Kamthi*(2), which was decided by SADASIVA AYYAR and PHILLIPS, JJ. Section 10, Transfer of Property Act, says that restraint against alienation is valid.

C. V. Anantakrishna Ayyar for respondent.—Assignment passes by title and the landlord's only remedy is to claim damages for breach of contract. My lease is one of 1876 and therefore English law applies. All the text-books treat it as settled that in England the estate would pass. See Halsbury, Vol. 18, page 575, *Foa on Landlord and Tenant*, page 268, *Redman on Landlord and Tenant*, page 356. See also *Williams v. Earle*(5), *London Corporation v. County of London Electric Supply Company*(6), *Parker v. Jones*(7), *Basarat Ali Khan v. Manirulla*(4) and *Promode Ranjan Ghosh v. Aswin Kumar Nag*(8). In *Donoughmore (Lord) v. Forest*(9) the law is stated to be the same, though changed as regards Ireland by special statute. The cases in this Court are all based on the doubt suggested in *Parameshri v. Vittappa Shanbaga*(1) and are wrong. Sections 6 and 111 (g) of the Transfer of Property Act referred to.

WALLIS, C.J.—In 1876 the plaintiff's predecessors-in-title granted a mulgeni lease, containing a covenant against alienation, to the predecessors of defendants Nos. 4 and 5, who in 1907 in breach of their covenant alienated the holding to defendants Nos. 1 to 3. The plaintiff having obtained a decree for rent against defendants Nos. 4 and 5 in Original Suit No. 490 of 1916, attached the holding in execution of the decree, when defendants Nos. 1 to 3 put in a claim petition and succeeded in getting the attachment raised. The plaintiff then filed this suit to

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| (1) (1903) I.L.R., 26 Mad., 157. | (2) (1915) 28 I.C., 904 Mad. |
| (3) (1883) I.L.R., 6 Mad., 327. | (4) (1909) I.L.R., 36 Calc., 745. |
| (5) (1868) L.R., 3 Q.B., 789 | (6) [1910] 2 Ch., 214. |
| (7) [1913] 2 K.B., 32. | (8) (1914) 18 C.W.N., 1138. |
| | (9) (1871) 5 I.R., C.L., 443. |

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establish his right, which was dismissed by both the lower Courts. In Second Appeal, BAKEWELL and PHILLIPS, JJ., differed and this is an appeal from the prevailing judgment of BAKEWELL, J., dismissing the suit. It is well settled in England that an assignment by a lessee in breach of his covenant not to assign is perfectly valid to pass the term; and we have been asked to apply the same rule here as it was applied by SARGENT, C.J., in *Tamaya v. Timapa Ganpaya*(1), in *Basarat Ali Khan v. Manirulla*(2), *Promode Ranjan Ghosh v. Aswin Kumar Nag*(3), and by BAKEWELL, J., in the present case. On the other hand it was contended that the rule was inapplicable, on the authority of an observation of BHASHYAM AYYANGAR, J., in *Parameshri v. Vittappa Shanbaga*(4), which was followed by a Bench of this Court in another case. All that BHASHYAM AYYANGAR, J., said was that a transfer by the lessee in breach of a covenant not to alienate might be void against the lessor, and that in his view the transfer would be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract, under section 108 (c), Transfer of Property Act. I have no doubt the learned Judge was well aware that such transfers are valid in England, and having regard to his express mention of section 108, Transfer of Property Act, I think that his suggestion that they may be void was made with reference to the fact that in section 108, Transfer of Property Act, the lessee's power of transfer in clause (j) and the provision as to the transferee's rights under the transfer in clause (c) are made subject to the words 'in the absence of contract or local usage to the contrary', at the beginning of the section. It may be argued on the strength of these words, and this, I think, was the view BHASHYAM AYYANGAR, J., was disposed to take, that whatever be the law in England, the Transfer of Property Act only recognizes transfers by the lessee in the absence of a contract by him not to alienate, which of course means a valid contract. It has, however, been expressly decided and may now be considered settled, that covenants not to alienate are valid under the Transfer of Property Act, as being for the benefit of the lessor, and it was so held by him in that case. It would also

(1) (1883) I.L.R., 7 Bom., 262.
(3) (1914) 18 C.W.N., 1188.

(2) (1909) I.L.R., 36 Cal., 745.
(4) (1908) I.L.R., 23 Mad., 157.

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seem that the learned Judge was disposed to apply the same rule to agricultural leases not governed by Chapter V, even when they were executed before the coming into force of the Act. As regards the last point, the English rule was applied in 1883 in *Tamaya v. Timapa Ganpaya*(1), by SARGENT, C.J. and MELVILL, J., in the case of one of these mulgeni leases in North Kanara executed before the enactment of the Transfer of Property Act, after a very careful examination of the history of this tenure in the previous case *Vyankatraya v. Shivrambhat*(2), judgment in which was given on the same day. It was there pointed out that in ancient times the interest of the permanent lessee or mulgenidar was freely transferred, and that restrictions against alienations by mulgenidars though not invalid, were of comparatively recent origin. In these circumstances, I have come to the conclusion that the decision in *Tamaya v. Timapa Ganpaya*(1), is sufficient authority for the application of the English rule, in the case of mulgeni leases in Kanara executed prior to the Transfer of Property Act, and that it is unnecessary to consider the effect of section 108 of that Act on transfers by lessees in breach of covenants in leases subsequent to the Act, more especially as the view of the section apparently taken by BHASHYAM AYYANGAR, J., has not yet been expressly adopted in any cases, and on the other hand, the English rule has been applied in Calcutta even after the passing of the Act, though without advertance to the terms of section 108. In the result, I agree with BAKEWELL, J., and dismiss the appeal with costs.

OLDFIELD, J.—I agree with the judgment just delivered.

OLDFIELD, J.

SESHAGIRI AYYAR, J.—The plaintiff's predecessor granted to the ancestor of defendants Nos. 4 and 5 a mulgeni lease of the property in dispute, in 1876. On 18th January 1907, defendants Nos. 4 and 5 transferred that lease to defendants Nos. 1 to 3. The plaintiff obtained a decree for rent against the former, and attached the properties ignoring the transfer and treating them as if they still belonged to the judgment-debtor. The question is whether the plaintiff is entitled to do that.

The lease was granted in the year 1876. There can be no doubt that, if the alienation had been made in the year 1878 or

(1) (1883) I.L.R., 7 Bom., 262.

(2) (1883) I.L.R., 7 Bom., 256.

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1877, and if the question came up before the Courts before 1882, it would have been decided, following English decisions enunciating principles of equity, justice and good conscience, that the alienation was not invalid. I fail to see why the conclusion should be different because the matter comes up before the Court after the Transfer of Property Act was passed. The rule that *prima facie*, the legislative enactments of this country should be consulted for principles of equity, justice and good conscience should not be held applicable to a transaction which was entered into before the Act. It would lead to anomalous results to interpret a document in a sense in which it could not have been construed when it was executed. Moreover, to the class of leases with which we are concerned, the Transfer of Property Act in terms does not apply.

I shall next deal with the question with reference to the Transfer of Property Act itself. Under section 8, every kind of property may be transferred subject to certain exceptions. By virtue of section 8, every such transfer passes to the transferee all the interest which the transferor has in the property, and in its legal incidents. Section 10, provides that a condition in a lease reserving a benefit for the lessor, or those claiming under him, will not be regarded as a repugnant condition. Section 12 is important. After enunciating the general rule that conditions reserving a benefit to the transferor on the transferee endeavouring to dispose of the property are invalid, it says that the benefit clause in a lease is an exception to the rule. This, and section 10, are clear indications that no condition against alienation is valid unless it be in a lease, and the condition is for the benefit of the lessor. Consequently, whenever in a lease a contract to the contrary is inserted, what the Court has to inquire into is whether that contract is for the benefit of the lessor. I do not think this proposition is affected by anything contained in section 108.

Clause (c), of that section, provides that the lessor shall be deemed to contract with the lessee, that if the latter pays the rent he may hold the property during the period of the lease without interruption. The further provision is that

“the benefit of such a contract shall be annexed to and go with the lessee's interest and may be enforced by every person in

whom that interest is for the whole or any part thereof from time to time vested.”

I understand this sentence to mean that the lessor would ordinarily have a right to rent against the lessee's assignee, and the lessee's assignee would have a right to claim that the lease should subsist during the stipulated period. This undoubtedly is subject to any condition against alienation that may be found in the lease deed, provided such a condition is for the benefit of the lessor. Clause (j) is absolute in terms, but I take it that the lessee will be governed by the prohibitions mentioned in sections 10 and 12.

Then we come to section 111 which deals with the determination of the lease. It is to be noted that there is no provision terminating a lease on the breach of every condition in the lease: that is to say, every breach of a contract would not determine a lease *ipso facto*. By clause (g), it is provided that the lessee would incur forfeiture if he breaks an express condition to the effect that, on breach thereof, the lessor may re-enter or the lease shall become void. If there is no provision for re-entry, or declaring that, on the breach of a condition, the lease shall become void, forfeiture is not incurred. Consequently, a bare stipulation that the lessee shall not transfer the property would not render the transfer inoperative.

The further question is, what is the construction to be placed on the words in sections 10 and 12 of the Transfer of Property Act, “except in the case of a lease whether the condition is for the benefit of the lessor or those claiming under him”. From the earliest times, in England, it has been held that a mere restraint upon alienation is not a covenant for the benefit of the lessor. The principle which has guided the framers of the Transfer of Property Act, and which also underlies the decisions of the English Courts is this: ordinarily the transferee of property is entitled to dispose of his interest in any way he chooses. A condition imposing limitations on him is not valid. A few exceptions are however recognized. One of them is where the landlord, apprehending that the transfer will injuriously affect his interest, stipulates that on the breach of the condition, he shall be at liberty to re-enter the property or to declare that the lease is void. In such cases, a direct benefit to

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him is secured, which would enable him to grant the lease to somebody else. A covenant by which he seeks simply to impose restrictions upon a lessee is not recognized by law as specifically enforceable. Section 111 of the Transfer of Property Act fully recognizes the above principle. Therefore, the construction that I place on section 108 is that no contract to the contrary will be regarded as binding between the parties, unless it be a contract which enables the landlord on the breach of it to re-enter possession or to put an end to the lease. In my opinion, the bare prohibition, not being for the benefit of the landlord is not a contract to the contrary which the law recognizes as operative.

I will not refer to very many English decisions. *Re Johnson, Ex parte Blackett*(1), *Paul v. Nurse*(2), all enunciate the principle I have mentioned. In *Williams v. Earle*(3), BLACKBURN, J., with the concurrence of LUSH, J., said :

"Though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative; . . . But the plaintiff is entitled to recover indirectly by way of damages for the breach of the covenant not to assign."

See also *Hatton v. May* (4). I shall now examine the Indian cases. In *Narayana v. Narayana*(5), the learned judges held that a stipulation that the lease shall be cancelled is a penal one which can be relieved against. There is also a dictum in that case to the effect that the alienation will be inoperative against the lessor. In *Parameshwari v. Vittappa Shanbaga*(6), Mr. Justice BHASHYAM AYYANGAR after dealing with a number of other circumstances expressed himself thus :—

"It may also be that a transfer by the lessee, absolutely or by way of mortgage or sub-lease, in breach of the covenant not to alienate, will be void as against the lessor and he may realise arrears of rent due by the lessee, by attaching and selling his interest in the lease as effectually as if there had been no transfer by the lessee."

This is a very guarded statement, which suggests, without deciding, a possible conclusion. In *Jacki Minezes v. Venkataramana Kamthi*(7), Mr. Justice SADASIVA AYYAR and Mr. Justice

(1) (1894) 70 L.T., 381.

(3) (1868) L.R., 3 Q.B., 789.

(5) (1883) I.L.R., 6 Mad., 327.

(2) (1828) 8 B. & C., 486.

(4) (1876) 3 Ch. D., 148.

(6) (1903) I.L.R., 26 Mad., 157.

(7) (1915) 28 I. C., 904 (Mad.).

NAPIER simply followed the dictum of BHASHYAM AYYANGAR, J., without discussion. On the other hand, we have in *Basarat Ali Khan v. Manirulla*(1), the well-considered opinion of Sir LAWRENCE JENKINS, C.J., and MOOKERJEE, J. This was followed in *Promode Ranjan Ghosh v. Aswin Kumar Nag*(2). See also *Nil Madhab Sikdar v. Narattam Sikdar*(3), *Mahananda Roy v. Saratmai Debi*(4), and *Akram Ali v. Durga Prasanna Roy Chowdhiri*(5). In *Madar Saheb v. Sannabowa*(6), it was held that a clause in a lease prohibiting alienation unaccompanied by a provision for re-entry did not put an end to the lease.

The above discussion leads me to the conclusion that Mr. Justice BAKEWELL has taken the right view.

I am therefore of opinion that the appeal fails and should be dismissed with costs.

M.H.H.

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APPELLATE CRIMINAL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Ayling and Mr. Justice Coutts Trotter.

ELACHURI VENKATACHINNAYYA AND THREE OTHERS
(ACCUSED), PETITIONERS,

1920,
February 5
and 20

KING-EMPEROR (RESPONDENT), RESPONDENT.*

*Criminal Procedure Code (Act V of 1898), ss. 107, 350, Proviso (1)—Transfer of
Magistrate—Trial de novo—Right of accused.*

Section 350 (1), proviso (a), Criminal Procedure Code, applies to proceedings under section 107, Criminal Procedure Code, and the accused in a security case is entitled to a trial *de novo* on the Magistrate being transferred.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of C. F. BRACKENBURY, the District Magistrate of Kurnool, in

(1) (1909) I.L.R., 36 Calc., 745.

(3) (1890) I.L.R., 17 Calc., 826.

(5) (1911) 14 C.L.J., 614.

(2) (1914) 18 C.W.N., 1138.

(4) (1911) 14 O.L.J., 585.

(6) (1904) I.L.R., 21 Bom., 195.

* Criminal Revision Case No. 677 of 1919 (F.B.).

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Criminal Appeal No. 4 of 1919, preferred against the order of M. NARASIMHAM PANIULU GARU, the Deputy Magistrate of Markapur, in Miscellaneous Case No. 13 of 1918.

Upon a charge-sheet filed by the Police the accused were called upon to show cause why they should not be bound over to keep the peace. After some of the prosecution witnesses were examined the Magistrate trying the case was transferred and another Magistrate took his place. The latter continued the proceedings from that stage. In appeal it was contended that the latter Magistrate was bound to start the inquiry afresh, but the District Magistrate dismissed the appeal. Against that order the present Revision Petition was filed.

The Revision Petition was heard in the first instance by ABDUR RAHIM and SPENCER, JJ., who made the following:—

ORDER OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.—In this case the question of law raised before us is whether proviso (a) to section 350 of the Code of Criminal Procedure applies to a proceeding under section 107.

The petitioners were bound down to keep the peace by a Magistrate who did not hear the evidence, the evidence having been recorded by another Magistrate who had been subsequently transferred. An application was made for recalling the witnesses, and for the evidence being taken *de novo*. That application was refused. We are asked to consider whether the petitioners were not entitled under proviso (a) to section 350 to have the witnesses resummoned and reheard.

It is not disputed that the main part of section 350 does apply to this case. But what is contended is that its application to a proceeding under section 107 is by virtue of the word 'inquiry' used in section 350, and that proviso (a) does not apply because it cannot be said that in a case like this any *accused* person is *tried*. The contention of the Public Prosecutor is that this is 'an inquiry' and not 'a trial' within the meaning of section 350.

There is no direct ruling on the point under section 350 of the present Code of Criminal Procedure, though under the old Code it was held that such a proceeding was 'a trial' in the

present connexion. There are rulings to the effect that a person who is proceeded against under Chapter VIII is an accused person, within the meaning of the Code of Criminal Procedure. For instance, *Jhoga Singh v. Queen Empress*(1), (GHOSH and RAMPINI, JJ.) *Queen Empress v. Mona Puna*(2), *Queen Empress v. Mutasadi Lal*(3), *Hopcroft v. Emperor*(4). There is also a decision of this Court that the words 'order in a criminal trial' in clause (15) of the Letters Patent comprehends an order passed by a single Judge of this Court in a proceeding under the provisions of Chapter VIII. See, *In the matter of Ramasamy Chetty*(5). There can be no doubt that in section 350 and in other sections of that Chapter, and several of the succeeding Chapters, the words 'inquiry or trial' when used in juxta position to each other are intended to mean two different things. Nor can there be any doubt that the word 'inquiry' is often used in several places in the general popular sense of investigation into the truth of any matter; see, for instance, section 177 where it is said:

"Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed".

There are also many other sections in which the word 'inquiry' is used in that popular sense. 'Inquiry' is defined in section 4 (k) as including every inquiry other than a trial conducted under this Code by a Magistrate or Court; but 'a trial' is not defined. The question in this connexion would be whether a proceeding under section 107 of the Code of Criminal Procedure cannot properly be called 'a trial', within the meaning of section 350 (a). This very definition shows that the word 'inquiry' has a wider significance which would ordinarily include 'trials', but when used in a technical sense it is to be taken to exclude 'trials'.

If we examine the scheme of the Code of Criminal Procedure, it seems to me to be apparent that wherever the words 'inquiry' and 'trial' are used in two distinct senses, by 'inquiry' the legislature mostly refers to inquiry into cases triable by the Court of Sessions or the High Court, and sometimes also inquiries such as under Chapter XII (inquiry into disputes as to immoveable

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(1) (1896) I.L.R., 23 Calo., 498.

(2) (1892) I.L.R., 16 Bom., 661.

(3) (1899) I.L.R., 21 All., 107.

(4) (1909) I.L.R., 36 Calo., 163.

(5) (1904) I.L.R., 27 Mad., 610.

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properties), which cannot be called 'trials'. Chapter XVIII is the Chapter which deals with 'inquiries' into cases triable by a Court of Sessions or High Court. Chapter XIX deals with the form of charges; Chapter XX with the trial of Summons Cases by Magistrates; and Chapter XXI with the trial of Warrant Cases. Chapter XXII deals with summary trials and Chapter XXIII deals with trials before High Courts and Courts of Sessions. Then we come to Chapter XXIV which contains section 350. That Chapter is headed:

"General provisions as to inquiries and trials".

Chapter XXV deals with the mode of taking and recording evidence in inquiries and trials. We find in section 353 that,

"All evidence taken down under Chapters XVIII, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader"

That does not go beyond Chapter XVIII, which deals with inquiries in cases triable by the Court of Sessions or High Court. Section 356 throws considerable light on the question. It says that, 'in all other trials' before Courts of Session and Magistrates, other than Presidency Magistrates, and in all inquiries under Chapters XII (disputes as to immoveable properties) and XVIII (cases triable by the Court of Session or High Court) the evidence of witnesses shall be recorded in a particular manner. If this section applies to proceedings under Chapter VIII—and there can be no doubt that it does—then a proceeding under section 107 is a trial within the meaning of the Code. Chapter XXVI deals with judgments. As regards Chapter VIII, it is in Part IV which deals with prevention of offences; and I do not find that in that Chapter the word 'inquiry' is used in any technical sense as contra-distinguished from 'trial'. In fact, as I have already pointed out, it is in Chapter XVIII that the word 'inquiry' is used in a strictly technical sense as distinguished from 'trial', that is to say, the Magistrate is to inquire into the cases dealt with there but is not empowered to dispose of them finally; he has to record the evidence and if he thinks there is a prima facie case he is to commit it to the Court of Session or High Court for trial. It seems to me therefore that there is no warrant for holding that

the word 'trial' as used in section 350 (a) is not intended to cover cases under section 107.

But even apart from that, I think that section 117 makes it quite clear that section 350 including proviso (a)—I am somewhat doubtful about proviso (b) because of the use of the word 'conviction' there—is made applicable to a proceeding under section 107. Section 117 says that an inquiry as to the truth of the information—it is evident that the word 'inquiry' here is used in the popular sense—

"shall be made as nearly as practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

It is argued by the learned Public Prosecutor that section 117, clause (2), refers only to Chapters XX and XXI which are headed "Trial of Summons Cases by Magistrates" and "Trial of Warrant Cases by Magistrates" and that none of the other succeeding Chapters are referred to in section 117. The argument in support of this contention is, I take it, that those Chapters specifically refer to trials of summons and warrant cases. But I am unable to accept this argument. Those two Chapters deal only with certain limited and special questions of procedure relating to summons and warrant cases. There can be no doubt that many of the general provisions of Chapter XXIV would apply to proceedings under section 107 and similar other proceedings under Chapter VIII. But it is said that this is so because both the words 'inquiry' and 'trial' are used and according to the contention for the prosecution a proceeding under Chapter VIII is an inquiry and therefore the provisions of Chapter XXIV are made applicable by force of that word. But it is difficult to see any force in this argument in the face of the express and clear language of section 117.

Chapter XXIV contains many provisions which must necessarily apply to proceedings under Chapter VIII. For instance, section 344, which gives power to the Court to postpone or adjourn proceedings; section 340 which says that

"Every person accused before any Criminal Court may of right be defended by a pleader;"

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and section 341 which lays down the procedure to be observed in cases where the accused does not understand the proceedings. The Code of Criminal Procedure must be taken to be exhaustive so far as the procedure to be observed by the Magistrates and other Criminal Courts in the various proceedings under that Code is concerned, and must be expected to provide for all cases in the proceedings under the Code where the evidence was heard and recorded by a Magistrate and that Magistrate is subsequently transferred. That is provided by section 350, and there is the other provision for such contingencies.

Section 117 says that where a matter is inquired into under Chapter VIII the inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trials (and not inquiries) and recording evidence in summons cases. Section 250, proviso (a) lays down what is to happen when the magistrate who recorded the evidence is no longer exercising jurisdiction in cases where an accused is under trial. That obviously applies both to summons and warrant cases. Section 117 thus by explicit language embodies proviso (a) of section 350.

It was suggested that the provision that an inquiry shall be made in the manner hereinafter prescribed, etc., does, not refer to a rule of procedure to be observed but to something else. I must say that I do not quite understand this contention, but so far as I could follow it, it seems to be utterly untenable. Section 117 clearly refers to the procedure to be observed in cases under section 107, and other similar sections of Chapter VIII. Therefore, even if it were granted—I have shown that this contention is not correct—that a proceeding under this Chapter is an inquiry as contradistinguished from a trial, I should still hold without any hesitation that the procedure prescribed in section 350(a) is expressly adopted by the legislature for the purposes of proceedings under Chapter VIII, as section 170 says that the inquiry shall be made in the manner prescribed for conducting trials.

If we look at the provisions of Chapter XXV, which refers to the mode of taking and recording evidence in inquiries and trials, the position seems to be equally clear. Similarly the Chapter relating to judgments shows that all the general

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provisions, as far as practicable, have to be applied in cases under Chapter VIII. I have, therefore, upon an examination of the Code arrived at the conclusion that section 350, proviso (a), applies to a proceeding under section 107.

A ruling of the Calcutta High Court was brought to our notice, in which it was held with reference to section 350 that a proceeding under section 145 of the Code of Criminal Procedure is an inquiry, and therefore section 350 would apply. That is the case of *Anu Sheikh v. Emperor*(1). It must be pointed out that in that case no question arose of the application of clause (a) of section 145, and it could hardly be contended that in such a proceeding there is any person who can be called 'accused', nor is there any provision like section 117 in Chapter XII. I might also point out that section 340 of the Code of Criminal Procedure has been applied to a proceeding under Chapter VIII; see *Jhoga Singh v. Queen Empress*(2). Section 443 has been applied to such a proceeding in *Hopcroft v. Emperor*(3), and section 437, in *Queen Empress v. Mutasadi Lal*(4). I would hold, therefore, that the petitioners were entitled to ask in this case that the witnesses should be re-summoned and re-heard, and I would direct that the order of the Magistrate be set aside and the case be remitted to him for further inquiry, the petitioners being given an opportunity to have the witnesses re-summoned and re-heard before the trying Magistrate.

But my learned brother takes a different view. The question of law involved is however one of some importance and should be settled by a Full Bench. The question is, whether section 350 (1), proviso (a), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code.

SPENCER, J.—This petition is to set aside an order made by the District Magistrate of Kurnool refusing to cancel the bonds taken from the petitioners by the Deputy Magistrate, Markapur, for security for keeping the peace. The Deputy Magistrate, who held an inquiry under Chapter VIII of the Criminal Procedure Code, passed an order requiring the petitioners to execute bonds to keep the peace upon evidence partly recorded by his predecessor. The question which has been argued before

(1) (1910) I.L.R., 37 Calo., 812.
(3) (1902) I.L.R., 3d Calo., 183.

(2) (1893) I.L.R., 23 Calo., 493.
(4) (1893) I.L.R., 21 All., 107.

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us is whether section 350 of the Criminal Procedure Code gives a person against whom such proceedings are being taken a right to demand that the witnesses already examined should be re-summoned and re-heard, when the Magistrate who first enquired into the case is transferred before the conclusion of the inquiry. Chapter XXIV of the Criminal Procedure Code deals with general provisions as to inquiries and trials, and section 350 which occurs in this Chapter, undoubtedly applies to proceedings for taking security to keep the peace as it in terms refers to 'inquiries' or trials. But proviso (a) runs thus—

"In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard."

If it was intended that this provision should apply to inquiries also, one would expect that the words used would be 'In any inquiry or trial,' as those are the words used in the body of the section. It was held in *Anu Sheikh v. Emperor* (1), that section 350 would apply to inquiries under section 145. But there is no authority for saying that the person called upon to show cause against giving security has an inherent right to insist, under proviso (a) to that section, on recalling witnesses, except the case of *Burda Kant Roy v. Korimuddi Moonshes* (2), which is under the Code of 1872. The learned Judges therein observe that an order directing a person to give security is in substance a conviction. With great respect, I am unable to agree with that proposition. According to the strict letter of the proviso to section 350, it is only in trials that the accused can demand a re-hearing of witnesses. Although 'a trial' is not defined in the Code, there is a definition of 'an inquiry' in section 4 (k), which is said to include every inquiry other than a trial conducted under this Code. Wherever the word 'trial' occurs in the Code of Criminal Procedure it appears to refer to proceedings in which an accused person stands before a Judge or Magistrate who is empowered to convict him upon a charge of an offence committed by him and to sentence him to one of the punishments described in Chapter III of the Indian Penal Code. Schedule II of the Code of Criminal Procedure provides by what Magistrates offences may be tried, and Schedule III empowers certain

(1) (1910) I.L.R., 87 Cal., 812.

(2) (1879) 4 O.L.R., 452.

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Magistrates to try offenders. But when the Schedule speaks of inquiries under the preventive sections of the Code it refers to them as powers to require security for good behaviour or for keeping the peace. I therefore consider that the word 'trial' in proviso (a) to section 350 does not include an inquiry with a view to requiring security to keep the peace. There is a decision of this High Court, *Palaniandy Goundan v. Emperor* (1), which I am prepared to follow, that proviso (a) to section 350 applies only to trials and not to inquiries. The learned Judges were dealing there with a preliminary inquiry prior to commitment and not to an inquiry under any other chapter than Chapter XXIII. But the body of section 350 is not limited to inquiries preliminary to commitment but also includes inquiries in miscellaneous matters under Chapters VIII, X, XI and XII, that is, to proceedings regarding security to keep the peace or for good behaviour, to suppress public nuisances, to determine disputes regarding immoveable property likely to cause a breach of the peace, as well as to a preliminary inquiry under section 476 before sending a case for inquiry or trial to a First-class Magistrate for an offence against the administration of justice. For this we have the high authority of Mr. Prinsep (see his commentary on the Code of Criminal Procedure). If it was intended that the provision should only apply to certain inquiries and not to others, it would have been easy to specify the kind of inquiries intended to be covered by the words of the provision. On the other hand, in proviso (a), the word 'trial' seems to be used in clear contradistinction to the words 'an inquiry or a trial' in the body of the section.

A suggestion has been made by my learned brother that by section 117 of the Code of Criminal Procedure, which directs that inquiries relating to security for keeping the peace should be made in the manner prescribed for conducting trials in Summons Cases, and proceedings for requiring security for good behaviour should be conducted in the manner prescribed for conducting trials in Warrant Cases, all other provisions in the Code which apply to trials wherever they occur will be attracted to and will govern inquiries regarding security for keeping the

(1) (1909) I.L.R., 32 Mad., 218.

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peace or for good behaviour, as if they were trials. In my opinion the provision in section 117 (2) refers only to the procedure laid down in Chapters XX and XXI respectively, for the trial of Summons and Warrant Cases. The general provisions in Chapters XXIV and XXV no doubt apply to proceedings under Chapter VIII but they do so of their own force and not because they contain rules of procedure for the trial of Summons and Warrant Cases by virtue of section 117, clause 2. This very section 117 refers to proceedings for requiring security as inquiries, and thus observes the distinction between an inquiry and a trial. In *In re Adur Desikachari*(1), it has been observed that proceedings under this chapter fall within the scope of an inquiry rather than a trial. We held in that case that for the purpose of the Madras Letters Patent they would come under the description of a criminal trial. But that decision was independent of the words of definition in the Criminal Procedure Code and had only to do with the words that occur in the Madras Letters Patent.

I am therefore of opinion that the District Magistrate was right in holding that the petitioners had no inherent right to require a retrial of the case. I also think that we have no power to order a retrial under proviso (b) to section 350, as there has been no conviction of an accused within the meaning of that proviso.

In my opinion, apart from the merits of the application into which we have not entered, the Criminal Revision Petition should be dismissed. I agree that the question of law should be referred to a Full Bench.

On this Reference—

A. S. Viswanatha Ayyar for the petitioners.—Section 350 (1), proviso (a), Criminal Procedure Code, applies to a proceeding under section 107 also. The person against whom such proceeding is taken is an accused and the proceeding itself is a 'trial' within the meaning of the proviso. The proceeding has all the incidents of a trial. Sections 114 and 115 show that the persons against whom the proceeding is taken may be arrested in certain events. Section 123 shows that he is liable

(1) (1915) 28 M.L.J., 307.

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to imprisonment in default of his not furnishing security. The Code does not define the word 'trial'. Section 4 (k) defines the word 'inquiry' and clause (c) defines 'investigation.' In the *matter of Ramasamy Chetty*(1) lays down what constitutes a trial. Proceedings under section 107 satisfy all the tests. See also *In re Adur Desikachari*(2). A person against whom proceedings under section 107 are taken has always been held to be an accused. See *Jhoga Singh v. Queen Empress*(3), *Queen Empress v. Mona Puna*(4), *Queen Empress v. Mutasadi Lal*(5), and *Hopcroft v. Emperor*(6). *Buroda Kant Roy v. Korimuddi Moonsee*(7) is an exact authority for what I contend. It has never been doubted or dissented from. Even if a proceeding under section 107 is not a trial and section 350 (1), proviso (a), does not apply to it of its own accord, the proviso applies by virtue of the provision in section 117, clause (2) which says that in the case of an order requiring security for keeping the peace the inquiry shall be made in the manner prescribed for conducting the trial and recording the evidence in summons cases. Section 350 (1), proviso (a) is applicable to a summons case; it is thus applicable to a proceeding under section 107.

The Public Prosecutor on behalf of the Crown.—A person against whom proceedings under section 107 are instituted is not entitled to a de novo trial. Section 117 differentiates between security for keeping the peace and security for good behaviour. This is the former and is to be conducted as a summons cases. Trial is confined to cases under the Penal Code. In an inquiry preliminary to a trial he cannot claim a trial de novo. Section 117 (2) does not attract as contended for by the other side. The clause merely attracts Chapters XX and XXI of the Code and not the provisions of Chapter XXIV, in which the proviso occurs.

OPINION.

WALLIS, C.J.—I agree with the opinion of AYLING and WALLIS, C.J. COURTS TROTTER, JJ., which I have had the advantage of reading, as to the effect of the proviso to section 350 read with section

(1) (1904) I.L.R., 27 Mad., 510.

(3) (1898) I.L.R., 23 Calc., 493.

(5) (1899) I.L.R., 21 All., 107.

(2) (1915) 28 M.L.J., 307.

(4) (1892) I.L.R., 16 Bom., 661.

(6) (1909) I.L.R., 36 Calc., 163.

(7) (1879) 4 C.L.R., 452.

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117, and will only add that in my opinion trial generally means the determination of the issues arising in the particular case. As pointed out in History of English Law, Pollock and Maitland, Vol. II, page 598, the word trial comes from the French *trier*, Latin *tritare*, and was first used of the testing or trial of challenges to jurors. Triers of challenges are still appointed when necessary in English criminal trials. Though we talk of the trial of persons, what are really tried, both in civil and criminal cases, are issues. An ordinary criminal trial in England is, in the language of the common law, a trial of the general issue joined between the Crown and the accused on the latter's plea of 'not guilty' of the charge preferred against him. See Archbold Criminal Pleadings, Chapter 4, section 5, "The General Issue," page 161, 25th Edition. On the other hand, the preliminary Magisterial inquiry which is of comparatively modern origin, forms no part of the trial. I think the framers of the Code had this distinction in mind when they framed the definition of 'inquiry' so as to exclude 'trial.' In the present case, an issue undoubtedly arises between the Crown and the accused, as to whether he should be dealt with under the sections, and I see no sufficient reason why the determination of that issue should not be regarded as a trial.

AYLING, J.

AYLING, J.—The question referred to us is as follows:—
"Whether section 350 (1), proviso (a), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code."

The proviso in question refers only to a 'trial' while the principal clause refers to 'an inquiry or a trial.' The difference is significant; and points irresistibly to the conclusion that the legislature intended to distinguish between an inquiry and a trial and to direct that, while the principal clause should apply to both, the proviso should only apply to a 'trial'. What, then, is a 'trial'? It is curious that the phrase is not defined in the Code, although it is explained in section 4 that the term 'inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court. It looks as if the framers of the Code regarded the word 'trial' as of such obvious significance as to require no definition. At the same time it is noticeable that in many sections of the Code the words 'inquiry' and 'trial' are

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used in close juxtaposition, and apparently intended to signify two different things. I can find nothing to support the idea that either is ever used in any general or popular sense; for instance the words 'inquired into' in section 177, which has been referred to, seem to me intended to direct that not only the trial of a Sessions Case, but the preliminary inquiry under Chapter XVIII, shall ordinarily take place before a Court having territorial jurisdiction. In the absence of an express definition we can only look at the various sections of the Code in which the word 'trial' is used; and I can find none in which it is not used in connexion with proceedings in which a person stands before a Court empowered to convict him of some 'offence' alleged against him. The word 'trial' as used in the Criminal Procedure Code seems to presuppose the idea of an offence—a word defined in section 4. No 'offence' is involved in an inquiry under Chapter VIII of the Code; and in my opinion, inquiries under that Chapter are not trials. It follows that the proviso to section 350 (1) does not apply *suo vigore* to such proceedings.

There remains, however, the argument that it nevertheless applies by virtue of the provisions of the second clause of section 117, Criminal Procedure Code, which runs thus:—

"Section 117 (1). When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

It is argued on behalf of the crown that the effect of clause (2) is merely to render applicable the provisions of Chapters XX and XXI of the Code which deal with the procedure in summons and warrant cases respectively, and those of Chapter XXV, in

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so far as they deal with the mode of taking and recording evidence in such cases. On behalf of petitioner it is contended that the clause attracts the provisions of all sections of the Code, wherever found, which are applicable to summons and warrant cases: and, in fact, places a person called on to show cause why he should not furnish security in exactly the same position (except as regards the framing of a charge) as a person tried in a summons or warrant case, as regards the procedure to be followed, and the privileges to be enjoyed by him in connexion with the proceedings.

I must confess to great difficulty in the interpretation of this clause. It is certainly true that if the intention of the legislature had been that ascribed to it on petitioner's behalf, other language might have been employed; and the specific reference to the mode of recording evidence is somewhat significant of a limitation of the attractive power of the section. On the other hand it would have been perfectly easy to specify Chapters XX, XXI and XXV, if the framers of the Act had only these in mind. I am not much impressed with the argument based on the fact that certain other sections of the Code have been held applicable to inquiries under section 117, e.g., sections 340, 341, 344, 443, and 437. Sections 341 and 344 apply *proprio vigore* to inquiries as well as trials. Sections 340, 443 and 437 have been held applicable in *Jhoga Singh v. Queen Empress*(1), *Hopcroft v. Emperor*(2), and *Queen Empress v. Mutasadi Lal*(3), but on a totally different ground—the true meaning to be attached to the word 'accused'—not by any reference to section 117.

It seems to me that the words of the clause may be held to cover anything which has to do with the procedure in the Magistrate's Court, and that the right to have the witnesses re-summoned and re-heard conferred by section 350 is as much a matter of procedure as the right to have prosecution witnesses recalled and cross-examined conferred by section 256. On the other hand if they are to be given the narrow interpretation contended for by the Crown, such provisions as those in Chapter XXVI, regarding judgments, will not apply to security cases.

(1) (1886) I.L.R., 23 Cal., 493.

(2) (1900) I.L.R., 36 Cal., 183.

(3) (1899) I.L.R., 21 All., 107.

That is to say, the Magistrate in ordering security under section 118, either for good behaviour or keeping the peace, would be under no legal obligation, *inter alia*, to record a judgment setting forth his reasons (section 367), or to give accused a copy of it without delay (section 371). So far as I can see, apart from the operation of section 117, the Magistrate might simply record an order requiring the execution of a bond, without recording any reasons or discussing the evidence. I do not think this could have been intended, especially as care has been taken to provide for an appeal against an order for security for good behaviour (*vide* section 406), and for the interference of the Chief Presidency or District Magistrate in either class of cases (section 125), for reasons to be recorded. The sections in Chapter XXVI certainly apply *proprio vigore* only to trials: but the words "offence (if any)" in clause (2) of section 367 are very curious, and suggest that the framers of the section may have had in mind the fact that they were indirectly applicable to inquiries under Chapter VIII by reason of the clause under consideration.

After the best consideration I can give the matter, I am inclined to think that section 117(2), Criminal Procedure Code, does attract proviso (a), section 350(1); and would answer the reference in the affirmative.

COUTTS TROTTER, J.—The question referred to us is whether section 350, (1) proviso (a), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code.

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The petitioners in the case were bound over to keep the peace under section 107, Criminal Procedure Code, by a Magistrate who did not hear the evidence which had been heard and recorded by his predecessor who was transferred before its final determination. The petitioners claimed under the proviso to section 350 to have the witnesses re-summoned and re-heard by the Magistrate who passed the final orders, and their application was refused. They applied in revision to the High Court and the learned Judges, ABDUR RAHIM and SPENCER, differed. They referred the question to this Full Bench.

Section 350 provides for a Magistrate, who takes up a part-heard case, acting on the evidence wholly or in part

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recorded by his predecessor, and the general part of the section enables him to do so in an 'inquiry' or 'trial', but the proviso only enacts that in any 'trial' the accused may have the witnesses recalled. The contention on behalf of the Crown is that the scheme of the Code is to divide magisterial proceedings into 'inquiries' and 'trials', and the latitude given to the accused is confined designedly to 'trials', and that 'inquiries' are excluded from its application. The next step in the argument is to show that proceedings under section 107 and the following sections are inquiries and not trials. The sections undoubtedly speak of an 'inquiry'—see sections 117, 118 and 119.

The first contention of the petitioners is that the word 'inquiry' is used in the Code in two senses, a narrower and technical sense, and a more general one. The narrower one is defined in section 4 (k) as follows:

"'Inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court."

A typical instance of such an inquiry is the preliminary inquiry held by a Magistrate previous to committal for trial to a higher Court. It can hardly be contended that the right conferred by the proviso to section 350 could be successfully claimed in that case. It is said that 'inquiry' is used in a more general sense—investigation into the truth of any matter—in section 177 and the following sections where the language used is:

"Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed."

But those sections are not incapable of meaning that the preliminary inquiry before trial, and the subsequent trial after committal, should both be within the limits of jurisdiction of each Court in respect of it. It is further urged that the word 'trial' should be regarded as being used, where the context requires it, in a general and popular sense. It is quite true that the word 'trial' is not defined in the Code, but it may not unreasonably be urged that the definition of 'inquiry' impliedly defines 'trial' as every proceeding which is not an inquiry.

The question is whether we are bound to confine ourselves to the four walls of the Code and taking the nearest approach we can

get to a definition, express or implied, apply it rigidly, or, whether we are at liberty to supplement the Code by an application of the principles that lie at the root of the administration of criminal law. In interpreting an English criminal statute there would be no difficulty: it is always subject to the general principles of the common law, unless they are excluded by the plain words of the statute. The history of the doctrine of *mens rea* and its application to various statutes is a familiar example. If we adopt such a procedure here, there could hardly be any doubt that the proceedings under section 107 and the cognate sections have all the features of a trial. A person against whom they are taken has repeatedly been held to be an accused within the meaning of the Code, though he is not expressly so described. He has been held to have the right to be professionally represented, and if he cannot be said to be 'charged' with an offence, it is at least sought to be proved against him that he is a person with criminal or undesirable propensities. Finally, the consequences to him, if he neglects or is unable to furnish security, are so serious as to entail loss of liberty for a very considerable period. On the other hand, the history of the various Codes, and the circumstances of those Codes, unquestionably show that the framers of them intended them to be complete in themselves.

Besides these general considerations, it may be argued that the contrast between the body of section 350, which expressly mentions both inquiry and trial, and the proviso which speaks exclusively of trial is indicative of the intention to use 'trial' as excluding 'inquiry', which can properly be, or is described as, an inquiry within the meaning of the Code. This comes back to the original argument, that 'inquiry' must be construed as used in a non-technical and popular sense in section 107, because if 'inquiry' there is used in the technical sense, by section 4 the idea of its being also 'a trial' is excluded *ex vi termini* since an inquiry is in effect defined as that which is not a trial. No doubt, if manifest absurdity or injustice ensued from treating 'inquiry' in any particular context as being used in the technical sense, the Court would feel itself at liberty to assume that the word is used in a looser and more popular sense. For reasons presently to be stated, I am of opinion that it is not necessary to decide this question, or to determine whether to

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deprive the accused of the right of having the evidence reheard by the Magistrate who is to determine his fate is so flagrantly oppressive as to call for the construction of the word 'inquiry' in the material sections in a different sense from that defined in the Code. By section 117 it is enacted that

"such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and, where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

It is argued that this only incorporates Chapters XX and XXI of the Code, which contain specific provisions applicable only to summons and warrant cases, respectively. But the Code contains many general provisions to be found outside these two Chapters which regulate matters of procedure in summons and warrant cases alike, such as the directions as to the manner in which evidence shall be received and recorded, the right of accused persons to be legally represented, and the like. I think the true interpretation of section 117 is, that it requires the whole of the procedure in a summons or warrant case respectively to be adopted by the tribunal which inquires into a security case. It is an essential part of that procedure to make provision for the contingency, common to all, of a case coming in the first instance before one Magistrate and afterwards, before its conclusion, before another. I am of opinion, therefore, that the accused has the same right to have the witnesses recalled in a security as in a summons or warrant case; for that is not a substantive right, but a right relating to the procedure to be adopted. Accordingly I answer the reference in the affirmative.

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COMPANY—Charge given by resolution of Company to its Secretary on unpaid calls for special services rendered to the Company—Failure to register charge—Duty of officers to register neglected—Indian Companies Act (VI of 1882), Sec. 68—Explanation—Mode of construction—Proceedings in Legislative Council cannot be referred to to aid construction.] The question in this appeal was whether a charge given to the appellant, the Secretary of a Limited Company upon unpaid calls, could be enforced by him although not registered as required by section 68 of Act VI of 1882 (Indian Companies Act), which section required registration of all mortgages and charges specifically affecting property of the company, and imposed a penalty upon any official of the company who knowingly and wilfully authorises or permits the omission of such entry in the register. The decision of this question depended on the proper interpretation of the explanation to the section which was as follows:—"Omission to register under this section a

mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves "as such" of a mortgage or charge specifically affecting property of the company and not so registered." Held that the construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words. Held that the words "as such" in their proper construction should not be read as denoting the capacity in which the officers take the mortgages or charges, as contended by the appellant, nor do they refer to the following words "of a mortgage or charge" as contended by the respondents. They are introduced simply as giving the reason for the inability to take advantage of the securities which is that officers entrusted with a duty as to registration could not take advantage of a security to them as to which they had neglected this duty. In the circumstances of the case, therefore, it was held that the appellant could not avail himself of the charge even though he had ceased to be an officer.

Krishna Ayyangar v. Nallaperumal Pillai ... (1920) I.L.R., 43 Mad., 550

CONTRACT ACT (IX of 1872), Sec. 16 (1)—Undue influence—Onus of proving undue influence—Suit to cancel contract on ground of undue influence—Domination of will must be put in action.] To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. But both by the Law of India and the Law of England more than mere influence must be established so as to render it, in the language of the law, 'undue'. It must be established that the person in a position of domination has used that domination to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. When the relation of influence as above set forth has been established, and it is also made clear that the bargain is with the person who influences the other, and is in itself unconscionable, then the person in a position to use his dominating power has the heavy burden thrown on him of proving affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. In the circumstances of the present case their Lordships were of opinion it has not been proved as an essential part of the plaintiff's case that the contract of sale came to was unconscionable in itself or constituted an advantage unfair to the plaintiff.

Poonathurai v. Kannappa Chettiar ... (1920) I.L.R., 43 Mad., 546

EVIDENCE ACT (I of 1872)—Admissibility of evidence recorded in a previous proceeding—Consent of parties.] Evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding, by the consent of both parties. *Sri Rajah Prakasarayanim*

Garu v. Venkata Rao (1915) I.L.R., 38 Mad., 160, approved. *Ponnuswami Pillay v. Singaram Pillay* (1918) I.L.R., 41 Mad., 781 overruled.

Jainab Bibi Saheba v. Hyderally Sahib ... (1920) I.L.R., 43 Mad., 609

HINDU LAW—Alienation—Alienation by widow—Onus of proof of legal necessity—Suit to set aside an alienation after long lapse of time—Presumptions to complete proof.] The suit which gave rise to this appeal was one by a reversioner to set aside an alienation by a widow made in 1880 on the ground that it was made without legal necessity. The widow died on the 15th December 1900, and the suit was instituted on 12th December 1912 involving an inquiry into the circumstances of a transaction more than 32 years after it took place. The District Court found that there was no legal necessity for the sale and decreed the suit. The High Court held that legal necessity had been proved and reversed the judgment of the Trial Judge. In the course of their judgment they said, "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time." Their Lordships of the Judicial Committee in affirming the decision of the High Court cited the above with approval as being in their opinion a correct statement of the law.

Chintamanibhatta Venkata Reddi Pantulu Garu v. Rani Saheba of Wadhavan ... (1920) I.L.R., 43 Mad., 541

Right of residence—Unmarried sisters' right—Decree against mother of last male owner on her personal debt—Sale of house in execution—Auction purchasers' right to oust unmarried sisters in possession—Right of residence of other females against purchasers.] An auction purchaser of an ancestral house, sold in execution of a money-decree passed on a personal debt of the mother who inherited the property as heir to her son, is not entitled to oust the unmarried sisters of the latter, who reside in the house.

P. Suriyanarayana Rao Naidu v. P. Balasubramania Mudali,

(1920) I.L.R., 43 Mad., 635

LIMITATION ACT (IX OF 1908), SEC. I, ARTS. 60, 63—Interest due on "Thavanai" transactions with Nattukottai Chetties—Hindu widow—Interest on her husband's assets—Acquiescence in treating it as part of her husband's estate—Effect on her death.] If a Hindu widow acquiesces in treating the interest on the investments of her husband's assets as part of her husband's estate, it will descend, on her death, to her husband's heirs. If money is deposited with Nattukottai Chetties on "Thavanai" with the understanding that at the end of each "Thavanai" period the interest for that period is not payable but is to be added to the principal, and both are to be treated as a fresh deposit, article 60 of the Limitation Act is applicable to the recovery of such interest and it becomes payable only on demand. Article 63 does not apply.

Narayanan Chetty v. Supptiah Chetty ... (1920) I.L.R., 43 Mad., 639

LIMITATION ACT (IX OF 1908), SEC. 12 (2)—Appellant filing a copy of decree appealed from, obtained by another party—Deduction of time taken to get that copy.] An appellant who is required to file with his memorandum of appeal a copy of the decree appealed from, may file a copy obtained by another party; and under section 12 (2) of the Limitation Act he is entitled to a deduction of time taken to obtain that copy. *Ram Kishan Shastari v. Kashi Bai* (1907) I.L.R., 29 All., 264, followed. *Ramamurthi Aiyar v. Subramania Aiyar* (1902) 12 M.L.J., 385, dissented from.

Amin-ud-din Sahib v. Pyari Bai ... (1920) I.L.R., 43 Mad., 638

SEC. 12 (2), (3)—Christmas Holidays—Deduction of, in computing time for appeal.] The defendant, against whom a judgment and decree were passed on 21st December 1919, i.e., on the first day of the Christmas vacation, applied for copies of the same on the 7th January 1920, i.e., some days after the reopening. Held, that in computing the time for appeal, the defendant was not entitled to deduct the period of the Christmas vacation as 'time requisite for obtaining copies' within section 12 of the Limitation Act.

Subrahmanyam v. Narasimham ... (1920) I.L.R., 43 Mad., 640

MADRAS IRRIGATION CESS ACT (MADRAS ACT VII OF 1865), SS. 1 AND 4 AS AMENDED BY MADRAS ACT V OF 1900—Right to take water for irrigation through artificial channel, Recognition of—Forfeiture of Estate to Government—Easement—Engagement with Government—Non-liability for cess after period of 80 or 90 years.] An artificial channel from a non-tidal river through which water for irrigation ran through an estate belonging to the respondent was constructed upwards of a century ago by the then zamindar of Palkonda, a neighbouring landholder, and the evidence showed that in 1814, the then zamindar recognised the right of the respondent's predecessor in title to irrigate his lands with water from the channel. In 1833, on forfeiture of the Palkonda zamindari for rebellion, it came into possession of the Government, but no attempt was made by the then Government to change the footing on which the irrigation rights were enjoyed by the predecessors in title of the respondent, and by the respondent himself, or to lessen or interfere with the continued enjoyment of the easement as of right and without any exaction or charge. No claim in respect of the lands in suit was made until 1907 when a sum was levied on the respondent under the Madras Irrigation Cess Act (Madras Act VII of 1865, as amended by Madras Act V of 1900) which he paid under protest, and brought a suit for a refund of the amount, and for a declaration that he was not liable to pay any cess under that Act. The act as amended enacts in a proviso "that where a zamindar or any other description of landholder not holding under ryotwari settlement is by virtue of an engagement with the Government entitled to irrigation free of separate charge no cess shall under this Act be imposed for water supplied to the extent of this right and no more." Held, that "an engagement with the Government" had been created, within the meaning of the proviso to the Act, by the transaction of the zamindari having passed to the Government, and had been accepted by them as binding the parties for a period of between 80 and 90 years during

which (including 40 years since the Act was passed) the respondent's zamindari had been enjoyed without any question or doubt that the respondent held under a tenure which gave him the benefit of the proviso in Act VII of 1865.

The Secretary of State for India in Council v. Maharajah of Bobbili.
(1920) I.L.R., 48 Mad., 51

ONUS OF PROOF—Suit by Government pattadar to eject tenants—Claim by tenants to right of occupancy—Facts establishing rights of occupancy—Title of plaintiff and service of notices to quit undisputed—Onus on defendants to prove claim, how satisfied—Second appeal—Jurisdiction of High Court on second appeal to deal with facts, Civil Procedure Code (1908), sec. 108.] In suits brought by the appellant as Government pattadar against the respondents after due service of notice to quit, to eject them from agricultural land in a ryotwari village, the respondents pleaded that they had a permanent tenancy or right of occupancy; and the appellant's title and the notices purporting to determine the tenancy were not disputed. Held that the onus was on the respondents to prove the existence of their right of permanent occupancy, but that it had been established by the evidence that they had been immemorially in possession of the lands, and that they had not been proved to have been ever let into occupation by the appellant; that they had been paying a uniform rate of rent; that the lands were reclaimed and brought under cultivation by them; that they had made great improvements and carried on the cultivation either of dry or garden crops of their own choice without any interference or objection; and that they had for a very long time been sometimes making alienations of wells and lands; and the onus of proof had been thereby satisfied. The District Judge had passed decrees in the appellant's favour for possession of all the lands in suit. The High Court was of opinion that the District Court had omitted to determine a question of fact which was essential to the right decision of the suit on the merits, and framed issues which it asked the District Judge to decide as to whether the respondents were yearly tenants or had a permanent right of occupancy. These the District Court returned without dealing with them in a satisfactory manner. The High Court on second appeal drew an inference of the respondents' occupancy rights, and decided the appeal (dealing with it under section 108 of the Civil Procedure Code, 1908) in favour of the respondents. Held that the inference not being contradictory to any finding of fact by the District Court, and there being materials from which such inference could be drawn, the High Court had jurisdiction, under the circumstances, to deal with the case under section 103 and make a decree as it had done.

Seturathnam Aiyer v. Venkatachela Goundan ... (1920) I.L.R., 48 Mad.,

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SEC. 17 (1) PROVISOR—*Ex parte* decrees, application to set aside—Whether proviso mandatory or directory—Time within which deposit to be made or security given.] By the Full Bench (SESHAGIRI AYYAR, J., dissenting)—The provisions of section 17 (1), Provincial Small Cause Courts Act, are mandatory. By the Full Bench—

But the deposit of the decretal amount may be made or the security given, within the period prescribed by the law of limitation for applications under the section, namely, thirty days from the date of the *ex parte* decree although it did not accompany the application itself.

Jeun Muchi v. Budhiram Muchi ... (1905) I.L.R., 32 Calc., 389, followed.
V. M. Assan Mohamed Sahib v. M. E. Rahim Sahib ... (1920) I.L.R.,

48 Mad., 579

RAILWAYS ACT, INDIAN (IX OF 1890), SEC. 72—Risk note—Consignment of goods—Loss, deterioration, or damage, meaning of—Liability of Railway Company—Insurers—Bailees—Competency of Company to contract for less liability than as bailees.] A consignor sent a bale of gunny bags through the defendant Railway Company. The risk note provided that the Company should not be responsible for any loss, destruction or deterioration of or damage to the consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of a Railway administration or to theft by or to the wilful neglect of its servants, etc. The bale was damaged by the dropping of a package of acid by the negligent act of the Company's servant. On a claim against the Company for damages, the latter pleaded that they were not liable on the ground, *inter alia*, that there was no 'loss' of the article consigned within the meaning of the risk note. Held, that the plaintiff could recover, only if the bale of gunnies was lost, that is, entirely deprived of value. The distinction between 'loss' and 'destruction, deterioration, and damage' pointed out. It cannot be said that there is no loss if the outer cover which encloses a parcel is delivered, whatever may happen to the contents. *East Indian Railway Company v. Nilakanta Roy* (1914) I.L.R., 41 Calc., 576; *B.B. & C.I. Railway Company v. Ambalal Sewaklal Ind. Ry.* Cas. 48 and C.S. 309 of 1914, Madras High Court, (unreported), dissented from. *Per SESHAGIRI AYYAR, J.*—The term 'loss' would include cases where the article consigned is lost to the consignor as such article or has lost its identity as such. *Asfer & Co. v. Blundell* [1896] 1 Q.B., 123 and *Hearn v. The London and South Western Railway Company* (1855) 10 Exch., 793, referred to. Under the Indian Law, a Railway Company has not the liabilities of an insurer, but only those of a bailee, and, under section 72 of the Indian Railways Act, can enter into an agreement limiting its responsibility, provided it is in a form approved by the Governor-General in Council. *Sheikh Mahamad Ravuther v. The British India Steam Navigation Co.* (1909) I.L.R., 32 Mad., 95, commented on. Persons who undertake to do certain things and who employ servants to do those things must be held responsible for the carelessness or negligence of those servants in the course of their employment.

Joseph Rand v. Craig, [1919] 1 Ch., 1, referred to.

The Madras and Southern Mahratta Railway Company, Ltd. v. Mattai Subba Rao ... (1920) I.L.R., 48 Mad., 617

TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 98 AND 60—Anomalous mortgage—Mortgages defined in section 58 and combined mortgages under section 98—Clog on equity of redemption, validity of—Applicability of provisions of the

Act to ordinary and anomalous mortgages—Terms of the deed and local usage, how far binding—Construction of document.] Where the mortgagee was put in possession of the lands mortgaged under a deed executed in 1900, which provided that the principal with interest at a specified rate should be repaid on a certain date, eleven years thereafter, and that, in default, the mortgagor should give up the lands as sold to the mortgagee and execute a proper sale-deed, and further that the latter should enjoy the property paying the revenue due to Government, and where the mortgagor sued in 1914 to redeem the mortgage and the mortgagee pleaded that the former could not redeem after the time limited under the deed, *Held* (by the Full Bench), that the transaction evidenced by the deed was not a mortgage by conditional sale or an anomalous mortgage under section 98, but a combination of a simple mortgage and a usufructuary mortgage, and that, consequently, the stipulation in the deed, which fetters the equity of redemption, was invalid as opposed to section 60 of the Act. *Held* (by WALLIS, C.J., and SESHASIBI AYYAR, J.)—In the case of anomalous mortgages referred to in section 98 the provisions of section 60 as to the right of redemption do not apply when there is a contract or local usage to the contrary.

Kandula Venkiah v. Donga Palaya ... (1920) I.L.R., 48 Mad., 589

PRIVY COUNCIL.*

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT),

v.

MAHARAJAH OF BOBBILI (PLAINTIFF).

[On Appeal from the High Court of Judicature
at Madras.]

1919,
May 20 and
22, and
July 11.

Madras Irrigation Cess Act (Madras Act VII of 1865), sections 1 and 4 as amended by Madras Act V of 1900—Right to take water for irrigation through artificial channel, recognition of—Forfeiture of Estate to Government—Easement—Engagement with Government—Non-liability for cess after period of 80 or 90 years.

An artificial channel from a non-tidal river through which water for irrigation ran through an estate belonging to the respondent was constructed upwards of a century ago by the then zamindar of Palkonda a neighbouring landholder, and the evidence showed that in 1814, the then zamindar recognized the right of the respondent's predecessor in title to irrigate his lands with water from the channel. In 1833 on forfeiture of the Palkonda zamindari for rebellion it came into possession of the Government, but no attempt was made by the then Government to change the footing on which the irrigation rights were enjoyed by the predecessors in title of the respondent, and by the respondent himself, or to lessen or interfere with the continued enjoyment of the easement as of right and without any exaction or charge. No claim in respect of the lands in suit was made until 1907 when a sum was levied on the respondent under the Madras Irrigation Cess Act (Madras Act VII of 1865, as amended by Madras Act V of 1900) which he paid under protest, and brought a suit for a refund of the amount, and for a declaration that he was not liable to pay any cess under that Act. The Act as amended enacts in a proviso "that where a zamindar . . . or any other description of landholder not holding under ryotwari settlement is by virtue of an engagement with the Government entitled to irrigation free of separate charge no cess shall under this Act be imposed for water supplied to the extent of this right and no more."

Held, that "an engagement with the Government" had been created, within the meaning of the proviso to the Act, by the transaction of the zamindari having passed to the Government, and had been accepted by them as binding the parties for a period of between 80 and 90 years during which (including 40 years since the Act was passed) the respondent's zamindari had been enjoyed without any question or doubt that the respondent held under a tenure which gave him the benefit of the proviso in Act VII of 1865.

APPEAL No. 155 of 1917 from a judgment and decree (27th October 1915) of the High Court at Madras, which affirmed a judgment

* *Present*:—Viscount HALDANE, Lord BUCKMASTER, Lord DUNEDIN, and Lord SHAW.

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and decree (9th December 1909) of the District Judge of Vizagapatam.

The suit from which this appeal arose was brought by the present respondent, the Maharaja of Bobbili, for the refund of a sum levied under the Madras Irrigation Cess Act (Madras Act VII of 1865, as amended by Madras Act V of 1900) and paid under protest, and for a declaration that he was entitled to use the water in question for irrigation in a village called Narayanapuram free of cess.

The plaintiff stated in his plaint that the channel from the river Suvarnamukhi through which the water ran for irrigation was constructed upwards of a century ago by the then zamindar of Palkonda, owner of a neighbouring zamindari, now in the possession of Government; that the plaintiff's lands had ever since been irrigated by water from the channel, and that he and his predecessors in title had from time to time repaired the channel, and constructed sluices in it at their own expense, and (paragraph 8) that he was entitled to the irrigation of his lands from the channel free of charge as a riparian proprietor, and by virtue of long user, custom, prescription, and easement, and according to an understanding and agreement between his predecessors in title and the then zamindars of Palkonda and (since the Palkonda estate was forfeited by those zamindars, and became the property of Government) between his predecessors in title and himself on the one hand and the Government on the other.

The defendant in his written statement alleged (*inter alia*) that both the river and the channel were the absolute property of Government, and were a Government source of irrigation; that there was no such understanding or agreement, nor any right by user, custom, prescription or easement as alleged; and he claimed to be entitled to levy water rate under Madras Act VII of 1865 upon all lands in the village in suit found to be in excess of the permanent settlement wet area on which a second wet crop was now raised.

Issues were settled of which those now material were, (a) whether the Suvarnamukhi river belongs to Government? (b) whether the plaintiff is entitled to the declaration sued for on any of the grounds alleged in paragraph 8 of the plaint, and

whether the special agreement therein pleaded is legal and valid? (c) what was the extent of wet land in Narayanapuram at the time of the permanent settlement, and at the time of the construction of the channel? what was the extent, if any, of such land under second crop at the time of the permanent settlement, and was that extent, if any, taken into account in fixing the permanent assessment? whether the plaintiff is liable to pay the water-rate imposed?

The District Judge held on the second issue that it was not necessary to come to a finding as to the ownership of the river, the only question being as to water taken from the channel, and as to the channel he held that it was constructed by the then zamindar of Palkonda between 1690 and 1780, and as the Government had succeeded to his rights by virtue of the forfeiture of the zamindari in 1833, it belonged to the Government. On the sixth issue the District Judge said that the plaintiff could have no material rights based on riparian proprietorship, for the channel was an artificial one; but that the evidence showed: (a) that in 1814 the then Palkonda zamindar undoubtedly admitted the right of plaintiff's predecessor to irrigate his land from the channel through five sluices, and that there were now only four: (b) that in 1865, 1901 and 1903, after the Government had acquired the zamindari, the right of the plaintiff to irrigate his lands from the channel was recognized by the Government, and he was allowed to construct masonry sluices from it at his own cost; and (c) that no charge had ever been made for the water so used until 1907, when the tax in suit was levied; that it appeared therefore that the plaintiff had enjoyed the right certainly since some time between 1801 (the date of the permanent settlement) and 1814 down to 1907, without charge; and that from this fact, in his opinion, a grant or agreement in respect of it might reasonably be inferred, and that the Government could only have succeeded to the zamindar's title to the channel subject to rights already acquired. He held, therefore, that there was no evidence to show that the Government had in any way improved the supply of water in the channel flowing to his lands through the four sluices now in existence. As to the eighth issue he said that was immaterial, as the plaintiff was entitled to use the channel as he liked, the only restriction being as to the number

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of sluices; and in the result, therefore, he held that the plaintiff was entitled to a refund of the amount claimed and to the declaration prayed for, and made a decree accordingly.

The defendant appealed to the High Court, and Sir ARNOLD WHITE, C.J., and OLDFIELD, J., remanded the suit to the Trial Judge for further findings (1) as to the ownership of the river; (2) as to whether the 160 acres in respect of which the Government claimed the right to levy water-cess were at the time of the permanent settlement taken into account as wet land, for the purposes of the settlement; and (3) as to whether subsequent to the permanent settlement there had been an engagement with Government under which the plaintiff had become entitled to irrigation free of separate charge as regards those 160 acres.

On the first question the District Judge found that the river belonged to Government; on the second, that the lands in suit were not taken into account at the permanent settlement; and on the third, on the evidence, he found that subsequent to the permanent settlement there was an implied engagement by Government to supply the plaintiff with water from the channel in the same ways as before the forfeiture, that the Government continued to recognize his right to take the water for a period of more than 70 years after the forfeiture, and that an engagement must therefore be implied on the part of Government to allow the plaintiff to continue to take the water through the existing four sluices for the purpose of irrigation, free of separate charge.

These findings were returned to the Appellate Court, and on 17th April 1914, the same Judges as before delivered judgment on the second and third. On the third the Chief Justice said he could not concur with the Trial Judge that there had been "an engagement with Government" subsequent to the permanent settlement within the meaning of the Act; on the second he said he was not prepared to differ from the conclusion of the Trial Judge and Mr. Justice OLDFIELD, that the lands in suit were not taken into account at the permanent settlement. On the third finding, OLDFIELD, J., said he was unable to accept the finding of the Trial Judge, but on the second he upheld the finding.

The case, however, was put down for further consideration on the first finding, whether the river belonged to Government or

not, and came before WALLIS, C.J., and Mr. Justice SESHAGIRI AYYAR.

WALLIS, C.J., said that in the present case the banks and bed of the river at the place in question belonged to the zamindar, and the Government did not own the banks or bed or any part of them until far below the point where the channel in question took off. He held, therefore, that the river could not be considered as one belonging to Government so as to warrant the levy of water-cess under Madras Act VII of 1865.

SESHAGIRI AYYAR, J., agreed. He said the proprietorship of a river could only be based on the right to the banks and bed of the stream through which it ran, and that on this principle the Government who in this instance owned neither bed nor banks could lay no claim to the water.

The appeal was therefore dismissed.

ON THIS APPEAL

Sir Erle Richards, K.C., and Kenworthy Brown, for the appellant, contended that both the river and the water channel belonged to Government, at any rate since the forfeiture in 1833, and that the respondent was liable to pay the cess duly levied under Madras Act VII of 1865. It was admitted that there was no engagement, either express or implied, between Government and the predecessor in title of the respondent at the permanent settlement which entitled him to use the water from the channel free of cess; and it is submitted that the High Court has rightly held that no such engagement had been made since the permanent settlement; and if there had been one it would not have been 'an engagement' within the proviso to section 1 of the Act. Reference was made to *Kandukuri Balasuraya Row v. Secretary of State for India*(1). The lands in suit in the present case were not irrigated from the channel at the permanent settlement. Persons owning the banks of non-tidal rivers in India were not for that reason owners of part or the whole of the river bed: some owners of the bed or part of it are not for that reason owners of the river. In any case, the respondent is not the owner of both banks of the river at the place where the channel takes off, and that is stated in the judgments now under appeal. Further, a zamindar who is permitted, or

(1) (1917) I.L.R., 40 Mad., 886; L.R., 44 I.A., 166.

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otherwise entitled, to use a Government supply of water for the purpose of irrigation is not for that reason alone exempted from liability under the Act.

Upjohn, K.C., Sir W. Garth and J. M. Parikh, for the respondent, were not called upon.

The JUDGMENT of their Lordships was delivered by

Lord SHAW.

Lord SHAW.—This is an appeal against a decree of the High Court of Madras, dated 27th October 1915, which affirmed a decree of the District Judge of Vizagapatam, dated 9th December 1909. The suit was brought by the Maharaja of Bobbili, viz., the present respondent, for the refund of a sum levied under the Madras Irrigation Cess Act (VII of 1865), and paid under protest, and for a declaration that he was entitled to use the water from a certain channel for irrigation of the village of Narayanapuram, free of the cess.

The respondent was the owner of a village called Narayanapuram in the district of Vizagapatam. For upwards of a century the lands of this village have been irrigated by the water of the Suvarnamukhi river flowing through an artificial channel known as the Sakarapalli channel. The river runs through the respondent's estate (amongst others), and its banks and bed in its course through that estate admittedly belong to him.

The history of the facts may be stated in one or two sentences. The Suvarnamukhi river rises in zamindari land and flows through zamindari land up to the suit village of Narayanapuram. From this river a channel was constructed by a zamindar of Palkonda, no doubt for irrigation purposes. Apparently in order to obtain a suitable flow, the river had to be tapped at a point considerably above the Palkonda lands, and the river being so tapped the channel proceeded therefrom through the lands of *inter alias* the predecessor of the present Maharaja, who is the respondent.

The Trial Judge is of opinion that the channel was probably constructed somewhere between 1690 and 1780. The evidence is not clear as to the exact date at which certain sluices, four of which still remain, were constructed from the channel for the purpose of irrigating the respondent's lands. The Courts below have come to the conclusion that the irrigation of the village is not proved to have taken place prior to the permanent settlement

of the year 1801, notwithstanding the fact that, as already stated, the Trial Judge is of opinion that the channel itself was constructed many years earlier. It is unnecessary for the Board to enter upon the question whether a conclusion of this kind, which is more of the nature of a conjecture with regard to the probabilities of an obscure situation, could be classed as a concurrent finding of fact precluding a different finding here; but their Lordships must not be held as acceding to the view, founded upon the state of the permanent settlement record, that the absence of express notice of the sources of water supply, warrants the conclusion that such a supply—from the channel admittedly in existence then and for many years before—was not furnished to the respondent's lands.

As to the state of matters at the beginning of the 19th century, their Lordships agree with the view of the District Judge when he says:—

“The plaintiff relies upon Exhibit C, as showing that in 1814 the then zamindar admitted the right of plaintiff's predecessor to irrigate his lands from the channel through five *punathas* (sluices). There can be no doubt about this. This document was proved as Exhibit IV, in the connected suit O.S. No. 13 of 1906, on behalf of the defendant. Its existence was then probably not known to the plaintiff, as it was only produced for the first time at the hearing of O.S. No. 13 of 1906. It shows conclusively that while the Palkonda zamindars owned the channel, the plaintiff's right to irrigate his Narayanapuram lands through five *punathas* was admitted and recognized, and that no labour or contribution was provided by the village for repairing the channel. The oral evidence shows that the zamindar (plaintiff) is in fact only enjoying four *punathas* now.”

Two outstanding facts accordingly appear with regard to the irrigation of this property, namely, that for over at least one hundred years it has been enjoyed as matter of right; secondly, that no pecuniary return was made therefor. In short, the case appears to be the simple one, viz. :—that, for land given as part of the channel artificially constructed for irrigation purposes, a right to draw off water as it passed was conferred upon the respondent's predecessors and himself, and that that right has been enjoyed by them ever since. It is in these circumstances that the question arises whether the respondent is liable to pay an irrigation cess in virtue of the Madras Act VII of 1865,

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as amended by Madras Act V of 1900. No claim in respect of these lands was made until the year 1907. Payment was made under protest, and the present suit to determine liability was instituted.

The case depends upon the proper construction to be put upon the Act referred to. Its preamble is not without importance :—

“Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land; and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works; it is enacted as follows :— . . . ”

So far as the preamble goes, the Act would not appear to be directed against lands such as those of the respondent; for it is admitted that no works or action of the Government have either created or increased the supply of water to his lands. It is nevertheless true, as was indicated by Lord PARKER in his judgment in *Kandukuri Balasurya Row v. Secretary of State for India*(1), that section 1 of the Amending Act makes operative provisions somewhat in excess of the apparent ambit of the preamble. If so, the section must govern.

It is in the following terms :—

“Sections 1 and 4 of the Madras Act VII of 1865 . . . shall be read and construed as if at the time of the passing of the said Act there were and have been inserted in lieu of the said sections the following, viz. :—

“(a) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by Government, and also,

“(b) Whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the collector, subject to the control of the Board of Revenue and of the

Government, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,

“It shall be lawful for the Government to 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 which, such water-cess as aforesaid shall be levied and alter or amend the same from time to time.

“Provided that where a zamindar or inamdar or any other description of landholder not holding under *ryotwari* settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more . . . ”

The respondent's position is that of a zamindar not holding under ‘*ryotwari* settlement’; he is, therefore, a person directly pointed to by the proviso just cited, and in view of the history of the lands as already sketched, the question is at once raised as to whether this zamindar is “by virtue of engagements with the Government” entitled to irrigation free of separate charge. If he is, then no cess is leviable in respect thereof; nor would any cess have been leviable under the Act of 1865 as unamended: for by section 4 of the Act of 1865 there is a similar proviso of exemption. The reason for such a proviso is not far to seek. The Government was contemplating irrigation works, and along with these the financing of those operations; and the preamble indicates not obscurely that the financing was to be met by way of a fit return to Government on account of the increased profits which would be derivable from lands irrigated by such Government works. If, however, in consequence of other arrangements, or, as section 1 puts it, ‘engagements,’ the irrigation had been accomplished and financed apart from expenditure under the statute, then those lands should stand free from the statutory cess.

The question accordingly in the present case is whether there are such ‘engagements with the Government’. On this question there was a sharp division of opinion in the Courts below, and it is necessary to state how it is that the Government's claim to be owner of the channel arises. In the year 1833 the Palkonda zamindar rebelled against the Government. His lands were in consequence forfeited to the Crown. As already stated, the artificial channel was at that time constructed, and the

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(1) (1917) I.L.R., 40 Mad., 886; L.R., 44 I.A., 106.

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irrigation as a system applicable to the lands of Bobbili was in full operation. No attempt was made by the Government of the day to change the footing upon which the irrigation rights were enjoyed, or to assert any right in the Crown, as owner of the servient tenement of Palkonda, which would lessen or interfere with the continued enjoyment of the easement by the respondent's predecessors, as of right and without exaction or charge.

What was the nature of this right of easement? It was to receive and utilize for irrigation purposes from an artificial channel a supply of water. It is, of course, in accord with legal theory that such a right of easement is created by grant, but it is also sound law that a grant of such a right is presumed from long possession, although the actual transaction of making such a grant cannot be discovered or proved. The present case is accordingly in no way singular in this respect, that the acts of parties over a long course of years point to the enjoyment of an easement founded upon a grant by the owner of the servient to the owner of the dominant tenement.

Upon the facts of the present case it appears to be clearly established that for about fifty years, namely from 1814 till 1865, when the Act was passed, the owners of Palkonda and the zamindar of Bobbili stood in the position of having, the one a servient, and the other a dominant tenement, with the unchallenged enjoyment of the easement of water-supply as stated. Had the question now in suit accordingly arisen in the year 1864, there seems little reason to doubt that the right of the respondent would have been settled upon that footing.

But the matter does not end there. The Act of 1865 was passed, and for forty-two years the same state of matters was continued. Had this suit been raised in the year 1866 instead of 1907, a serious question would still even then have arisen, namely, whether the words in the section 'engagements with the Government' did not require a construction inclusive of engagements with the Government or its predecessors in title, as only by such a construction could justice be done to the manifest intention to reserve as against water cess those who had already been furnished with their own water-supply.

The position is strengthened by the further lapse of time and, in their Lordships' view, the Government must stand committed to the transactions which they have accepted as binding parties for a period of between eighty and ninety years, during which (including forty years since the Act was passed) the zamindari of Bobbili has been enjoyed without any question that the zamindar held under a tenure which gave him the benefit of the proviso in the statute.

This view is in no way in conflict with the view of Lord PARKER in the case referred to. On the contrary, it appears to be supported by certain passages in that judgment. His Lordship refers to the permanent settlement in the Madras Presidency under which the Government granted to the zamindars

"a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances"; and he adds:

"Under these circumstances the Government could not impose cess for the use of water, the right to use which was appurtenant to the land in respect of which the *jumma* was payable without in fact, if not in name, increasing the amount of such *jumma*, and thus committing a breach of the obligation undertaken at the time of the permanent settlement."

With regard to the actual question in the present case, judgment was expressly reserved. Referring to the difficulties which arise in the construction of the Act and the fact that the levy is made on the basis of the area irrigated, irrespective of profits, Lord PARKER said:

"If in order to avoid this result reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

That question so reserved is the point now in issue. In their Lordships' opinion such an engagement should be implied in the circumstances already set out. The predecessors of the respondent were using the water as of right when the servient zamindari was forfeited to the Crown in 1833; with the owners of that zamindari they had, to use the general term employed in

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the statute, a good 'engagement': in taking the servient estate, this engagement accompanied the transaction, and the engagement was thereafter with the Crown. In short, the forfeiture could not operate against a dominant and unforfeited zamindari. With acquisition by forfeiture the Crown became bound to take the forfeited estate *tantum et tale*, as it stood in the subject who had rebelled, that is to say, to respect the rights and in particular the easements enjoyed by others. Otherwise the scope of the forfeiture would be extended; *pro tanto* it would fall upon innocent and loyal subjects.

This is sufficient for disposal of the appeal. The case was unfortunately much delayed owing to various causes not sufficiently explained. Time also was occupied by a remit for inquiries in regard to the ownership of the river itself from which the water was drawn by the channel. While their Lordships do not differ from the conclusion upon that topic arrived at by the High Court, they are of opinion that the case should be determined on the simpler ground above stated. In their Lordships' opinion the Crown has failed to establish the liability of the respondent.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Solicitor, India Office.*

Solicitor for the respondent: *Douglas Grant.*

J.V.W.

PRIVY COUNCIL.*

CHINTAMANIBHATLA VENKATA REDDI PANTULU
GARU AND ANOTHER (PLAINTIFFS),

v.

RANI SAHEBA OF WADHWAN (DEFENDANT).

[On Appeal from the High Court of Judicature
at Madras.]

1919,
November
18.

*Hindu Law—Alienation—Alienation by widow—Onus of proof of legal necessity—
Suit to set aside an alienation after long lapse of time—Presumptions to
complete proof.*

The suit which gave rise to this appeal was one by a reversioner to set aside an alienation by a widow made in 1830 on the ground that it was made without legal necessity. The widow died on the 15th December 1900, and the suit was instituted on 12th December 1912 involving an inquiry into the circumstances of a transaction more than 82 years after it took place. The District Court found that there was no legal necessity for the sale and decreed the suit. The High Court held that legal necessity had been proved and reversed the judgment of the Trial Judge. In the course of their judgment they said "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time." Their Lordships of the Judicial Committee in affirming the decision of the High Court cited the above with approval as being in their opinion a correct statement of the law.

APPEAL No. 157 of 1917 from a judgment and decree (29th February 1916) of the High Court of Madras (ABDUR RAHIM and PHILLIPS, JJ.), which reversed a judgment and decree (7th October 1914) of G. H. B. JACKSON, Acting District Judge of Vizagapatam.

The suit which gave rise to this appeal was brought by the appellants against the respondent to recover possession of an estate belonging to one Ananta Rao in the district of Vizagapatam. The claim in the plaint was that the appellants were the next reversioners of Ananta Rao the last male holder of the estate who died in 1829 leaving a widow Hanumayamma and a daughter, and that the widow had on 5th May 1830 sold

* Present:—Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMEER ALI and Sir LAWRENCE JENKINS.

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the estate to one Goday Suraprakasa from whom it became ultimately vested in the respondent. The appellant's case was that the sale was not binding on them as it had been made by the widow without any legal necessity, and whether or not that was the case was the main question for determination in the present appeal.

The widow Hanumayamma died on 15th December 1900 and the present suit was instituted more than 82 years after the sale, and within three days of its liability to be barred by limitation, namely on 12th December 1912.

The respondent pleaded (inter alia) that the sale of the estate was for necessity, and bound the heirs. The District Judge on the evidence was of opinion that the length of time that had elapsed since the sale and since the widow's death could not affect the case, because when once the appellants had proved that they were the next reversioners they were entitled to a decree unless the respondent proved that the sale was justified by legal necessity; that the result of the authorities as to what constituted such necessity was that if there was actual pressure such as an outstanding decree on impending sale, a widow was at liberty within a reasonable latitude to sell such part of the property as would meet that necessity; but that in the present instance, though an estimate was made at the time of sale showing arrears of Government revenue and other debts amounting in all to Rs. 16,500, the whole of this amount was not actually payable at the time; and the widow's privilege of selling to pay off debts without compulsion must in his opinion be confined to debts actually payable; that though one of the appellant's witnesses had proved that the widow was under the impression that she must sell in order to pay the Government revenue, and she very probably was so informed at the time, with the actual figures now before it the Court could form a better estimate than could have been formed then by a distracted widow; and he thought that after making the highest possible estimate of her husband's liabilities she had in fact a reasonable prospect of liquidating them (and could well have liquidated them) within five years. The question, therefore, was whether under these circumstances she was justified in selling, though not pressed by any process of attachment, and he knew

of no accepted definition of necessity which would permit of any but a negative answer to this question. Although therefore he found that the price paid was a fair one, he held that there was no legal necessity for the sale and decreed the suit with mesne profits and costs.

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From that decision the respondent appealed to the High Court and the appellants filed cross-objections under Order XLI, rule 22, of the Code of Civil Procedure, 1908.

The High Court in reversing the decree of the District Judge said that the enormous lapse of time since the sale took place must necessarily make some difference in the amount of evidence that could reasonably be demanded from the respondent in support of the transaction, and that the District Judge did not appear to have kept this obvious consideration in view in dealing with the case. On the evidence, the High Court was of opinion that the presumptive heirs had had full opportunity of inquiring into and ascertaining the actual facts relating to the sale, and their silence and inaction for such a long time (though they could have brought a declaratory suit) undoubtedly raised a certain presumption that they knew the sale was for necessity; that the history of the estate showed that it was always a source of anxiety to whoever happened to hold it; and that during the time it was owned by Ananta Rao's family the latter were in a chronic state of indebtedness, and that there could be little doubt but that if Ananta Rao had lived he would himself have had to part with it; that Ananta left debts to the extent of Rs. 7,000 besides the liability for his funeral expenses; and that his widow had apparently nothing in the way of assets except the estate, which was a difficult one to manage with any substantial profit; that at the time of the sale the Government revenue for April, Rs. 5,000, was in arrear and unless it was promptly paid the estate would be sold by Government; that on 15th May another instalment of revenue amounting to Rs. 4,647 would be payable; that these two instalments and such of Ananta's debts as were then actually due made up together more than Rs. 14,000 which the widow had to meet, and all she had in hand was grain worth about Rs. 1,870; that the balance must have been raised either by loan or sale; that on the most favourable calculation the utmost net average income realizable from the estate was Rs. 1,500 out of which the widow had to pay her husband's debts and funeral expenses,

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and maintain herself and her daughter, and must therefore inevitably have borrowed for the purpose, which she would have had great difficulty in doing. And the High Court held that she was not bound to wait until the very last moment when she would be pressed for payment either by suits or letters of demand; that the law did not compel her, where (as they found was the case in this instance) the debts amounted to the full value of the property, to go on borrowing on the mere chance that at some distant date she might be able to realize sufficient income to discharge the debts, but allowed her discretion to judge what was the best course of action in the interest of the estate as well as of herself; and that having regard to all the facts the sale under consideration was in their opinion a very clear case of actual necessity and was inevitable. They accordingly allowed the appeal and dismissed the suit with costs throughout.

ON THIS APPEAL

De Gruyther, K.C., and *B. Dube*, contended that the respondent had failed to discharge the onus which lay on her of proving that the sale was made for legal necessity. The District Judge rightly says the widow was not being pressed by any process of and could easily have paid off all the debts within a reasonable time. The length of the period that has elapsed since that sale is less material because there is documentary evidence which made clear what the position was in 1830 when it took place. [*Upjohn, K.C.*, referred to *Banga Chandra Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri*(1).] The evidence of necessity was recited in the deed in that case: in the present case the deed was not produced. The weight of evidence was on the whole in favour of the appellant as was rightly held by the District Court.

Upjohn, K.C., *Sir William Garth, K.C.*, and *J. M. Parikh*, for the respondent, were not called on.

The JUDGMENT of their Lordships was delivered by

Lord SHAW.

Lord SHAW.—This is an appeal from a decree of the High Court of Madras, dated 29th February 1916. It reversed a decree of the District Court of Vizagapatam, dated 7th October 1914.

The object of the suit, which was by a reversioner, was for the purpose of setting aside a deed of sale—an alienation by a widow: and the pinch of the case, as argued in the Courts below and before their Lordships, is whether that alienation is challengeable on the ground that it is made without legal necessity. The sale took place so far back as 5th May 1830. The widow in question survived that sale by no less a period than 70 years, she having died on 15th December 1900. The suit in the present case was instituted in the year 1912, within a few days from the expiry of the period of limitation under the statute. It results accordingly that the investigation subsequent to the initiation of the suit in 1912 was an investigation with regard to the circumstances of a transaction more than 82 years after that transaction took place.

In these circumstances their Lordships—the case being singular in these points of date—are moved to repeat as part of their own judgment the following propositions, which represent, in their view, both the sense as well as the law of the situation so disclosed. In the judgment appealed from, the learned Judges of the High Court lay down the law as follows:—

“It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, that is, about 82 years, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time.”

Their Lordships adopt that statement of the law.

They desire indeed only to add that it is matter of some surprise that so much documentary evidence still remains: and from a perusal of it and the whole proceedings in the case they see no cause to doubt that the decree pronounced by the High Court is one which ought to be affirmed. They have the less reason to doubt this on account of the argument of the appellants presented to the Board, which appears to have exhausted every avenue of attack open to a person challenging an ancient transaction.

(1) (1917) I.L.R., 44 Cal., 186 (P.C.); L.R., 43 I.A., 249.

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Their Lordships will humbly advise His Majesty that this appeal stand dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

Solicitor for the respondent: *T. L. Wilson & Co.*

J.V.W.

PRIVY COUNCIL.*

POOSATHURAI (PLAINTIFF),

v.

KANNAPPA CHETTIAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Madras.]

Contract Act (IX of 1872), section 16 (1)—Undue influence—Onus of proving undue influence—Suit to cancel contract on ground of undue influence—Domination of will must be put in action.

To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. But both by the Law of India and the Law of England more than mere influence must be established so as to render it, in the language of the law, 'undue'. It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid.

When the relation of influence as above set forth has been established, and it is also made clear that the bargain is with the person who influences the other, and is in itself unconscionable, then the person in a position to use his dominating power has the heavy burden thrown on him of proving affirmatively that no domination was practised so as to bring about the transaction but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent.

In the circumstances of the present case their Lordships were of opinion it had not been proved as an essential part of the plaintiff's case that the contract of sale came to was unconscionable in itself or constituted an advantage unfair to the plaintiff.

APPEAL No. 3 of 1918 from a judgment and decree (10th July 1912) of the High Court at Madras (MILLER AND ABDUR RAHIM, JJ.) which reversed a decree of S. RAMASWAMI AYYANGAR, Subordinate Judge of Madura.

*Present:—Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMER ALL, and Sir LAWRENCE JENKINS.

The suit giving rise to this appeal was brought against the present respondents by the appellant to set aside a sale-deed, dated 17th March 1906, executed by him in favour of the third defendant Kannappa Chettiar on the ground of fraud, and undue influence exercised over him by the first and second defendants who were maternal uncles of the appellant. Misrepresentation and want of consideration was further alleged against all three defendants.

The Subordinate Judge found on the evidence that the allegations in the plaint had been made out, and he made a decree setting aside the decree, on condition that the appellant paid to the first respondent the sum of Rs. 6,725 and interest.

On appeal the High Court dismissed the suit on the ground that 'undue' influence had not been proved.

For the purpose of this report the circumstances of the case and the evidence are sufficiently given in the judgment of the Judicial Committee.

ON THIS APPEAL—

Sir H. Erle Richards, K.C. and *B. Dubé* for the appellant.

De Gruyther, K.C. and *Kenworthy Brown* for the respondent were not called upon.

The JUDGMENT of their Lordships was delivered by

Lord SHAW.—This suit has been brought by the present appellant for the cancellation of a deed of sale executed by him on 17th March 1906. Cancellation was decreed by the Subordinate Judge, and the decision was reversed by decree of the High Court of Judicature at Madras.

The real and only point at issue between the parties is whether the deed in question should be cancelled on the ground of undue influence. In the Court of the Subordinate Judge this point did not clearly appear from the issues which were framed. But an examination of the proceedings and evidence shows that it is to an issue of this kind that the plaintiff was throughout groping. The High Court properly discerned that; and the learned Counsel for the appellant properly presented the case from that point of view.

It is not necessary to speculate whether the provisions of the Indian Contract Act differ in any particulars from the doctrines of the English Law upon this subject. For no such

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Lord SHAW. differences are suggested to have any bearing on the issue between these parties. The issue in the present suit is an issue of fact, and there does not appear to the Board to be any sufficient reason for doubting that the judgment arrived at in the High Court is sound.

The Indian Contract Act by section 14 provides that

"Consent is said to be free if it is not caused by . . . undue influence as defined by section 16."

By section 16 (1)

"the contract is said to be induced by 'undue influence' where the relations existing between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other."

Sub-section 3 of the same section may also be referred to. It provides that

"Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in the position to dominate the will of the other."

It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point 'influence' alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the Law of India or the Law of England, more than mere influence must be proved so as to render influence, in the language of the law, 'undue.' It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

And where the relation of influence, as above set forth, has been established, and the second thing is also made clear, viz., that the bargain is with the 'influencer' and in itself unconscionable: then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the

grantor of the deed was scrupulously kept separately advised in POOSATHURAI the independence of a free agent."

These general propositions are mentioned, because if laid alongside of the facts of the present case, then it appears that KANNAPPA CHETTIAR. one vital element—perhaps not sufficiently relied on in the Court below, and yet essential to the plaintiff's case—is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself, or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue. Lord SHAW.

The subject of the sale, to mention only one particular, was not the two villages mentioned in the plaint, but the property in the villages burdened with usufructuary mortgages which did not expire for eighteen years. These mortgages amounted to Rs. 51,000. The crucial enquiry on the point of sufficiency of consideration accordingly was, what on the date of the sale was the *de presenta* value of the plaintiff's right of property in these villages? Beyond a loose reference to a lakh of rupees, without any specification as to whether this referred to the present value, or to deferred value, or to value of the property, the evidence is entirely silent.

Nothing has been brought in argument before the Board to satisfy their Lordships' minds that the price of Rs. 6,000, even coupled with the demand for the wiping off of a debt of about Rs. 8,000, incurred for litigation and for the honouring by the plaintiff of a promissory note executed by him for another Rs. 3,000, was not a fair consideration for the transaction.

Their Lordships think it unnecessary to enter into the further grounds stated by the learned Judges of the High Court for their decision, although they express no disagreement with these grounds in themselves.

The true contradictor in the issue was the party to the transaction, the vendee. But the plaintiff endeavoured to strengthen the case for cancellation by convening also as defendants his two uncles, now also his two fathers-in-law.

Their Lordships do not doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. But they think it right to say

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that no proof has been given of any such conspiracy or agency in the present case.

When it is added that the consideration paid was in part actually defrayed to cover expenses incurred by the plaintiff on the occasion of his marriages to the two daughters of his uncles, the first and second defendants, and that these marriages took place, it would require fairly strong evidence to induce any Court to give countenance to the suggestion that his uncles and fathers-in-law had conspired with the third defendant to subject the plaintiff to unconscionable loss. To this element weight is properly attached in the Court below.

Their Lordships humbly advise His Majesty that the appeal stand dismissed with costs.

Appeal dismissed.

Solicitors for the appellant : *Chapman, Walker and Shephard.*

Solicitor for the respondents : *Douglas Grant.*

J.V.W.

PRIVY COUNCIL.*

KRISHNA AYYANGAR (PETITIONER),

v.

NALLAPERUMAL PILLAI (OPPOSITE PARTY).

[On appeal from the High Court of Judicature
at Madras.]

Company—Charge given by resolution of Company to its Secretary on unpaid calls for special services rendered to the Company—Failure to register charge—Duty of officers to register neglected—Indian Companies Act (VI of 1882), s. 68—Explanation—Mode of construction—Proceedings in Legislative Council cannot be referred to to aid construction.

The question in this appeal was whether a charge given to the appellant, the Secretary of a Limited Company upon unpaid calls, could be enforced by him although not registered as required by section 63 of Act VI of 1882 (Indian Companies Act), which section required registration of all mortgages and charges specifically affecting property of the company, and imposed a penalty upon any official of the company who knowingly and wilfully authorizes or permits the omission of such entry in the register. The decision

* Present :—Viscount FINLAY, Lord SUMNER, and Lord PARMEER.

of this question depended on the proper interpretation of the explanation to the section which was as follows :—

"Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves "as such" of a mortgage or charge specifically affecting property of the company and not so registered."

Held that the construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words.

Held that the words "as such" in their proper construction should not be read as denoting the capacity in which the officers take the mortgages or charges, as contended by the appellant, nor do they refer to the following words "of a mortgage or charge" as contended by the respondents. They are introduced simply as giving the reason for the inability to take advantage of the securities, which is that officers entrusted with a duty as to registration could not take advantage of a security to them as to which they had neglected this duty.

In the circumstances of the case, therefore, it was held that the appellant could not avail himself of the charge even though he had ceased to be an officer.

CONSOLIDATED APPEAL No. 4 of 1918, from a judgment and order dated 30th April 1915 of the High Court at Madras, which reversed a judgment and order (22nd December 1913) of the Court of the District Judge at Tinnevely.

The main question for decision on this appeal is whether the appellant, the Secretary of the Swadeshi Steam Navigation Company, Limited, at Tuticorin which was in liquidation, was entitled to avail himself of a charge specifically affecting the property of the Company, although the charge had not been registered under the provisions of section 68 of the Indian Companies Act (VI of 1882) which was to the following effect :

"Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register, in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge.

"If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry, shall incur a penalty not exceeding five hundred rupees.

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5, 6 and
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"The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times.

"*Explanation.*—Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company, and not so registered."

The company was incorporated under the Indian Companies Act in 1906 and the present appellant was its Secretary. The Directors, on 11th August 1909, appointed three persons Managing Directors of the Company, with all the powers of Directors for one year. At that time it was in a failing state with little, if any, hope of being able to carry on its business. The company was in debt to the appellant as its Secretary to the amount of Rs. 10,488, and he was anxious to be paid. The Managing Directors passed a resolution on 27th June 1910 as follows: "Resolved, that in consideration of the fact that the Honorary Secretary, Krishna Ayyangar, has worked for the company without any salary, foregoing his own source of income, and of the fact that he has borrowed and advanced moneys to meet the urgent needs of the Company, the unpaid calls due the company from the shareholders are mortgaged for the amount advanced by the aforesaid person to the company and for interest thereon."

This charge was not entered in the register of charges as required by section 68 of the Indian Companies Act, and the company was generally known to be failing at the time it was made.

The appellant (the Secretary) thereupon filed a petition on 21st April 1911 for the winding up of the company, and on 4th July 1911 the District Judge ordered that "the company be wound up by this Court under the provisions of the Indian Companies Act," and the respondent SANKARA AYYAR was appointed the official liquidator.

The present petition was filed by the appellant on 15th November 1911 in the Court of the District Judge under section 156 of the Indian Companies Act, 1882. He claimed Rs. 10,488 with interest at 12 per cent per annum, and prayed that the amount might "be made a charge on, and ordered to be paid out of the collections that may be made from the arrears of

call moneys due from shareholders of the company," in accordance with the resolution of 27th June 1910.

The official liquidator admitted the debt, but not the liability to pay interest, and contended that the charge not having been entered in "the register of mortgages and charges" as required by section 68 of the Indian Companies Act, 1882, the Secretary could not avail himself of it.

Two issues were framed by the District Judge: (1) whether the charge is invalid under section 68 of the Indian Companies Act, 1882, and as a fraudulent preference? and (2) whether the petitioner is entitled to interest, and if so, at what rate?

The District Judge decided the issues in favour of the appellant. The Secretary, he held, was claiming the charge as a private person for his private advantage and not as a Secretary "as such" within the explanation to section 68. He also held that the charge was not a fraudulent preference within section 218 of the Indian Companies Act, or section 53 of the Transfer of Property Act (IV of 1882). He therefore made an order allowing the charge for Rs. 10,488 with interest at 12 per cent per annum.

When the appellant proceeded to execute the order, respondents Nos. 1 to 4, who were debenture-holders and not parties to the order, filed objections: they denied the right of the Secretary to avail himself of the charge because it had not been entered in the register as required by section 68 of the Act, and they set up their own right to priority over the claim of the Secretary. The official liquidator set up the same objections as before.

The District Judge dismissed all the objections and allowed the appellant to execute the order made in his favour on 27th April 1912.

The respondents filed separate appeals to the High Court, and the appeals were heard by Sir JOHN WALLIS, C.J., and Mr. Justice TYABJI who allowed the appeals.

The JUDGMENT was delivered by the CHIEF JUSTICE (TYABJI, J., concurring).

WALLIS, C.J.—"These are appeals from an order of the District Judge of Tinnevely, in O.P. No. 307 of 1911, in the matter of the winding-up of the Swadeshi Steam Navigation Company, Limited.

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By an order of 27th April 1912 made in the winding-up, the District Judge had held that the charges created by a resolution of the Directors in favour of claimants Nos. 23 and 16, the Secretary and the Manager of the office of the Company, were not rendered invalid by the provisions of the explanation to section 68 of the Indian Companies Act, 1882, and that they did not amount to a fraudulent preference. The claimants then put in the petitions now under appeal for payment, out of the assets, of the amounts of their charges, when the debenture-holders of the Company, whose rights as secured creditors had not been considered in the previous application, appeared and opposed the applications on the ground that their floating security had become fixed or crystallised, and had attached on the assets of the Company before the creation of these charges. The District Judge having overruled these objections, the debenture-holders have appealed and have raised three contentions in support of their case.

"In the first place, they rely on the express provision of the debenture-deed which after charging all the assets of the Company by way of floating charge and providing that notwithstanding such charge the Company should have power to carry on business and deal with the assets of the Company until default should have been made for six calendar months in the payment of the principal, an event which admittedly happened, provided that from and after the happening of such default the liberty and authority hereinbefore given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable.

"In this connexion it must be borne in mind that the right of the Company to create a charge of this kind is incident to its right to carry on business, and it is quite clear that no such charge can be created after the Company has actually stopped business or after the debenture-holder has intervened under the powers reserved to him to stop the business by obtaining the appointment of a Receiver or petitioning for the winding-up of the Company. The difficulty arises when, as in the present case, the Company has been allowed to continue carrying on business and creating charges after the happening of any of the events which determined its right to carry on business. In cases of this kind, the Courts have been disposed to hold at any rate when the language of the deed admits of it, that the right to carry on business is not determined automatically by the happening of one of the events indicated, but continues until the debenture-holder intervenes to show his desire that it should cease, as

by applying for a Receiver. In *Government Stock & Investment Co. v. Manila Railway Co.*(1), LINDLEY, L.J., pointed out the hardship and injustice that must arise to third parties by the debenture-holder allowing the business to go on after the happening of the specified event and then turning round and treating all the transactions as void under the debenture-deed, and held that such a result was so unreasonable and undesirable that, in the absence of an express provision to that effect in that case, it ought not to be held to have been in the contemplation of the parties. On appeal the House of Lords(2), in the above case took the same view, and Lord MACNAGHTEN laid down generally that it was of the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.

"There was no difficulty in applying that doctrine to the facts of that case, but there is more when, as in the debenture in *Edward Nelson and Co., Limited v. Faber and Co.*(3), which is in terms identical with the debenture here except in a particular which does not seem very material, it is expressly provided that on the happening of a specified event the liberty and authority of the Company to carry on business shall forthwith cease, and the charge created by the debenture shall and may be immediately enforceable. In this case it would almost seem as if these words had been expressly inserted to take the case out of the decision in *Government Stock & Investment Co. v. Manila Railway Co.*(2), and to determine the Company's authority to carry on business automatically without any intervention of the debenture-holders. The Courts, however, lean strongly against such a contention, and JOYCE, J., has rejected it in *Edward Nelson and Co., Limited v. Faber and Co.*(3), a decision which was not appealed against, and has been since cited without comment in some cases, and most text-books though it is omitted from the last edition of Buckley on Companies.

"In a still later case, *Evans v. Rival Granite Quarries, Limited*(4), FLETCHER MOULTON, L.J., after referring to the leading cases as to the incidents of a floating security of this kind, observed that in all the cases the Courts realized that it was impossible to come to any other conclusion than that it was intended to leave the Company free to carry on its business until the time arrived when the debenture-holders enforced their security upon the

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(1) [1895] 2 Ch., 551.
(3) [1903] 2 K.B., 367.

(2) [1897] A.C., 81.
(4) [1910] 2 K.B., 979.

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Company's assets and undertaking. And the learned Lord Justice went on to say, not without reference, I cannot help thinking to the case of *Edward Nelson and Co., Limited v. Faber and Co.*(1), which had been cited in the argument, that though in the earlier cases the actual words of the particular document may have influenced the Courts, it early became clear to the Judges that this did not depend on the special language used, but upon the essence and nature of a security of this kind. On the other hand BUCKLEY, L.J., in the same case seems still to have relied on the language of the document and speaking of the various ways in which crystallisation may happen and the security become fixed he said "A Receiver may be appointed, or the Company may go into liquidation and a liquidator be appointed or any event may happen which is defined as bringing to an end the right of the Company to carry on business."

"In this state of the authorities, I hesitate to differ from the decision of JOYCE, J., reinforced as it is by the observation of FLETCHER MOULTON, L.J., although it is not strictly binding on me.

"As regards the second point, the appellants do not seem to have relied in the lower Court on the fact that the Company had stopped business before the granting of the charges and the evidence taken by the District Judge in the earlier case sufficiently shows that it had not.

"The third point is that the charges having been created in favour of officers of the Company—one of them is Secretary and the other had been appointed, by resolution, Manager of the Company's office—and not having been registered as required by section 68 of the Indian Companies Act of 1882, were not available to the claimants within the meaning of the explanation to that section. This objection was taken by the liquidator in the earlier case and was overruled by the District Judge, now Mr. Justice OLDFIELD. It was again expressly taken in the lower Court in this case, but was apparently not argued in view of Mr. OLDFIELD's decision at an earlier stage. It is not expressly mentioned in the grounds of appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of the statutory provision, we think we ought to enforce the provisions of the section if they are applicable. The Companies Act of 1882 whilst providing penalties for failure to register mortgages and charges, did not provide that unregistered mortgages and charges should be void, but there were decisions that

(1) [1903] 2 K.B., 367.

it would be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir GEORGE JESSMIL criticised these decisions in several cases pointing out that they imposed an additional penalty not warranted by the statute and his view was finally upheld in 1887 by the House of Lords in *Wright v. Horton*(1). At the time when the Indian Companies Act of 1882 was being drafted and passed into law, the other view still prevailed and the legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Ex parte Valpy and Chaplin*(2), Lord Justice JAMES after observing that the mortgage was not void for want of registration, went on, 'But as it is the duty of the officers of the Company to see that every charge specifically affecting property of the Company is registered, I am of opinion that no Director, Manager or other Officer of the Company can avail himself of a charge which is not registered,' and he applied the doctrine to a person who had acted as solicitor to the Company. The same language was used by the Court of Appeal in *In re South Durham Iron Company*(3), where Sir GEORGE JESSMIL interpreted the decisions as meaning that a Director, Manager or Officer cannot avail himself of the security. These were all cases in which the officer had taken a charge in respect of advances made by him to the Company and not for arrears of salary due to him.

"The explanation to section 68 which appears to be intended to reproduce the ruling of Lord Justice JAMES in *Ex parte Valpy and Chaplin*(2), as far as possible in his own language, is as follows:—

"'Omission to register under this section a mortgage or charge does not render it invalid, but the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered.'"

"The words 'as such' present some difficulty. If they mean 'as officers of the Company,' it is difficult to see what is meant by officers of the Company availing themselves of a mortgage or charge as officers of the Company unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the legislature was anxious to reproduce not only the substance but as far as possible the very language of the decisions and that this must be accepted as the meaning of the explanation.

(1) (1887) 12 App. Cas., 371.

(2) (1872) 7 Ch. App., 289.

(3) (1879) 11 Ch. D., 579.

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"The only other point is whether both claimants were officers of the Company. The Secretary admittedly was. The other claimant denies that he was an officer of the Company within the meaning of the section, and although he would *prima facie* appear to be such, yet as he appears to rely on special facts which he has not had an opportunity of proving, we have decided to call for a finding as to whether he was an officer of the Company within the meaning of the section when he obtained the charge."

ON THIS APPEAL

Kenworthy Brown, for the appellant, contended that having been given a charge on the capital not called up for his special services, he was entitled to enforce it. On the true construction of the explanation to section 68 of the Act, his disability to enforce an unregistered charge only ceased, when he ceased to be an officer; that was what was meant, it was submitted, by the expression "as such". When the official liquidator was appointed, the Secretary became under section 187 of the Act no longer an officer. Reference was made to *Ex parte Valpy and Chaplin*(1), the principle of which was not followed in *Re Globe New Patent Iron & Steel Co.*(2); nor in *In re South Durham Iron Co.*(3), the decisions in which were prior to the passing of the Indian Companies Act, 1882; and subsequently, the House of Lords in *Wright v. Horton*(4) overruled *Ex parte Valpy and Chaplin*(1). As to whether the present question was *res judicata* by the decision of the District Judge in April 1912, it was contended it was, and that the respondents were debarred from raising it by section 11 of the Code of Civil Procedure, 1908, explanation 6, and indeed apart from that section. The official liquidator represented the appellants as being creditors in those proceedings. Reference was made to *In re Madras Irrigation & Canal Company*(5) and to *Ram Kirpal v. Rup Kuari*(6). The appeal to the High Court was not properly preferred, as notice of it was not given within 21 days of the order as required by section 169 of the Act, and no order was made extending that time.

(1) (1873) 7 Ch. App., 289.

(2) (1878) 48, L.J., Ch., 295.

(3) (1879) 11 Ch. D., 579.

(4) (1887) 12 App. Cas., 371.

(5) (1883) 28 Ch. D., 248.

(6) (1884) I.L.R., 6 All., 269 (P.C.); L.R., 11 I.A., 37.

Clauson, K.C. and *B. Dubé* for the respondents contended that the High Court had rightly construed section 68 of the Act, and the explanation debarred the appellant from getting any advantage from a charge that was not registered. The intention was to give it the same meaning as under the English Companies Act, 1862, the principle of which was that an officer of the Company was responsible for registering the charge and he could not avail himself of it, if he omitted to register it. The construction put on it by the appellant would make an alteration in the words of it necessary: the language of it is similar to that of JAMES, L.J. in *Ex parte Valpy and Chaplin*(1). The words "as such" refer to the mortgage or charge, and the rights of an unsecured creditor were not effected.

[Counsel was desirous of referring to the proceedings in the Legislative Council when section 68 and the explanation were in course of being enacted, submitting that such proceedings were admissible to show the meaning given to the expression "as such," though, they could not be referred to for the purpose of ascertaining the intention of an enactment. *Kenworthy Brown* objected to that being done referring to Craies on Statute Law, 2nd Edn., pages 133, 134, and to the case of *Administrator-General of Bengal v. Premal Mullick*(2). After their Lordships had considered the question, Viscount FINLAY said the Board was of opinion that no reference to the proceedings of the Legislature should be allowed].

The decision of the District Court of April 1912, was not *res judicata* as against the respondents who were not parties to the proceeding in which it was made. It was to be presumed that the High Court extended the time for appealing as they allowed the appeal after the proper time for it had expired. The question of *res judicata* was not raised in the appellant's memorandum of appeal to the High Court, and it could not be taken without leave: Order XLI, rule 2 of the Civil Procedure Code, 1908. It was also contended that the charge was bad on the ground of fraudulent preference: and that the debenture holders were entitled to claim priority over the debt of the appellant.

Kenworthy Brown replied.

(1) (1872) L.R., 7 Ch., 289 (291).

(2) (1895) I.L.R., 22 Calc., 788 (P.C.); L.R., 22 I.A., 107.

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The JUDGMENT of their Lordships was delivered by Viscount FINLAY.—The question in the present case is whether a charge given to the Secretary of a Limited Company upon unpaid calls can be enforced by him although not registered as required by section 68 of Act VI of 1882 (Indian Companies Act). The difficulty in the case is occasioned by the explanation appended to the section, which otherwise is on the same lines as the corresponding section in the English Act. It was held by the High Court of Madras that the terms of the explanation rendered the charge not enforceable. Apart from the effect which the explanation in the Indian Act may have in the case of a mortgage or charge to an officer of the Company, it is clear that a mere failure to register does not under either the English or the Indian Act render a mortgage or charge on the property of the Company unenforceable.

Section 68 of the Indian Act requires registration of all mortgages and charges specifically affecting property of the Company, and imposes a penalty upon any official of the Company who knowingly and wilfully authorizes or permits the omission of such entry on the register. The performance of the duty to enter the mortgage or charge on the register may be compelled by order of the High Court. There is appended to this section in the Indian Act an explanation in the following terms:—

“*Explanation.*—Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered.”

The appellant contends that the judgment of the High Court is erroneous, and that the question of construction has been conclusively settled in his favour by an order of the District Judge in 1912 which stands unreversed.

The appellant was the Secretary of the Swadeshi Steam Navigation Company, Limited. On the 27th June 1910 a Resolution creating the charge in question was passed by the managing directors in the following terms:—

“*Resolution III.*—Resolved that, in consideration of the fact that the Honorary Secretary, Krishna Ayyangar, has worked for the

Company without any salary, foregoing his own source of income, and of the fact that he has borrowed and advanced moneys to meet the urgent needs of the Company, the unpaid calls due to the Company from the share-holders are mortgaged for the amount advanced by the aforesaid person to the Company and for interest thereon, and for the money advanced to the Company by the late Manager Kandaswami Pillai and for the deposit money due from the Company to the late cash-keeper Gopalakrishna Pillai; that the Secretary be authorized to collect the unpaid calls through Court if necessary under the power already given to him, and that out of the amounts collected the deposit money due to Gopalakrishna Pillai be paid first, and that the Secretary Krishna Ayyangar and the said Kandaswami Pillai Avargal shall appropriate the balance amount in the proportion of the amounts due to each of them.”

This charge was never registered.

An order was made on the 4th July 1911, that the Company should be wound up by the Court, and in the course of the winding up a petition was presented by the appellant to the District Judge, Mr. OLDFIELD, asking for an order recognizing the validity of the charge. The liquidator relied on section 68 and contended that the charge not having been registered was not enforceable by the appellant, as he was an officer of the Company when it was taken. The District Judge rejected this contention on the ground that the explanation refers to the contingency of the officers of the Company desiring to avail themselves as such of a charge, and that it was not as Secretary but as an individual that the appellant sought to avail himself of this charge, and made an order on the 27th April 1912, allowing the claim for the reasons set out in his judgment on pages 8 to 10 of the record. The liquidator further attacked the charge before the District Judge as a fraudulent preference, but the District Judge by the same order decided in favour of the appellant on this point also. No appeal was ever presented against this order. On 25th September 1918, the appellant applied to the District Court for an order directing the official liquidator to pay to the petitioner the amount collected or to be collected for unpaid calls. This was opposed by debenture-holders and by the liquidator on the grounds (a) that the charge was void as a fraudulent preference; (b) that it had not been registered; and (c) that it was not entitled to priority over debentures

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previously issued. The District Judge, Mr. WALLER, refused to entertain grounds (a) and (b) as they had been decided by the order of 27th April 1912, but heard argument on ground (c), and on 22nd December 1913, decided that the appellant was entitled to priority over the debenture-holders. On appeal against this decision to the High Court at Madras the judgment now under appeal was delivered on 30th April 1915. The judgment deals with two points. The first was as to the claim of the debenture-holders to priority over the charge. On this the High Court decided in favour of the present appellant and against the debenture-holders. The second point was that of non-registration, which the Court allowed the debenture-holders to raise on this appeal. The Chief Justice, in delivering judgment, referred to the conflict on the interpretation of section 43 of the English Act which had arisen between Sir George JESSEL and JAMES, L.J., as to mortgages and charges to officers of the Company, and said that the explanation appeared to be intended to reproduce the ruling of JAMES, L.J., in *Ex parte Valpy and Chaplin*(1). He then proceeded as follows:—

“The words ‘as such’ present some difficulty. If they mean ‘as officers of the Company,’ it is difficult to see what is meant by officers of the Company availing themselves of a mortgage or charge as officers of the Company unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the legislature was anxious to reproduce not only the substance, but as far as possible the very language of the decisions, and that this must be accepted as the meaning of the explanation.”

It is undoubtedly true that the very point which has now been argued before their Lordships was argued before the District Judge in 1912 and then decided in the appellant's favour, and there has been no appeal against that decision. Ought this, as the appellant contends, to make an end of the matter? The point is of considerable importance as a matter of practice. The order of 27th April 1912, which was made after argument on behalf of the appellant and the official liquidator, decided that the want of registration did not prevent the enforcement of the mortgage. Their Lordships think that the

(1) (1872) 7 Ch., App. 289.

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official liquidator must be regarded as having represented on that application the debenture-holders and creditors as well as the Company, and that so long as the decision stands it is conclusive in the winding up on all parties so represented. The official liquidator did not appeal. If any debenture-holder or other person interested desired to attack the decision, it was open to him to ask that he should be made a party and should have leave to appeal. No such application was made. But when the appellant applied on 28th September 1913, for enforcement of the order made on 27th April 1912, the debenture-holders, on their appeal from the order of 22nd December 1913, were allowed by the High Court to raise the point of non-registration which had been decided against them in 1912. (See the judgment now under appeal, *ante* page 556.) The proper course to have taken in order to raise this point would have been to get leave, notwithstanding the lapse of time, to appeal from the judgment of 27th April 1912. But the matter is merely one of practice. The High Court could have regularised the proceedings by extending the time, and giving leave to appeal from the 1912 decision, and they considered the point without going through this process. Their Lordships are not prepared to reverse the decision of the High Court merely because the proper course in point of practice was not taken, and they propose to deal with this appeal on the footing that the respondents were entitled to raise in the High Court their objections under section 68. Whether leave should have been given to appeal would have been a matter of discretion, but the High Court appear to have had no doubt that they should allow the point to be raised. Their Lordships have, therefore, dealt with the case on this basis, and now proceed to consider the appeal on its merits.

The question of the effect of non-registration in cases where the charge was taken by an officer of the Company must be decided upon the terms of the explanation to section 68, but in order to make the judgment of the Chief Justice intelligible it is necessary to refer shortly to the English decisions which he quotes in his judgment.

The English section—section 43 of the Companies Act of 1862—corresponds to section 68 of the Indian Act minus the

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Explanation. In 1872, in *Valpy's case*(1) JAMES, L.J., held, that as the unregistered charge had been taken by a person acting as solicitor to the Company, he could not avail himself of it, and in 1876 in *Re the Native Iron Ore Company*(2) a mortgage in favour of directors of the Company was held not enforceable as the registration was defective, there being no description of the property. These decisions proceeded on the supposed principle that, as it is the duty of officers of the Company to see to registration of mortgages, if they fail to do so in the case of mortgages to themselves they cannot be permitted to enforce them. But in 1878 in the *Globe case*(3) Sir GEORGE JESSEL expressed his dissent in the strongest terms from these two decisions, and in 1879 in the *South Durham case*(4) Sir GEORGE JESSEL and BRAMWELL, L.J. (*dissentiente* BAGGALLAY, L.J.), adhered to the view that these two cases had been improperly decided. The whole Court, however, held that they were binding authorities, but distinguishable on the facts of the case then before the Court.

This was the state of the authorities when the Indian Companies Act became law. The High Court in the present case took the view that the explanation was intended to reproduce the ruling of JAMES, L.J., and must be construed accordingly. The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. The controversy was terminated, so far as the English Courts are concerned, by the decision of the House of Lords in 1887 in *Wright v. Horton*(5), which is an express and final decision that Sir GEORGE JESSEL's view was right. Of course this decision can have no effect upon the present case. If the effect of the Explanation in the Indian Act of 1882 was to adopt as law in India the view of JAMES, L.J., there is an end of the matter in the absence of further legislation. If the Explanation has this effect it must be carried out, and the fact that the enactment was passed in consequence of what the subsequent decision of the House of Lords showed to be a misconception of the English law would be quite irrelevant. The question is, What does the Explanation mean?

(1) (1872) 7 Ch., App. 289.

(2) (1876) 2 Ch. D., 345.

(3) (1878) 43 L.J., Ch., 295.

(4) (1879) 11 Ch. D., 579.

(5) (1887) 12 App. Cas., 371.

No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

The question really narrows itself to this: What effect should be given to the words "as such" in the Explanation?

The appellant contended that the words "as such" relate to the words "the officers of the Company," and that the effect is to enact that the officers cannot avail themselves as such officers of unregistered mortgages or charges taken by them in their capacity of officers of the Company. This is the most natural meaning of the words; it was adopted by Mr. OLDFIELD, the District Judge, in his decision of 27th April, 1912, and in his judgment he suggested circumstances in which he thought the words so read would take effect. The contingency referred to by Mr. OLDFIELD was the retention by the Company of redeemed debentures or charges in the name of an officer. Such a contingency, however, is remote even if possible and it appears to their Lordships that it would be a mistake to read the words as directed to it.

The respondents contended that the words "as such" refer entirely to the following words "of a mortgage or charge," and that their effect is that the officers of the Company cannot avail themselves of a mortgage or charge as such unless it has been registered. It was suggested that the words were introduced in order that it might be open to the officer of the Company to avail himself of the instrument as evidence of a debt or for some other purpose of that kind.

Their Lordships are unable to accept this construction. It seems to them to be at variance with the language of the Explanation. The structure of the sentence is such that the words must be read as referring to what precedes and not to what follows them. To hold otherwise would be to put an unjustifiable strain upon the clause, which must be read according to the ordinary usages of the English language. Indeed, the intervention of the word "of" between the words "as such" and the words "a mortgage or charge" appears fatal to this theory.

Yet another construction has been put forward, viz., that "as such" means "while such," and prevents the enforcement of the security by an officer of the Company while he remains such officer. If this view be correct, the appeal would succeed,

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as, owing to the winding up of the Company, the appellant had ceased to be an officer of the Company before the claim was put forward. Their Lordships do not see their way to construing the words in this sense as relating merely to time.

There is a fourth possible construction of these much debated words and it is that which after much consideration their Lordships adopt. It is this. The words "as such" should not be read as denoting the capacity in which the officers take the mortgages or charges. They are introduced simply as giving the reason for the inability to take advantage of the securities. The reason underlying the judgments, which the explanation appears to have been intended to crystallize into the form of an enactment, was that officers entrusted with a duty as to registration could not take advantage of a security to them as to which this duty had been neglected by them. The words "as such" relate simply to the prohibition under which they are as officers. The officers are forbidden as such, because they are officers and were therefore bound to see to registration, to avail themselves of unregistered securities. The words in this sense are unnecessary but not insensible. The drafting is bad, but having regard to the extreme improbability that it was intended to meet such a contingency as that put by Mr. OLDFIELD in his decision of 27th April, 1912, and to the fact that the construction now suggested would, as the Chief Justice in the Court below points out, embody the effect of the judgments of the Court of Appeal, which were in 1882 when this clause was enacted recognized as of binding authority, their Lordships think that this last construction should be adopted. The language of the explanation is to some extent taken from these judgments, as the Chief Justice remarks, and this strengthens the probability that it was intended by the language used to reproduce their effect.

Their Lordships therefore are of opinion that the judgment of the High Court of Madras is right and will accordingly humbly advise His Majesty that these appeals should be dismissed with costs.

Appeals dismissed.

Solicitor for the appellant: *John Josselyn.*

Solicitor for the respondents: *Henry S. L. Polak.*

J.V.W.

PRIVY COUNCIL.*

SETURATNAM AIYER (PLAINTIFF),

v.

VENKATACHELA GOUNDAN AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature
at Madras.]

1919,
November,
18, 20, 21
and 24.
December,
15.

Onus of proof—Suit by Government pattadar to eject tenants—Claim by tenants to right of occupancy—Facts establishing rights of occupancy—Title of plaintiff and service of notices to quit undisputed—Onus on defendants to prove claim, how satisfied—Second appeal—Jurisdiction of High Court on second appeal to deal with facts—Civil Procedure Code, 1908, section 103.

In suits brought by the appellant as Government pattadar against the respondents after due service of notice to quit, to eject them from agricultural land in a ryotwari village, the respondents pleaded that they had a permanent tenancy or right of occupancy; and the appellant's title and the notices purporting to determine the tenancy were not disputed.

Held that the onus was on the respondents to prove the existence of their right of permanent occupancy, but that it had been established by the evidence that they had been immemorially in possession of the lands, and that they had not been proved to have been ever let into occupation by the appellant; that they had been paying a uniform rate of rent; that the lands were reclaimed and brought under cultivation by them; that they had made great improvements and carried on the cultivation either of dry or garden crops of their own choice without any interference or objection; and that they had for a very long time been sometimes making alienations of wells and lands; and the onus of proof had been thereby satisfied.

The District Judge had passed decrees in the appellant's favour for possession of all the lands in suit. The High Court was of opinion that the District Court had omitted to determine a question of fact which was essential to the right decision of the suit on the merits, and framed issues which it asked the District Judge to decide as to whether the respondents were yearly tenants or had a permanent right of occupancy. These the District Court returned without dealing with them in a satisfactory manner. The High Court on second appeal drew an inference of the respondents' occupancy rights, and decided the appeal (dealing with it under section 103 of the Civil Procedure Code, 1908) in favour of the respondents.

Held that the inference not being contradictory to any finding of fact by the District Court, and there being materials from which such inference could be drawn, the High Court had jurisdiction, under the circumstances, to deal with the case under section 103 and make a decree as it had done.

* *Present*:—Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMER ALI, and Sir LAWRENCE JENKINS.

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CONSOLIDATED APPEAL No. 158 of 1917 from three decrees (18th February 1913) passed by the High Court at Madras, which reversed three decrees (31st January 1910) of the Court of the District Judge of Trichinopoly, which modified three decrees (27th June 1908) of the Court of the District Munsif of Kulittalai.

The suits in which the above decrees were made were brought by the appellants as pattadars of the village of Karuppathur to eject the respondents, the persons in possession of the samudhayam or common land in the said village as being yearly tenants who had received due notice to quit.

The question for decision in these appeals is whether the appellants have proved any right to eject the respondents from the garden and dry lands of the village.

The facts are that the village consists of garden lands (lands with a well in them), dry lands (lands cultivated but having no well), and pasture lands (lands not brought under cultivation). The respondents have been immemorially in possession of these lands, and the appellants, the mirasidars have no evidence to show that they or their predecessors in title were ever in possession of any of these lands, or that they ever let them to the respondents. All the lands were originally waste and the respondents and their predecessors brought the garden and dry land under cultivation. The respondents and their predecessors have always paid rent at a uniform rate for the garden and dry lands. They have dug and built wells, and have made great improvements in their holdings, and they have always grown garden or dry crops of their own choice without interference or objection by the appellants. They have for more than fifty years at least sold and conveyed their garden lands either in the form of conveying the wells, or the wells and the lands, or the wells and the right to cultivate the lands. Since 1897 there has been a continuous dispute between the respondents and the appellants as to whether the respondents were yearly tenants, or had occupancy rights, and the respondents received from the appellants on 16th September 1903 six months' notice to quit and give up possession and declined to comply with the notice, and thereupon on 8th November 1904 the appellants brought the present suits, claiming that as pattadars of the village they

were entitled to eject the respondents whom they alleged to be yearly tenants, and also claiming arrears of rent (as to which there is no dispute).

The respondents filed written statements in which they denied the appellants' right to eject them, and claimed to have occupancy rights and also, if ejected, compensation for improvements made by them.

The following issues only are now material " (5) Are the defendants " (respondents) " all or any and which of them tenants from year to year ? and are the plaintiffs entitled to the lands in suit themselves or are they entitled to the occupancy right in all the lands in suit ? and is the plaintiff entitled only to a fixed teerwa thereon ? (8) Have any and which of the defendants made any and what improvements on the lands in suit ? and what is the cost thereof ; is the plaintiff liable or not to pay such costs before claiming possession ? "

The Munsif heard the suits and recorded the evidence, decreed the claim of the appellant to the dry and pasture lands, and rejected it as to the garden lands. He based his judgment on the principle which he deduced from certain rulings of the Madras High Court that Karuppathur being a ryotwari village, the presumption was that the appellants, the pattadars, were the owners of the entire lands, and that it lay on the respondents if they claimed occupancy rights to prove them.

Both parties appealed from the Munsif's decree, and the District Judge who heard the appeals decided that the appellants were entitled to a decree for possession of all the lands claimed by them, but remanded the case to the District Munsif for a finding on issue 8, as to compensation. He agreed with the Munsif that the onus was on the respondents as tenants in a ryotwari village to establish a right of permanent occupancy, but disagreed with his view that the appellants were equitably estopped from ejecting the respondents, and thought that the question for consideration was whether the respondents had shown that the appellants had contracted to give them any right of tenancy which could be changed into a right of permanent occupancy.

The Munsif held an inquiry and found the respondents entitled to compensation, but the District Judge on appeal made a

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decree allowing no compensation to the respondents, but giving the appellants possession of all the lands in suit.

On a second appeal by the respondents to the High Court, BENSON and SUNDARA AYYAR, JJ. held that the real point for decision by the District Judge was whether—apart from any presumption in the admitted and undoubted facts of the case and the evidence on both sides—the respondents held as tenants from year to year or as permanent occupants. They thought that the District Judge had not applied his mind to this question, and also that he was under a misapprehension as to the state of the evidence, as he had stated that there was no evidence that the respondents or their ancestors had made improvements in the lands by digging wells or ponds, whereas it was admitted on appeal that there was such evidence. They therefore were unable to accept his finding as to the respondents' rights, and they also pointed out that there were further questions of estoppel and of right to compensation in respect of improvements proved, and they called for revised findings on those points.

The District Judge returned the following findings:—
(a) that the respondents had been in possession of the land for a very long period and at a uniform rent; (b) that it had not been proved that respondents had transferred their holdings by way of sale, mortgage or lease to any of the pattadars, or to other persons, with their acquiescence or knowledge; (c) that the wells in certain parts of the lands had been sunk by the respondents or their managers; but that the respondents had not proved that they or their ancestors had made any other improvements of considerable value in their holdings.

On the question whether the respondents had a permanent right of occupancy or were yearly tenants, and as to whether the appellants were estopped from disputing that the respondents had a permanent right of occupancy, his findings were that in the case of all the last-named wells (except one with survey number 33 A) there was an estoppel. As to all the rest of the land in question he found that the respondents were only yearly tenants, basing this finding on the principle that the onus lay on the person holding lands in a ryotwari village to prove that he had occupancy rights, and that a proof of tenancy

of long duration at a uniform rent was not sufficient to discharge this onus.

The respondents and appellants objected to these findings, and the High Court allowed the appeal and dismissed the suits as to all except the pasture lands. They expressed their opinion that the District Judge had been wrong in throwing the onus on the defendants to establish their rights, and that the criterion he had applied to the question of estoppel was "absolutely indefensible." They held that there was no reason why the ordinary rule, that a plaintiff suing in ejectment must prove that the occupant came into possession as his tenant under a contract which entitled him to eject, should not apply.

ON THIS APPEAL

De Gruyther, K.C. and *Kenworthy Brown*, for the appellants, contended that on the facts found by the District Judge the respondents had no right of permanent occupancy in the lands in suit; that the High Court had no jurisdiction to overrule the findings of fact by the District Judge: *Durga Chowdhurani v. Jewahir Singh Chowdhuri*(1). The appellant is the mirasidar of the land in suit, and a pattadar under the Government in respect of it, and possesses the kudivaram interest therein, as his ancestors did before him, and in the present case, it is submitted, there was no presumption against him that the respondents have a permanent tenure. The appellant was entitled to recover possession of any of the land on which neither he nor his predecessors are proved to have created a permanent interest in favour of the respondent tenants. There is no finding or proof that the appellant or his predecessors parted with any of the lands in suit for more than a temporary interest, and the evidence in the case, it is submitted, negatives the suggestion that he or they ever did so. The onus of proof was on the respondents as is shown by the decisions of the Board in *Secretary of State for India in Council v. Luchmeswar Singh*(2); and *Mayandi Ohettiya v. Chokkalingam Pillai*(3); and they also show that proof of long occupation at a fixed rent did not satisfy the onus. The same appeared from

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(1) (1891) I.L.R., 18 Cal., 23 (P.C.): L.R., 17 I.A., 122.

(2) (1889) I.L.R., 16 Cal., 223 (P.C.): L.R., 16 I.A., 6.

(3) (1904) I.L.R., 27 Mad., 291 (P.C.): L.R., 31 I.A., 83.

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E. B. Raikes and Palat, for the respondents, contended that the view taken by the District Judge was erroneous, and the High Court had jurisdiction to alter it under section 103 of the Code of Civil Procedure, 1908. The onus lay on the appellant to prove his right to eject the respondents, and they had not done so. If the onus was on the respondents, they had, it was submitted discharged it. The only fact which supported the appellant's contention was that he was a pattadar, but that by itself did not entitle him to succeed. The circumstances in which the tenants came into possession in the case of *Secretary of State for India in Council v. Luchmeswar Singh*(8), were known, which distinguishes that case from the present. On the facts found in *Mayandi Chettiar v. Chokkalingam Pillai*(9), the tenants were rightly found to have permanent rights of occupancy; and it does not conflict with the decisions of

(1) (1897) 7 M.L.J., 1.

(2) (1899) I.L.R., 22 Mad., 264.

(3) (1900) I.L.R., 23 Mad., 318.

(4) (1902) I.L.R., 25 Mad., 507.

(5) (1918) 31 M.L.J., 234.

(6) (1919) 36 M.L.J., 463.

(7) (1911) 21 M.L.J., 845.

(8) (1889) I.L.R., 16 Cal., 223 (P.C.): I.R., 16 I.A., 6.

(9) (1904) I.L.R., 27 Mad., 291 (P.C.): L.R., 31 I.A., 83.

the High Court referred to for the appellant. It is supported by *Veeranani Ambalam Peria Kampalam Ambalam v. Annasawmi Ayyar*(1), and *Muna Muhammad Rowther v. Muthu Alagappa Chettiar*(2). Reference was also made to *Krishnasami v. Varadaraja*(3); *Afzal-un-nissa v. Abdul Karim*(4); *Suryanarayana v. Patanna*(5); the Trichinopoly Manual, page 178 and the Fifth Report (Madras Presidency), pages 104, 106, 489, 615, 622, 625, 750, 785. The appellant is equitably estopped from alleging that the respondents are his yearly tenants.

De Gruyther, K.O., replied, contending that the right of the tenants was only to be compensated for the wells made in the garden lands.

The JUDGMENT of their Lordships was delivered by

Sir LAWRENCE JENKINS.—These consolidated appeals are from three decrees of the High Court at Madras, dated the 18th February 1917. The decrees had modified three appellate decrees of the District Court of Trichinopoly, which in turn had modified three original decrees of the Court of the District Munsif of Kulittalai.

The three suits thus came before the High Court in second appeal, so that the Court had no jurisdiction to interfere with any finding of fact by the District Court; its only power to determine issues of fact was that created by section 103 of the Code of Civil Procedure, 1908.

Each of the suits is for the recovery of possession of agricultural land in a ryotwari tract, and has been instituted by the plaintiff as the Government pattadar.

The number of the defendants in the several suits is 165, 103 and 30. They are not, however, in joint possession; on the contrary, they have separate holdings and should have been separately sued.

The plaintiff's title is conceded, and he alleges that the defendants are tenants under him and that their several tenancies have been determined by notice. The defendants plead in answer to his claim for possession (1) that they severally

(1) (1911) 21 M.L.J., 845.

(2) (1918) 34 M.L.J., 234.

(3) (1882) I.L.R., 5 Mad., 345 (F.B.).

(4) (1919) I.L.R., 47 Cal., 1 (P.C.): L.R., 46 I.A., 131.

(5) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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have a permanent tenancy or right of occupancy, and (2) that they are protected from ejectment by the doctrine of estoppel.

The land in suit is of three classes, garden, dry, and pasture. In the Court of the Munsif it was held that the plaintiff's claim to recover the garden land was barred by the plea of estoppel, but that his claim to the rest must succeed as no right of permanent tenancy was established.

From this decision cross-appeals were preferred. At the first hearing of the appeals the District Judge disallowed the plea of estoppel, and also held that the defendants had not established their right to a permanent occupancy. It is important to observe how he dealt with this last aspect of the case:—

"The question for consideration in this case," he said, "is whether the defendants have shown that the plaintiff or his predecessor in title had contracted the right of tenancy (which) should be changed into a right of permanent occupancy."

His finding on this was as follows:—

"In these circumstances it is, I think, clear that the defendants have not established any contract on the part of the plaintiff or his predecessor in title to convey to them a right of permanent occupancy."

Ultimately he passed decrees in the plaintiff's favour for possession of all the suit lands. The defendants appealed to the High Court, and the learned Judges expressed the view that the mode in which the District Judge had dealt with the question of a permanent tenancy was not satisfactory. And after quoting the proposition as formulated by him they observe that:—

"The real point for determination before the learned Judge was whether on the admitted and undoubted facts of the cases and the evidence of both sides the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

The distinction between the two propositions is manifest. In the result the learned Judges asked the District Judge to return revised findings on the following questions:—

"1. Whether the appellants in these appeals are tenants from year to year, or whether they have a permanent right of occupancy in the lands in dispute?

"2. Whether the plaintiff is estopped from denying that the appellants in these appeals have a permanent right of occupancy?

"3. What compensation, if any, the appellants in these appeals are entitled to for effecting improvements on the land by digging wells and ponds?"

It has been contended that the Court acted without jurisdiction. But this proceeds on a misapprehension of what the High Court did. It did not remand under rule 23 of Order XLI of the Code of Civil Procedure, but merely framed issues and referred them for trial to the District Court as provided in rule 25, and for this reason.

In the opinion of the learned Judges of the High Court, the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights.

It is perhaps to be regretted that the learned judges of the High Court did not give a fuller and clearer explanation of the reasons which influenced them, for the result was that the District Judge failed to grasp the true meaning of the issues framed by the High Court, and again dealt with the question in the same incomplete manner.

He treated the long duration of the tenancy and the uniform and unvarying rate of the rent as a circumstance by itself not sufficient "to raise a presumption of an implied contract that the right of tenancy should be changed into a right of permanent occupancy."

The District Court's findings were returned to the High Court, and the learned Judges pointed out that the District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy.

Instead of a further reference the High Court proceeded to determine this issue and, if and so far as this was an issue of fact—a point on which it is not necessary to express a definite

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opinion in the circumstances of this case—the Court had power to deal with it under section 103 of the Civil Procedure Code, 1908.

The conclusion at which it arrived was that the defendants had occupancy rights.

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This finding, however, is attacked on the ground, first, that the burden of proof was wrongly thrown on the plaintiff, and secondly that in any case the facts did not justify the inference.

To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what propositions of fact or of law the parties were at variance, and how matters stood when the cases reached the High Court.

The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adapt the language of section 101 of the Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognized in the series of Madras decisions cited in argument and is, in their Lordships' opinion, not open to doubt.

There are passages in the High Court's final judgment which unquestionably invite the comment that the learned Judges misapprehended the proper incidence of the burden of proof. Thus the learned Judges say:—

"We hold that the mere fact of the plaintiff being pattadar does not entitle him to any presumption in his favour."

This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say:—

"We also hold that even if that fact could be of any use to him the various circumstances proved, un rebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."

The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them.

In the end the learned judges drew the inference—they speak of it as a presumption—in favour of the defendants' occupancy rights, and as finally expressed their determination was unvitiated by any error as to the burden of proof.

Nor is their inference contradictory of any finding of fact by the District Court; on the contrary, it rests on the findings of that Court, and in the shape it took in the High Court it certainly had not been negatived by the District Court.

A word of explanation will make this evident. Permanence is not a universal and integral incident of an under-ryot's holding; if claimed, it must be established. This may be done by proving a custom, a contract, or a title, and possibly by other means. Custom is out of the question here; there is no suggestion of it. Contract has been decisively negatived by the finding of the District Court. Title was left untouched, and it was on title that the High Court pronounced in the defendants' favour; for the meaning of their finding is not that there was a subsequent change in the relations of the parties, but that at the inception of those relations the defendants' predecessors possessed occupancy rights.

Conflict with any finding of the District Court being eliminated, it next has to be seen whether there were materials on which the High Court could come to its conclusion. They are minutely indicated in the judgment under appeal, and, in the absence of all information as to the origin of the defendants' holdings, it cannot be said that there is no evidence to support the High Court's finding. It may be that regarded even as a finding of fact—and it has been so treated throughout—it is not conclusive, though curiously enough it would have had that character had it been pronounced by the District Judge and not by two judges of the High Court. But after due consideration of the evidence brought to their notice and of all the circumstances, their Lordships see no sufficient reason to interfere with the High Court's conclusion; nor is it in their opinion to be regretted that effect has been given to the very long possession—'immemorial' in the High Court's view—of the defendants and their predecessors

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It has been objected by the appellant that much of the evidence that has been used against him is not relevant, as the long possession, the alienations and the improvements to which it relates have not been traced to the several defendants or their predecessors in title. But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation has been conducted and treated throughout as though the defendants were a community with common interests. The plaintiff therefore cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance and to which he apparently took no exception when it was tendered at the trial.

The objection might have been formidable had the plaintiff sued the several defendants in separate suits, and their Lordships recognize that in view of the exceptional and irregular character of this litigation this case cannot in this respect be a satisfactory precedent in a properly constituted suit. As it is, however, the objection must fail and the High Court's finding as to the permanence of the defendant's rights in the garden and dry lands must stand.

Following on this finding the High Court, while confirming the decree for possession of the pasture land passed by the lower Courts, ordered that the plaintiff's suits so far as they sought delivery of possession of the garden and dry lands, be dismissed.

The plaintiff alone has appealed from the High Court's decree, and the present appeals are limited to the garden and dry lands. For the reasons already indicated they must fail.

Their Lordships therefore will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs of the appeals.

Appeals dismissed.

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J.V.W.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield,
and Mr. Justice Seshagiri Ayyar.*

V. M. ASSAN MOHAMED SAHIB (DEFENDANT),
PETITIONER,

v.

M. E. RAHIM SAHIB (PLAINTIFF), RESPONDENT.*

1930,
January
19, 20, and
February 23.

Provincial Small Cause Courts Act (IX of 1937) sec. 17 (1) proviso—Ex parte decree, application to set aside—Whether proviso mandatory or directory—Time within which deposit to be made or security given.

By the Full Bench (SESHAGIRI AYYAR, J., dissenting)—The provisions of section 17 (1), Provincial Small Cause Courts Act, are mandatory.

By the Full Bench—But the deposit of the decretal amount may be made or the security given, within the period prescribed by the law of limitation for applications under the section, namely, thirty days from the date of the ex parte decree, although it did not accompany the application itself.

Jann Muchi v. Budhiram Muchi (1905) I.L.R., 32 Cal., 339, followed.

PETITION under section 25 of Act IX of 1887 and section 107 of the Government of India Act, praying the High Court to revise the order of P. C. LOBO, Subordinate Judge of the Nilgiris, Ootacamund, in Civil Miscellaneous Petition No. 477 of 1918, in Small Cause Suit No. 949 of 1918.

The petitioner applied to set aside the ex parte decree passed against him in Small Cause Suit No. 949 of 1918, on the file of the Subordinate Judge of the Nilgiris, on the ground that he was not served with any summons in the suit. At the time that the petition was filed the decree amount was not paid, nor was any security given. No objection was raised until the evidence and arguments for the petitioner were closed. And though the petitioner requested two hours' time within which to deposit the decree amount, the petition was dismissed on the ground that the provisions of section 17, Provincial Small Cause Courts Act, were not complied with.

* Civil Revision Petition No. 155 of 1919.

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Against this order the petitioner filed this Civil Revision Petition to the High Court.

The petition came on for hearing in the first instance before SADASIVA AYYAR and SPENCER, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question that arises for our determination in this Civil Revision Petition is one upon which there has been considerable difference of opinion, so far as this Court is concerned. It is whether the wording of section 17 of the Provincial Small Cause Courts Act makes it imperative that a party seeking to set aside an *ex parte* decree of a Small Cause Court should deposit the decree amount in Court, or give security, at the time of presenting his application.

In *Ramasami v. Kurisu*(1), a case which went before a Full Bench on another point, the Divisional Bench that heard the Civil Revision Petition held that the provisions of this section were merely directory and not mandatory. In *Chaturvedula Suryanarayana v. Chaturvedula Ramamma*(2). MILLER, J., considered this ruling but decided the case before him on another point, namely, that a deposit made after the hearing of the petition was in any case too late and rendered the application liable to be dismissed as barred by limitation.

In *Akula Achiah v. Lakshminarasimham*(3), the authority of *Ramasami v. Kurisu*(1) was followed with some hesitation, as the learned Judges were unwilling to make a departure from what had been held to be the law in this Presidency, by the practice prevailing for over thirty years.

On the other hand, the Allahabad High Court has held in *Jagan Nath v. Chet Ram*(4) and *Chhotey Lal v. Lakhmi Chand Magan Lal*(5), that the words of this section are mandatory.

We agree with this view. In our opinion the meaning of the section is clear. When it says that the applicant shall either 'deposit the amount due . . . or give security' as the Court may direct, it does not mean that this shall be done only 'if the Court so directs,' which is the interpretation that the petitioner's *vakil* wishes us to place on these words. The deposit

(1) (1890) I.L.R., 13 Mad., 178.

(3) (1919) 37 M.L.J., 438.

(2) (1911) I.L.R., 34 Mad., 88.

(4) (1908) I.L.R., 28 All., 470.

(5) (1916) I.L.R., 38 All., 425.

or the tender of security must also be made 'at the time of presenting the application.' Those words cannot be treated as intended to be devoid of their natural meaning so as to leave it open to the applicant to make the deposit, or tender the security, at that time or at any other time.

We therefore refer to a Full Bench the question whether the directions in section 17 of the Provincial Small Cause Courts Act, as to the deposit of the decree amount or the giving of security at the time of presenting an application to set aside an *ex parte* decree, are mandatory or not.

ON THIS REFERENCE

T. M. Krishnaswami Ayyar for the petitioner.—This section was reproduced from section 21 of the prior Act XI of 1865. The difference in language shows that while under the prior Act the provision was mandatory under the present Act it is directory. The reference is in general terms. Even if the provision is held to be mandatory, the obligation will arise only after the direction of the Court. The Court has to direct which of two things the party has to do—deposit the amount or give security. The applicant has to await the direction of the Court. [C.J.—The Court has no discretion: if the applicant deposits the money it must accept it; if he tenders security it must test it.] On the facts, the question arises as to whether the Court has jurisdiction to allow the deposit to be made after the presentation of the petition.

[OLDFIELD, J.—Do you concede that the Court must require a deposit or security, at some time or other?

Yes.]

So far as practice is concerned it has been all one way. See *Chaturvedula Suryanarayana v. Chaturvedula Ramamma*(1).

The decisions in Bombay, Allahabad and Calcutta are against my contention. The decisions in Punjab and Oudh are in my favour. The omission of the words of the former Act is a relaxation of the rigour of the old section. I would add the words 'and if he does not do so, he can deposit at any time prior to disposal.' Compare Order XLV, rule 7, Civil Procedure Code. Under the prior Act the application was to be dismissed.

(1) (1911) I.L.R., 34 Mad., 88.

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Those words were omitted in the present Act. There is a similar omission of the words in section 21 of the prior Act XI of 1865 and the present Small Cause Courts Act. The change of language is in my favour. Under section 92 of the Civil Procedure Code it has been held in Madras, that subsequent consent satisfies the provision. See *Ramanyangar v. Krishnayyengar*(1), and *Srinivasa Chariar v. Raghava Chariar*(2). *Gopal Dei v. Kanno De*(3) is against that view. Bombay has followed Allahabad, and there is no express decision of the Calcutta High Court on this point. Decisions show that the Court has power to extend time: *Burjore and Bhawani Pershad v. Bhajana*(4), *Mohesh Mahto v. Shesh Piru*(5), *Rangasayi v. Mahalakshammamma*(6).

C. Madhavan Nayar for respondent.—The practice has stood for a number of years and applying the doctrine of *stare decisis* your Lordships will not interfere. The language in section 17 of the present Act is the same as is contained in the two paragraphs of section 21 of Act XI of 1865. *Somabhai v. Wadilal*(7) shows what interpretation is to be given to the expression 'at the time of presentation.' *Pate v. Pate*(8) lays down the canon of interpretation. See also *Tricomdas Coocorji Bhoga v. Gopinath Jm Thukur*(9). *Akula Achiah v. Lakshminarasimham*(10) is also in my favour.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The corresponding provision in the earlier Small Cause Courts Act XI of 1865 was enacted as a proviso to section 21, which, after enacting that all decrees and orders of the Court should be final and making provision for setting aside *ex parte* decrees and also for granting new trials in other cases, expressly provided that no such new trial should be granted to a defendant 'unless he shall with his notice of application deposit in Court the amount,' etc. Under this section there was clearly no jurisdiction to grant a new trial unless the proviso had been complied with in terms. Under that Act the procedure in these Courts was governed by rules made by the High Court under

(1) (1887) I.L.R., 10 Mad., 185.

(3) (1904) I.L.R., 26 All., 162.

(5) (1877) I.L.R., 2 Cal., 470 (F.B.).

(7) (1907) 9 Bom. L.R., 858.

(9) (1917) I.L.R., 44 Cal., 759.

(2) (1900) I.L.R., 23 Mad., 28.

(4) (1884) I.L.R., 10 Cal., 557 (P.O.).

(6) (1891) I.L.R., 14 Mad., 391.

(8) (1915) A.C., 1100.

(10) (1919) 37 M.L.J., 432.

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section 46, but by section 5 of the Code of Civil Procedure of 1877, the sections of the Code set out in the Second Schedule were applied to Small Cause Courts, so far as applicable. The sections so applied included the sections dealing with applications to set aside *ex parte* decrees and applications for review, and it was therefore only natural that the proviso now in question should appear in the present Act as a proviso to section 17, which again expressly provided that Small Cause Courts should follow the procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the Second Schedule. This re-arrangement necessitated some alteration in the language of the proviso, but that alteration in my opinion affords no ground for attributing to the legislature an intention to modify the clearly mandatory nature of the earlier enactment, more especially as the new proviso is expressed in terms which are *prima facie* mandatory, and have been so construed by the other High Courts. There are, no doubt, some English decisions in which the Courts have found indications in the particular enactments that provisions in form mandatory were only intended to be directory, but having regard to the history of the section there is in my opinion no room for any such conclusion here. In *Ramasami v. Kurisu*(1), PARKER, J., no doubt stated that he was disposed to hold that section 17 was merely directory and not mandatory and went on to observe:—

"The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section."

With all respect, this appears to me to be importing into the section a new mandatory provision not to be found there. It does not appear from the report in that case whether the time prescribed in the Limitation Act for making an application under section 17 had expired when the costs were deposited. In *Jeun Muchi v. Budhiram Muchi*(2), where the application was made without making a deposit or giving security, it was held by BRETT AND MOOKERJEE, JJ., that, if the requirements of the section were complied with within the period prescribed for such applications in the Limitation Act, it might be treated as sufficient, as no objection could have been taken if a fresh application had been presented when security was deposited. I

(1) (1900) I.L.R., 13 Mad., 178.

(2) (1905) I.L.R., 32 Cal., 332.

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think that this interpretation of the requirements of the section may well be followed, having regard to the practice which has prevailed in this Presidency, and would answer accordingly that the provision in question is mandatory, but is sufficiently complied with by satisfying the requirements of the section before the time prescribed for such applications in the Limitation Act has elapsed.

OLDFIELD, J. OLDFIELD, J.—I entirely agree, and add only that the interpretation we are adopting is consistent with the object of the Provincial Small Cause Courts Act, the provision of a simple procedure for the cheap and expeditious disposal of petty claims.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—After the very full discussion which this case has received, I am confirmed in the view I took in *Akula Achiah v. Lakshminarasimham*(1), that there is no necessity for bringing our decision into line with the decisions of the other High Courts, except with *Jeun Muchi v. Budhiram Muchi*(2).

On the question whether the language of section 17 of the Provincial Small Cause Courts Act is only directory, there can be difference of opinion. The position is this. Before the enactment of Act IX of 1887, the procedure for the trial of Small Cause Suits and the procedure for the trial of regular suits were regulated by distinct legislative enactments. By the Madras Civil Courts Act III of 1873, section 28, power was conferred upon the Local Government to invest District Munsifs and Subordinate Judges with Small Cause Court jurisdiction in regard to suits of a particular description. My impression is, that until the enactment of this provision, there were separate Small Cause Courts in defined centres, and the regular tribunals of the presidency were not invested with Small Cause powers. Then came the Civil Procedure Code of 1877. It was intended to regulate the procedure not only in the regular Courts but also in the Small Cause Courts. The Civil Procedure Code of 1882 recognized this principle, and also provided for the repeal of some of the provisions of the Small Cause Courts Act of 1865. When the present Small Cause Courts Act was re-enacted,

(1) (1919) 37 M.L.J., 423.

(2) (1905) I.L.R., 32 Calo., 399.

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provisions were introduced into it which while confirming the right of a small cause suitor to have his case tried according to the procedure prescribed in the Civil Procedure Code, imposed limitations upon the exercise of some of the powers. Section 17 is an instance of this kind. In granting applications for setting aside *ex parte* decrees, the Small Cause Courts Act, section 17, imposes a limitation upon the right of the suitor. Whereas, under the ordinary law, what the Courts have to be satisfied is that the party has not been duly served and that he had no opportunity of defending the suit, under the Small Cause Courts Act, in addition to satisfying these requirements, the defendant is required to deposit the amount of the decree. Therefore section 17 should be read not as conferring a new jurisdiction subject to certain conditions, but, as limiting the exercise of jurisdiction by imposing conditions. This aspect of the history of legislation is essential for finding out whether section 17 is directory or mandatory. Mr. Krishnaswami Ayyar referred to section 43 of the Small Cause Courts Act of 1865, and drew our attention to the fact that the language in the present Small Cause Courts Act is materially different. I think there is force in this contention. The language of section 17 suggests *ex facie* that the deposit of the decree amount should precede the application for setting aside the *ex parte* decree; but there are no words in the section that, if the deposit is not made, the application should not be received. That seems to be one of the criteria for construing a statutory provision to be mandatory; I do not say that that is the sole criterion. This view gathers strength from the decision of the Judicial Committee to which Mr. Krishnaswami Ayyar drew our attention, namely, *Burjore and Bhawani Pershad v. Bhajana*(1). Their Lordships accepted the view taken in *In the matter of the petition of Soorj mukhi Koor*(2), that the absence of a provision for the dismissal of a suit or application for failure to comply with a condition is a circumstance tending to show that the provision is permissive, and not mandatory. Even more significant is the decision of the Judicial Committee under the Pensions Act: *Muhammad Asmat Ali Khan v. Lalli Begum*(3).

(1) (1884) I.L.R., 10 Calo., 557 (P.O.). (2) (1877) I.L.R., 2 Calo., 272.
(3) (1889) I.L.R., 8 Calo., 422 (P.O.).

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In that Act, sections 4 and 6 read together make the institution of a suit in the Civil Courts dependent upon the production of a certificate from the Collector; and yet the Judicial Committee held that the production of a certificate during the course of the trial would be sufficient, thereby indicating that the sections are only directory. This view has been followed in *Malras* and the other High Courts. See *Bepin v. Abdul*(1), *Gunpat Rao v. Anand Rao*(2) and *Gunpat Rao v. Anant Rao*(3).

A third class of cases was referred to by me in my judgment in *Akula Achiah v. Lakshminarasimhan*(4). In *Ramayyengar v. Krishnayyengar*(5) and in *Srinivasa Chariar v. Raghava Chariar*(6), it was held that section 92 of the Civil Procedure Code, which, on a plain reading of it, indicates that the sanction of the Collector or the Advocate-General is a condition precedent to the institution of a suit, was satisfied by the production of the sanction during the course of the suit. I cannot say that the language of section 17 of the Small Cause Courts Act is more imperative than sections 4 and 6 of the Pensions Act, or section 92 of the Code of Civil Procedure. Therefore, the principle which underlies the decisions in these latter Acts are equally applicable to the construction of section 17 of the Small Cause Courts Act.

In Maxwell on "Interpretation of Statutes," it is stated in one place that the conditions relating to the giving of recognizances or to trials in suits should ordinarily be regarded as mandatory. But a reference to *Rendall v. Blair*(7) will show that this statement is subject to many exceptions. In that case, the question was whether, if the consent of the Charity Commissioners was not obtained prior to the institution of an action, the action failed. Justice KAY in the first Court held that it was a fatal objection. The learned Judge says:

"Another objection is this: if I allow the action to stand over in order that leave may be obtained, the writ, which was issued more than a year ago, must be treated as a writ issued *nunc pro tunc* and amendment must be allowed to the effect that the action was commenced after that leave obtained. I think that would be wrong.

(1) (1916) 24 C.L.J., 446.

(3) (1910) I.L.R., 32 All., 148 (P.C.).

(5) (1887) I.L.R., 10 Mad., 185.

(2) (1906) I.L.R., 28 All., 104.

(4) (1919) 37 M.L.J., 423.

(6) (1900) I.L.R., 23 Mad., 28.

(7) (1800) 45 Ch. D., 189.

It would, I think, be entirely against the object and purpose of this section to allow the action to stand over for leave to be obtained."

In Appeal, all the Lord Justices agreed that time should be given for obtaining the consent. Lord Justice BOWEN said:

"whether, supposing the consent of the Commissioner was necessary, it would be right to dismiss the action altogether. . . . It does not seem to me that the proper course, if an action appears to the learned Judge at the hearing to be an action which falls within section 17, would be to dismiss it altogether; on the contrary, I think you ought to allow it to stand over to see if the consent of the Commissioners can be obtained."

Then the learned Judge examines the language of the statute, which is in these terms:

"Before any suit, petition, or other proceeding for obtaining any relief, etc., relating to any charity, shall be commenced, presented or taken, there shall be transmitted notice in writing to the board . . . and the said board, if upon a consideration of the circumstances they think fit, may, by an order or certificate direct any suit, petition or proceeding be next presented, etc., . . . and save as herein otherwise provided no suit, petition or other proceeding shall be entertained or proceeded with by the Court except upon and in conformity with the order or certificate of the said board."

On this language Lord Justice BOWEN says:

"This section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit."

This decision in my opinion, which was concurred in on this point by Lord Justices FRY and COTTON, furnishes a clue for the construction of the section we are dealing with. I am not therefore prepared to say that the section is mandatory.

However that may be, in *Jeun Muchi v. Budhiram Muchi*(1), it is laid down that, even though the original application may not be accompanied by a deposit, once the application

(1) (1905) I.L.R., 32 Cal., 889.

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is on record, a deposit subsequently received within the time limited by law, would validate the application. This seems to be a very salutary rule. The later deposit would attract to itself the earlier application, and the application itself may be regarded as having been made on the date of the deposit. While this view would still make it permissible to the suitor to come into Court with an application unaccompanied by a deposit, it would also compel him to pay the money within the time limited by law. As against this view, there is the answer suggested by Mr. Krishnaswami Ayyar that, whenever a deposit is made before the conclusion of the trial, it should date back to the date of the original application. In support of this view, there is the analogy of the practice in this and the other Courts by which deficient Court fees paid subsequent to the date of filing of the appeal and the filing of necessary papers which did not accompany the memorandum of appeal have been regarded as enabling the party to claim that the additional payment and the later production of documents should date back to the presentation of the appeal. In such cases the office fixes a time within which the deficiency or the omission should be set right. If this is done, the delay is excused in the Admission Court.

My answer to the question is that the provision of section 17 of the Small Cause Courts Act will be complied with, if the deposit required by that section is made within the period of limitation, although it did not accompany the application for setting aside the ex parte decree.

M.H.H.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice,
Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.*

KANDULA VENKIAH alias PADMANABHUDU
(PLAINTIFF), APPELLANT,

1920,
March, 11.

v.

DONGA PALLAYA AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882) ss. 98 and 60—Anomalous mortgage—Mortgages defined in section 58 and combined mortgages under section 98—Olog on equity of redemption, validity of—Applicability of provisions of the Act to ordinary and anomalous mortgages—Terms of the deed and local usage, how far binding—Instruction of document

Where the mortgagee was put in possession of the lands mortgaged under a deed executed in 1900, which provided that the principal with interest at a specified rate should be repaid on a certain date, eleven years thereafter, and that, in default, the mortgagor should give up the lands as sold to the mortgagee and execute a proper sale-deed, and further that the latter should enjoy the property paying the revenue due to Government, and where the mortgagor sued in 1914 to redeem the mortgage and the mortgagee pleaded that the former could not redeem after the time limited under the deed.

Held (by the Full Bench), that the transaction evidenced by the deed was not a mortgage by conditional sale or an anomalous mortgage under section 98, but a combination of a simple mortgage and a usufructuary mortgage, and that, consequently, the stipulation in the deed, which fettered the equity of redemption, was invalid as opposed to section 60 of the Act.

Held (by WALLIS, C.J. and SESHAGIRI AYYAR, J.)—In the case of anomalous mortgages referred to in section 18 the provisions of section 60 as to the right of redemption do not apply when there is a contract or local usage to the contrary.

SECOND APPEAL against the decree of the Court of the Temporary Subordinate Judge of Ellore in Appeal Suit No. 609 of 1917, preferred against the decree of the Court of the Additional District Munsif of Bhimavaram, in Original Suit No. 42 of 1916.

The plaintiff instituted the suit for a declaration that the mortgage bond (Exhibit A), executed by the tenth defendant as

* Second Appeal No. 146 of 1919.

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guardian of the plaintiff during his minority, was not supported by consideration, or if it was, for an account to be taken for the purpose of passing a decree for redemption in this suit. The bond was executed in 1900, by the tenth defendant in favour of the father of defendants Nos. 1 to 3 and grandfather of defendants Nos. 7 to 9. The document is set out in full in the Order of Reference.

The plaintiff brought this suit on 18th August 1914 for declaration and possession or in the alternative for redemption. The defendants, the sons and grandsons of the mortgagee, pleaded *inter alia*, that the mortgagor was not entitled to redeem the mortgage under the terms of the document after the lapse of the time fixed in the deed, as thereafter the lands should be deemed to have been sold to the mortgagee. The District Munsif, who tried the suit, overruled this contention of the defendants, took an account of the profits derived by the mortgagee, and passed a decree for possession of the lands together with an amount for excess profits derived by the defendants. Defendants Nos. 1 to 9 preferred an appeal, and the Subordinate Judge held that the transaction under Exhibit A was an anomalous mortgage under section 98, Transfer of Property Act, and that the clog on the equity of redemption in the deed, was not invalid and inoperative in the case of anomalous mortgages under section 98 of the Act, and consequently he reversed the decree of the District Munsif and dismissed the suit. The plaintiff preferred this Second Appeal.

The case came on for hearing before SPENCER and KRISHNAN, JJ., who made the following:—

ORDER OF REFERENCE TO THE FULL BENCH.

SPENCER, J.—The appeal relates to the mortgagor's right of redemption. The terms of the mortgage (Exhibit A) are as follows:—

"Possessory mortgage deed of immoveable property for Rs. 50 executed on 23rd August 1900 in favour of Donga Pallaya's son Sarvesa of Ediga caste, ryot, residing at Peda Amaram, by Kandula Subbarayudu's son Venkiah being minor, by his mother and guardian Subbamma. For the expenses of my minor daughter Rattamma's marriage and for my family expenses, the amount already borrowed from you is Rs. 50-0-0. This sum with interest thereon at Re. 1-0-0 per cent per month I shall pay you on 23rd August 1911 and have

the payment endorsed by you on this. No other is valid. If I fail to pay on the due date aforesaid I shall give up the said land as sold to you for the amount then outstanding due to you and execute a proper sale-deed. The property has been delivered possession to you on this very date. You shall henceforth enjoy the property as you please, and yourself pay Rs. 6-3-0 due to Government every year without giving any consideration whatever every year."

The Subordinate Judge treated this document as an anomalous mortgage and held that the plaintiff could not redeem the property which by the terms of the mortgage belong to the mortgagee as owner from 23rd August 1911, when the mortgagor failed to pay the amount borrowed with interest at Re. 1 per cent per mensem. The District Munsif thought that the clause as to the sale of the property operated only as a clog on the equity of redemption.

For the appellant reliance is now placed on *Srinivasa Ayyangar v. Radhakrishna Pillai*(1), while the respondents' vakil relies on *Hakeem Patte Muhammad v. Shaik Davood*(2).

I was a party to both the above decisions and from a consideration of the terms of the document now before us, I think it resembles that which was the subject of the latter case rather than the former. It is not a usufructuary mortgage within the definition of section 58 of the Transfer of Property Act, because it does not provide for the rents and profits of the land being appropriated towards the principal or interest of the mortgage money. At the end of the term the mortgagor was to pay the whole of the mortgage money and the interest, without any reduction for the mortgagee's enjoyment of the property.

In fact, the only advantage he was to get out of the transaction was that the mortgagee undertook to pay the Government revenue on the land.

It is not a simple mortgage, because possession of the mortgaged property was agreed to be given to the mortgagee. It is not a mortgage by conditional sale because it is essentially a mortgage and not an ostensible sale. Nor is it a combination of either of the latter two descriptions of mortgage with the former kind. It is, therefore, an anomalous mortgage to which

(1) (1915) I.L.R., 38 Mad., 667. (2) (1916) I.L.R., 39 Mad., 1010.

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section 98 of the Transfer of Property Act is applicable, and the rights and liabilities of the parties must be construed strictly in the light of their contract. I think that the mortgagor had a right of redemption but that it became extinguished on 23rd August 1911. I think that the language of section 98 precludes the application of section 60 to anomalous mortgages, as well as other sections, such as 69, 78, 80 to 82; and if section 60 is inapplicable, then I think that the Privy Council decision in *Thumbusawmy Moodelly v. Hossain Rowthen*(1), is against the importation of English principles of equity, for which the Transfer of Property Act has not provided, in dealing with Indian mortgages executed since the Act was passed. In my opinion, the second appeal should be dismissed with costs, but as my learned brother wishes to refer to a Full Bench the question of terms in anomalous mortgages that limit the mortgagor's right of redemption being treated as clogs on the equity of redemption, I have no objection to that course being adopted for the purpose of clearing up such doubts as may exist on the meaning of sections 98 and 60 of the Transfer of Property Act.

KRISHNAN, J.—The question for decision in this case is whether the stipulation in the suit mortgage deed, Exhibit A, that

"If I fail to pay you on the due date aforesaid I shall give up the said land as sold to you for the amount outstanding due to you" is not invalid as a clog on redemption. It is not denied that it is a clog on redemption and would be invalid in the case of ordinary mortgages but it is contended for the mortgagee that the transaction under Exhibit A is an anomalous mortgage and that the rule as to the invalidity of clogs on redemption is inapplicable to such mortgages by reason of the provision in section 98 of the Transfer of Property Act, that the rights and liabilities of the parties to an anomalous mortgage shall be determined by their contract as evidenced by the mortgage-deed and reliance is placed on the ruling in *Hakeem Patte Muhammad v. Shaik Darood*(2).

The first question then for our consideration is whether the suit mortgage is an anomalous mortgage or not. Exhibit A

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calls itself a "Swadheena Tanaka" or possessory mortgage-deed. But though possession is given under it to the mortgagee, there is no provision for taking the usufruct towards either the mortgage money or the interest in part or wholly. Interest is specially provided for at 1 per cent per mensem and the principal and interest have to be paid to the mortgagee on redemption. The document makes no express provision as to what is to be done with the usufruct by the mortgagee. From the last sentence in Exhibit A it looks likely that the parties intended the usufruct to be taken for the payment of the Government assessment, the land apparently yielding very little in the shape of income. However this may be, there is no proper ground for accepting the suggestion that the usufruct was to go in reduction of further interest not expressly provided for in Exhibit A. The document expressly relieves the mortgagee from accounting for the usufruct, and makes no provision for its being utilized in discharge of the mortgage money or interest thereon. The mortgage, therefore, does not fall within the definition of usufructuary mortgages in section 58, clause (d), of the Transfer of Property Act.

It does not seem to fall within the definition of a mortgage by conditional sale in section 58, clause (c), for it is difficult to hold that Exhibit A evidences an ostensible sale. The sale is to result in the future if certain conditions are not fulfilled. It is, as SADASIVA AYYAR, J., has described a similar mortgage in *Srinivasa Ayyangar v. Radhakrishna Pillai*(1), "A mortgage with a clause providing for future conditional sale." A mortgage in similar terms has been held to be not a mortgage of conditional sale in *Hakeem Patte Muhammad v. Shaik Darood*(2). But a contrary view was taken by the learned Chief Justice and BENSON, J., in *Kola Venkatanarayana v. Vuppala Ratnam*(3); their view is in accord with what the Privy Council laid down as the essential characteristic of a mortgage by conditional sale in *Thumbusawmy Moodelly v. Hossain Rowthen*(4). But *Kola Venkatanarayana v. Vuppala Ratnam*(3) referred to a document in 1877, that is, before the Transfer of Property Act. However, as I am proposing to refer this case to the Full Bench, this

(1) (1915) I.L.R., 38 Mad., 667.

(2) (1916) I.L.R., 39 Mad., 1010.

(3) (1906) I.L.R., 29 Mad., 531.

(4) (1875) I.L.R., 1 Mad., 1 (P.C.).

(1) (1875) I.L.R., 1 Mad., 1 (P.C.). (2) (1916) I.L.R., 39 Mad., 1010.

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question may also be settled by the Full Bench. I am inclined to think that the mortgage under Exhibit A does not fall within the category of mortgages by conditional sale as defined by the Transfer of Property Act.

It is not a simple mortgage, as though there is a covenant to repay, possession of property is delivered under it to the mortgagee, and he does not seem to have the right to get the property sold for his mortgage money but only to take it after due date as sold to him in lieu of the debt due to him.

It is not such a combination of mortgages as is mentioned in section 98 of the Transfer of Property Act, and we are therefore bound to hold that it is an anomalous mortgage.

The next question which arises on the above view is whether section 98 excludes the applicability of the rule about the invalidity of clogs on redemption, to an anomalous mortgage. It has been answered in the affirmative by the decision in *Hakeem Patte Muhammad v. Shaik Davood*(1). But as the question of the construction of section 98 is one of much importance with reference to the numerous mortgages in this country which may fall within the category of anomalous mortgages and as, with all respect, I feel some doubt whether the view taken on the point in that case is correct, I think it desirable that the question should be settled by a Full Bench.

As observed by Dr. Gour in his notes to section 98, though anomalous mortgages are in their operation made subject to contracts and local usage, they are still 'mortgages' and rules applicable to mortgages in general should continue to apply to them. (See Gour on Transfer of Property Act, 4th Edition, Vol. II, para. 1944, page 1252.) The rule relating to clog on redemption is such a general rule based on principles applicable to all mortgages irrespective of their form. As pointed out by Dr. Gour, the jurisdiction to disallow stipulations in mortgages of the nature of clogs on redemption was merely a special application of a more general power to relieve against penalties, and was exercised to guard against the oppression of necessitous land-owners by mortgagees (*ibid.* para. 1397, page 933). I feel much doubt whether section 98 should be construed as excluding such a jurisdiction with reference to anomalous

(1) (1918) I.L.R., 39 Mad., 1010.

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mortgages alone, for I can discover no reason why the legislature should have discriminated between anomalous mortgages and other mortgages in this respect.

The strict construction of the section adopted in *Hakeem Patte Muhammad v. Shaik Davood*(1) must lead to the exclusion of all the sections in the Transfer of Property Act dealing with the rights and liabilities of parties from applying to anomalous mortgages, including even such sections as 69, 78 and 80 to 82. It is, however, conceded by the learned vakil for the respondent that where there is no contract or local usage the anomalous mortgage should be taken to be governed by the provisions of the Transfer of Property Act. This amounts to reading into the section some such words as "so far as they are sufficient for the purpose", and yet we have to read the section in that manner. It seems to me the section must be reasonably construed and should not be held to affect a rule like the one before us.

Stipulations which are clogs on redemption have been set aside in numerous cases on general principles, apart from section 60 of the Transfer of Property Act, even after the observations of the Privy Council in *Thumbusawmy Moodelly v. Hossain Rowthen*(2). Such a stipulation was set aside in the case of an anomalous mortgage itself in *Neelakandhan v. Ananthakrishna Ayyar*(3), where the mortgage was prior to the Act though there was no statutory rule for it.

The argument has been put before us in another form also. It is pointed out section 98 speaks of 'contracts', and therefore any stipulation to fall under that term must amount to a contract within the meaning of section 10 of the Contract Act; in other words they must be legally valid stipulations. It is then argued that a stipulation like the one before us should be treated as invalid because it is opposed to the general rule against clogs on redemption and the provision in section 98 cannot be held to affect that rule. There seems to be some force in this argument.

I would refer to the Full Bench the following question :

"Is the stipulation in Exhibit A set out in the beginning of this judgment valid or invalid in law?"

(1) (1918) I.L.R., 39 Mad., 1010. (2) (1875) I.L.R., 1 Mad., 1 (P.O.).

(3) (1907) I.L.R., 30 Mad., 61.

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ON THIS REFERENCE

P. Narayanamurti for the appellant.—This document is certainly a mortgage of some kind or other. It calls itself a *thanaka* which means a mortgage with possession. It is a simple mortgage as well as a usufructuary mortgage, i.e., a combination of the first and the third form of mortgages specified in section 58 and referred to in section 98, Transfer of Property Act. It is not an anomalous mortgage under section 98. The right of redemption given by section 60 cannot be negated by the terms of the document.

Even if it is an anomalous mortgage under section 98 of the Transfer of Property Act, the provisions of section 60 of the Act, which confer a right of redemption on all mortgagors, will apply to anomalous mortgages also. It is to be noted that section 60 does not contain a qualifying clause, "in the absence of a contract to the contrary", which occurs in several other sections of the Act. The right to redeem is the very essence or fundamental characteristic of every mortgage, whether ordinary or anomalous. Such essential incident cannot be taken away by contract or local usage in the face of the statutory provision contained in section 60, which is not limited to any particular form of mortgage but evidently applies to all transactions which are mortgages, irrespective of contract to the contrary. The rule against clog on equity of redemption, impliedly embodied in section 60, is applicable to anomalous mortgages. Other sections of the Act are clearly applicable to anomalous mortgages, e.g., sections 72, 76, 82, 83, etc., will certainly apply to such mortgages. Equity of redemption is the very essence of a mortgage. See *Noakes & Co., Limited v. Rice*(1). The security is contemplated at the inception and then the transaction is to become a sale: reference was made to the following cases:—*Hakeem Patle Muhammad v. Shaik Davood*(2), *Srinivasa Ayyangar v. Radhakrishnan Pillai*(3), *Badal Molla v. Chemai Mondal*(4), *Gopalan Nair v. Kunhan Menon*(5), *Thambusawmy Moodelly v. Hossain Rowthen*(6).

The suit document is evidence of a combined mortgage. It is a combination of a usufructuary mortgage and a mortgage

(1) [1902] A.C., 24 at p. 30.

(3) (1915) I.L.R., 38 Mad., 687.

(5) (1907) I.L.R., 30 Mad., 300.

(2) (1916) I.L.R., 39 Mad., 1010.

(4) (1917) 40 I.O., 894.

(6) (1875) I.L.R., 1 Mad., 1 (P.C.).

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by conditional sale. It is, in any event, a combination of simple and usufructuary mortgage. In either view, it is not an anomalous mortgage, and the general provisions of the Act against the clog on the equity of redemption under, section 60 will apply to the combined mortgage.

Patanjali Sastri for respondents.—This is not a combined mortgage under section 98 of the Act. It is only an anomalous mortgage. The provisions of the deed and local usage apply and not the provisions of the Act. Section 60 does not apply. It deals with a general provision and cannot affect a particular provision under section 98, which is not subject to any statutory rule. If the effect of not applying the rule contained in section 60 be inequitable, it is for the legislature to intervene. Courts ought not to assume the functions of the legislature. See the observations of the Privy Council in *Thambusawmy Moodelly v. Hossain Rowthen*(1). Section 98 may not exclude the priority sections under sections 82, 83, etc., as it affects only the rights of the parties to the mortgage and not third parties who claim priority.

The suit mortgage is not a mortgage by conditional sale, as there is not an ostensible sale as defined in section 58 of the Act. It is not a combination of simple mortgage and usufructuary mortgage. It is not a simple mortgage, since possession is given from the beginning. It is not a usufructuary mortgage, because the income is not to be enjoyed under the deed either in lieu of interest or principal, or partly in lieu of interest and principal, as required by section 58. It is, therefore, an anomalous mortgage and is governed solely by the provisions of the mortgage deed.

OPINION.

WALLIS, C.J.—This reference raises two questions, (1) WALLIS, C.J. whether Exhibit A is an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act and (2) if it is, whether effect is to be given to the stipulation for the execution of a sale-deed by the mortgagor in favour of the mortgagee on default of payment within the stipulated time, although this stipulation amounts to a clog on the statutory right of redemption conferred by section 60 of the Act. As regards

(1) (1875) I.L.R., 1 Mad., 1 (P.C.).

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the first question, there are four classes of mortgages defined in section 58 :—(1) simple mortgage, (2) mortgage by conditional sale, (3) usufructuary mortgage, and (4) English mortgage. Section 98 also recognizes two further classes of mortgages, viz., a combination of (1) and (3), a simple mortgage and a usufructuary mortgage, or a combination of (2) and (3), a mortgage by conditional sale and a usufructuary mortgage; and it is only to mortgages which do not come within any of these six classes that the provision in section 98, that the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage, is made applicable. Now, in all mortgages, including mortgages of the six classes already referred to, the rights and liabilities of the parties are determined by their contract as evidenced in the mortgage deed, except in so far as any of the terms of the contract may be opposed to the provisions of the Act or otherwise illegal. The legislature apparently considered that the provisions of the Act, including the statutory right of redemption conferred on the mortgagor by section 60, should be made applicable to the four classes of mortgages defined in section 58, which include the usual forms of mortgage, and to the two combinations mentioned in section 98, so as to override any terms in the mortgage deed inconsistent with the Act, but that it would be safer to leave other forms of mortgage, which may be regarded as anomalous and are so referred to in the heading to section 98, to be governed by the provisions of the mortgage deed or local usage, and in effect to exempt them from the operation of the Act to this extent at any rate that the terms of the contract or the local usage applicable thereto should override the general provisions of the Act. The general rule being that, except in this particular case, the provisions of the Act should override the terms of the mortgage contract, the Court should, I think, satisfy itself that the particular mortgage cannot fairly be brought within any of the six specified classes of mortgages before holding it to come within the rule of exception created in favour of anomalous mortgages.

Coming now to Exhibit A, I am clearly of opinion that it is not a mortgage by conditional sale within the meaning of the definition in section 58 (c), of the Transfer of Property Act.

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The provision that, in default of payment on or before the stipulated date, the mortgagor shall execute a deed of sale in favour of the mortgagee, no doubt brings it within the description given by Sir CHARLES TURNER in *Ramusami Sastrigal v. Samiyappa Nayakan*(1) of a conditional mortgage as understood in Southern India before the passing of the Act, but we are governed by the terms of section 58 and as pointed out by SADASIVA AYYAR, J., in *Srinivasa Ayyangar v. Radhakrishna Pillai*(2), clause (c) seems to have been expressly framed so as to exclude the Hindu form of mortgage by conditional sale from the definition of mortgage by conditional sale in the Transfer of Property Act, with the result that the provision as to a future sale must be regarded overridden by the statutory right of redemption conferred by section 60. *Hakeem Patte Muhammad v. Shaik Davood*(3), is to the same effect, and, both on the construction of the Act and on these authorities, I am of opinion that Exhibit A is not a mortgage by conditional sale within the meaning of sections 58 and 98.

This, however, does not conclude the question, as we have still to see if Exhibit A comes within any of the five remaining classes, one of which is a combination of a simple mortgage and a usufructuary mortgage. Now, if we take the first part of Exhibit A with its covenant to repay with interest at one per cent on the date fixed, and the stipulation that on failure to pay on that date, the mortgagor is

"to give up the land as sold to you for the amount then outstanding due to you and execute a proper sale-deed",

it contains all the essentials of a simple mortgage with an illegal clog on the equity of redemption superadded. If now we take the second part of the instrument and read it with the recital of the mortgage debt at the beginning, it provides

"possession of the property having been delivered to you on this very date, you shall henceforth enjoy the property as you please and shall yourself pay Rs. 6-3-0 due to Government every year without giving any consideration whatever for every year".

Here we have all the essentials of a usufructuary mortgage, as defined in section 58 (d), as the property is delivered to the

(1) (1882) I.L.R., 4 Mad., 179 (F.B.). (2) (1915) I.L.R., 38 Mad., 667.
(3) (1916) I.L.R., 39 Mad., 1010.

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mortgagee and he is authorized to receive the rents and profits accruing from the property and to enjoy them subject to the payment of land revenue without accounting for them. The deed does not say expressly he is to "appropriate them in lieu of interest", but an express statement to that effect in the mortgage deed is not necessary to make a usufructuary mortgage as defined in section 58 (d), because, as by the terms of the instrument they are not to be appropriated in satisfaction of the principal, the only inference must be that they are to be appropriated by the mortgagee himself in consideration of his advance, which is another way of saying that they are to be appropriated in lieu of interest. Reading the two parts of the document together the mortgagee gets in addition to the rate of interest provided in the first and simple mortgage part of the document, the enjoyment of the rents and profits provided in the second and usufructuary part, which must in my opinion be regarded as by way of further interest. In any case Exhibit A, as I have pointed out, contains expressly or impliedly all the essentials of a simple mortgage and also of a usufructuary mortgage with a clog on the equity of redemption superadded, and amounts in my opinion to a combination of a simple mortgage and a usufructuary mortgage within the meaning of section 98. My answer therefore is, that the stipulation in Exhibit A which fetters the equity of redemption is invalid as opposed to section 60 of the Transfer of Property Act which admittedly governs all mortgages but the residuary class of mortgages defined in section 98.

OLDFIELD, J.

OLDFIELD, J.—It is, I agree, possible to deal with this reference on the ground that Exhibit A is not an anomalous mortgage, and without expressing any opinion as to whether section 98 of the Transfer of Property Act is controlled by section 60.

The terms of the document are given in the order of reference. It is clear that the sale provided for in it is future and not ostensible; and there is therefore no question of a mortgage by conditional sale. It is next material, that the provision for a sale must for the present purpose be dismissed from consideration. For such provision, standing in a mortgage of one of the normal forms defined in section 58 or in one of the combinations of them specified in section 98, would operate

as a restraint on the right of redemption; and, whether the prohibition of restraints on redemption implied in section 60 is or is not applicable to anomalous mortgages, the settled principle that such a provision is inoperative in a normal mortgage cannot be evaded by the classification of all mortgages containing a restraint as on that ground anomalous. Our conclusion as to the character of the transaction must accordingly be reached with reference only to the remainder of the document, the provision by the mortgagor to pay on a specified date and the transfer of possession to the mortgagee.

Such a promise and such a transfer would *prima facie* be characteristic respectively of a simple and of a usufructuary mortgage and, occurring in one document, of a combination between the two. But the learned Judges in their order of reference are unwilling to recognize Exhibit A as including a simple mortgage, because possession is transferred, or a usufructuary mortgage, because profits are not appropriated in lieu of interest or the mortgage money.

The words of the definition of a simple mortgage in section 58 (b), "without delivering possession of the mortgaged property", no doubt at first sight support the first of these objections. But, with all deference, if combinations between the forms of mortgage are to be recognized at all to any purpose, some departure from the definitions must in all or almost all cases be condoned; and there seems to be no reason on principle why it should not be, so long as the substantial character of each of the mortgages combined is preserved and, although no such question arises in the present case, so long as no legal relation of a different kind is introduced. The alternative involved in strict adherence to the definitions is that the combinations contemplated are only between one mortgage and the other in succession, the right to the remedy under the one being lost, when the mortgagee elects or is constrained by the contract to avail himself of the remedy under the other. But, if the simple mortgage is regarded, as it easily may be, as superseding the usufructuary at the moment, when the right to bring the property to sale is exercised and the mortgagee's possession ends in favour of the auction purchaser, the distinction between the successive and simultaneous existence of obligations under the two is of little

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practical importance. Certainly that distinction has been disregarded by this Court in *Ramayya v. Guruva*(1), and *Kanyaya Gurukul v. Kalimuthu Annavi*(2), and the judgment of SADASIVA AYYAR, J., in *Srinivasa Ayyangar v. Radhakrishna Pillai*(3); and in my opinion no reason has been shown for dissent from these decisions.

To turn to the other aspect of the transaction as a usufructuary mortgage, there is no doubt nothing explicit in Exhibit A to connect the mortgagee's possession with an appropriation of the profits to interest. But I am with all respect unable to follow KRISHNAN, J., in his surmise that they would be devoted entirely or almost entirely to the payment of revenue, since there is no reason for assuming that money was advanced on property which it would not be profitable to enjoy. In the absence of any other explanation, there is no reason against and every reason in favour of the view that the profits were to be set against interest in addition to that expressly stipulated for in the document. Section 58 (d) no doubt refers only to appropriation of profits in lieu of interest or in payment of the mortgage money or partly in lieu of interest and partly in payment of the mortgage money, not, as here, in part payment of interest alone. But appropriation in part payment of interest might be the result, whenever the stipulation is for an account to be taken as section 76 (b) provides; and such appropriation therefore does not appear inconsistent with the definition, or with the character of Exhibit A as a combination of a simple and usufructuary mortgage with which we are concerned.

I concur in the opinion proposed by the learned Chief Justice.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I am under the impression that both the learned Judges who referred this case have come to the conclusion that the mortgage we are dealing with is an anomalous one and that it does not come within the four classes of original mortgages and the two classes of combined mortgages referred to in section 98 of the Transfer of Property Act. If

they wanted our ruling on the construction of the document, they would not have framed the question as they have done, as, if the transaction is not anomalous there can be no question that the condition would be invalid. However, as both the learned Chief Justice and Mr. Justice OLDFIELD are of opinion that it is still open to us to consider the nature of the transaction, I shall very shortly state my view of it.

I respectfully agree with my lord that this is not a mortgage by conditional sale. The transaction which Sir CHARLES TURNER examined in *Ramasami Sastrigal v. Samiyappa Nayakan*(1), was undoubtedly one which prior to the passing of the Transfer of Property Act was regarded in this country as a conditional mortgage, that is, a mortgage with a condition for selling the property, which condition executed itself on default being made. But the definition of a mortgage by conditional sale as given in section 58 of the Transfer of Property Act apparently does not include the ancient form of conditional mortgage within it. There must be an ostensible sale to begin with, and as this document neither ostensibly nor otherwise purports to be a sale-deed, I feel no doubt that it does not satisfy the requirements of a mortgage by conditional sale. What was pressed on us was that the transaction in question is a combination of a simple and a usufructuary mortgage. Before examining the terms of the document, I may state briefly the principles which in my opinion ought to guide Courts in construing transactions of this kind. In the first place, Courts should not be astute to take a transaction out of the category of recognized mortgages. In the second place, the essential elements of the transaction should be examined to find out whether the constituent parts of the recognized mortgages are found in it. The third principle is that in finding whether there has been a combination or not, the intention of the parties must be given paramount weight to. No doubt it is not merely the language in which the document is worded that should conclude Courts. It is really the substance of the transaction that should be looked into.

Bearing these principles in mind, I shall proceed to examine the nature of the transaction before us. I am clear that the

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(1) (1891) I.L.R., 14 Mad., 232. (2) (1904) I.L.R., 27 Mad., 526.
(3) (1915) I.L.R., 38 Mad., 667.

(1) (1882) I.L.R., 4 Mad., 179 (F.B.).

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elements of a simple mortgage are there. There is a time fixed for payment. There is a stipulation in case of default, etc. The really difficult question is whether there are stipulations in the document which bring it within the definition of a usufructuary mortgage. On this point, I have very grave doubts whether the essential characteristic of a usufructuary mortgage is to be found in this document. The element of possession is there, but the usufruct must be intended by the parties to be applied towards principal, interest, or both. It has been suggested that the direction to pay the Government revenue is virtually an allocation of the usufruct for a portion of the interest by paying the Government revenue. Unfortunately, the document distinctly states that interest at 12 per cent shall continue to be paid independently. In my opinion, the stipulation to pay the assessment was inserted to relieve the mortgagor from the obligation to pay it, and not as indicating that the payment of it was an appropriation towards any portion of interest. I am of opinion that the document is wanting in this essential condition relating to usufructuary mortgages. I have therefore great hesitation in holding that the main requirements of a usufructuary mortgage are satisfied by this transaction. However, as both the learned Chief Justice and Mr. Justice OLDFIELD have come to the conclusion that the transaction in question is one of the recognized combinations of mortgages and as on a question of construction the interpretation of one document is not ordinarily a precedent for construing another document, I am not prepared to differ from the conclusion. There can be no doubt that if this is a combination of a simple and a usufructuary mortgage, section 60 of the Transfer of Property Act would apply.

I shall next proceed to deal with the question which I think was really referred to us. I entirely agree with the learned Chief Justice that the classes of mortgages which do not come within the class of original mortgages and of the two combined mortgages are not affected by section 60 of the Transfer of Property Act. The language of section 98 to my mind seems clear. It declares that the contract between the parties should be given full effect to, and that where there is no contract, local usage should govern the rights of the parties. If we read into this section the provisions relating to the rights and liabilities of mortgagor and mortgages elsewhere enacted, we shall render

the section nugatory. It was suggested in the course of the argument that the use of the word 'mortgage' indicates that anomalous mortgages are within clause (a) of section 58. I am unable to accept this contention. The essentials of the mortgages for enforcing which the legislature has provided, are defined in that clause. We are not entitled to extend such provisions to transactions of the kind now in question, because the expression 'mortgage' is applied to them. The result of such a process would be this—in regard to each one of them, we can separate the enforceable portions from what are considered illegal or unenforceable and treat them as falling under one or the other of the classes of recognized mortgages.

There are two dangers to be avoided—one the conversion of every mortgage into what we want it to be and the other of giving a premium to ingenuity which would get round the Act by wording the document in such a manner as to elude the definition of the recognized mortgages. The true rule is to examine the document to find out whether the essentials of one of the four classes of mortgages are existent in it. If they are, then we should treat the rest as surplusage and ignore them; but when it is not possible to bring the document into any of the recognized categories, one should not by ignoring what the parties intended to be governed by, make a new mortgage for them.

The legislature by referring to the four classes of mortgages, and to some combinations of them, must be taken to have intended that all other forms of mortgages not falling within those enumerated categories are beyond the pale of the provisions enacted for the enforcement of mortgages. That seems to me to be the plain reading of the section, but as doubts have been entertained on this mode of construction, I propose to deal with the history of legislation which led up to the enactment of section 98.

The principle enunciated in *Noakes & Co., Limited v. Rice* (1) by Lord MACNAGHTEN that 'redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity' and that 'it is inherent in the thing itself' is not applicable, apart from the statute law, to this country. Before fully referring to

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(1) [1902] A.C., 24.

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Pattabhiramier v. Venkatarow Naicken(1), where the Judicial Committee drew attention to this view, I shall briefly consider the Hindu law on the subject. In the above case, their Lordships said generally that the ancient law of India was not in favour of the view of the Sudder Adalut that every mortgage is subject to redemption. Smriti writers, as a general rule, hold that after a lapse of time, the pledger loses his right to redeem the pledge. Manu lays down

"The mortgaged premises for being long held in mortgage shall not cease to be subject to mortgage and as such incapable of being sold".

See chapter VIII, section 143. When Vignaneswara wrote his commentary on the Yagnavalkya Smriti, there was apparently a considerable change in the feelings of the people on this question. Referring to Manu's view, the author of Mitakshara says that the text should be confined to the subject of 'pledge for use' and should not be extended to ordinary pledges. Then he says, referring to the text of Vrihaspati,

"Gold having doubled and the stipulated period having expired the creditor becomes owner of the pledge after the lapse of fourteen days." "A question arises that the pledge is forfeited is not consistent because there is neither a gift nor sale, etc., by which the right of the debtor can cease. Neither is there an acceptance nor purchase, etc., by which the right to the creditor can accrue and that it is also contrary to the text of Manu".

Then he proceeds to answer this Poorvapaksha (objection) in these terms:

"It is a well-known popular notion that a transfer by pledge is a qualified cause of the loss of right; and the acceptance of a pledge, the qualified cause of the creation of right. Consequently after the debt has doubled and the stipulated time has arrived, the right to satisfy the debt ceases by virtue of this text that debtor's right is lost for ever and that of the creditor accrues."

Nothing can be clearer than this. Thus, in the opinion of Vignaneswara, the right of the debtor to redeem is lost after the stipulated time. Passages from other Smritis can be quoted to the same effect. What I want to emphasize is this, that the principle that redemption is of the essence of a mortgage was not

(1) (1870) 13 M.I.A., 560.

recognized by the Hindu sages; on the other hand, they seem to have given more sanctity to freedom of contract than was done in England. If the ancient texts are examined, it will be found that the idea of security which in England seems to underlie the principle of redemption is restricted in India to retention of property until a stipulated time. This view was referred to by the Judicial Committee in *Pattabhiramier v. Venkatarow Naicken*(1). Their Lordships said

"What is known in the law of England as equity, of redemption depends upon the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India."

In the case before them, the document was very similar to what we are dealing with; and it was held that the mortgagor was not entitled to redeem after the stipulated period had expired.

In *Thumbusawmy Moodelly v. Hossain Rowthen*(2), the Judicial Committee introduced some reservations on account of the fact that, in Madras, a course of decisions had sprung up on the principle of 'once a mortgage always a mortgage'; but their Lordships reiterated their view that this special doctrine of the Court of Equity was not the law of India. At the same time, they suggested to the legislature that an Act should be passed for regulating the rights of the parties to a mortgage. This invitation was accepted and Act of IV of 1882 was passed. In my opinion, having regard to the Indian theory regarding mortgages and having regard to the exposition of that theory by the Judicial Committee, section 98 should be regarded as a residuary section which was intended to leave to parties their unfettered right to be controlled by the terms of the contract independently of the provisions of law relating to the classes of mortgages recognized in the Act.

One or two decisions subsequent to the two Privy Council decisions ought to be referred to. *Bapirazu v. Kamarazu*(3), is a very important one. That was a decision of Sir CHARLES TURNER and INNES, J. That case was very similar to the present one. INNES, J., after reviewing the earlier authorities in Madras held

(1) (1870) 13 M.I.A., 560.

(2) (1875) I.L.R., 1 Mad., 1 (P.C.).

(3) (1881) I.L.R., 3 Mad., 26.

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that no right of redemption subsisted after the period had expired and that the principle of *Pattabhiramier's* case(1) governs the transaction. He said

"The principle of the decision in *Pattabhiramier's* case(1), as explained by the case of *Thumbusawmy*(2) is clearly that doctrines such as that of the equity of redemption and other doctrines foreign to the ancient law of the country should not be permitted to stand in the way of giving effect to the clear intention of the parties as expressed in the written instrument".

TURNER, C.J., said

'I am of the same opinion'.

This decision was in April 1881. Sir CHARLES TURNER was one of the Commissioners along with two others who were entrusted with the task of drafting the Transfer of Property Bill. It is well known that the report with a draft bill was sent up to the Government of India in 1879. It was at this interesting stage that *Bapirazu v. Kamarazu*(3), was decided.

I may also point out that in *Perlathail Subba Rau v. Mankude Narayana*(4), another decision before the Transfer of Property Act, the learned Judges held that the usage of the parties should govern the rights and not the principles relating to redemption. Then we come to *Perayya v. Venkata*(5). In that case there are some observations which are of a general character. Apparently, there was no contention in that case that the mortgage was an anomalous one, because the learned Judges say:

"It was conceded that if there was otherwise a right of redemption that right is extinguished by the act of the parties within the meaning of the proviso to section 60".

The main argument before the learned Judges seems to have been that, as there was a contract to the contrary, section 60 was excluded. Moreover, we have not got the language of the document and I am not satisfied that that was not a case which would have been covered by the combinations referred to in section 98. In my opinion, therefore, this decision does not affect the present case. Subsequent to this decision, there have been a fairly large number of rulings in which it was held that the contract of the parties should be the guiding element.

(1) (1870) 13 M.I.A., 500. (2) (1875) I.L.R., 1 Mad., 1 (P.O.).
(3) (1881) I.L.R., 3 Mad., 26. (4) (1882) I.L.R., 4 Mad., 113.
(5) (1888) I.L.R., 11 Mad., 403.

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Raman Nair v. Vasudevan Namboodripad(1), and *Gopalan Nair v. Kunhan Menon*(2), were cases of Kanom mortgages which were held to be anomalous mortgages and to have been governed by the usage of the district.

In *Visvalingam Pillai v. Palaniappa Chetty*(3), the principle underlying section 98 was expressly recognized. In *Srinivasa Ayyangar v. Radhakrishna Pillai*(4), the learned Judges impliedly held that, if the mortgage in question was not covered by section 58, there will be no right of redemption. *Hakeem Patte Muhammad v. Shaik Davood*(5) is an express decision on the point. *Badal Molla v. Chemai Mondal*(6) is another to the same effect.

I do not think that such a large number of decisions should be overruled. I am inclined to think that they rest upon the basis which was outlined by the Judicial Committee in *Pattabhiramier v. Vencatarao Naicken*(7). If in a given case, there is a likelihood of hardship, it is for the legislature to intervene.

I am therefore of opinion that *Hakeem Patte Muhammad v. Shaik Davood*(5) is right and that the mortgagor is not entitled to claim redemption in cases of anomalous mortgages.

K.R.

APPELLATE CIVIL - FULL BENCH.

Before Sir John Wallis, C.J., Mr. Justice Coutts Trotter and
Mr. Justice Krishnan.

JAINAB BIBI SAHEBA (FIRST DEFENDANT), APPELLANT,

v.

HYDERALLY SAHIB AND THREE OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

*Evidence Act (I of 1872)—Admissibility of evidence recorded in a previous
proceeding—Consent of parties.*

Evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding, by the consent of both parties.

Sri Rajah Prakasrayanin Guru v. Venkata Rao (1915) I.L.R., 38 Mad., 160, approved.

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(1) (1904) I.L.R. 27 Mad., 26. (2) (1907) I.L.R., 30 Mad., 300.
(3) (1908) 8 M.L.J., 113. (4) (1915) I.L.R., 38 Mad., 687.
(5) (1916) I.L.R., 39 Mad., 1010. (6) (1917) 40 I.C., 894.

(7) (1870) 13 M.I.A., 500.

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Ponnuswami Pillay v. Singaram Pillay (1918) I.L.R., 41 Mad., 731, overruled.

APPEAL from the decree of K. KRISHNAMACHARYA, Temporary Subordinate Judge, Masulipatam, in Original Suit No. 88 of 1916.

The plaintiff in the present suit is the brother of one Roshan Ali Sahib of Gudur, since deceased, and he brought the suit for recovery of one-fourth of the latter's properties at his death. First defendant is the daughter of the deceased Roshan Ali, second defendant is his sister and defendants Nos. 3 and 4 are his widows. Fourth defendant previously brought another suit for her one-sixteenth share of the deceased's properties and obtained a decree therein. The present plaintiff was fourth defendant in that suit, and asked for a decree for his share also, but as he did not pay the proper court fees in time he was referred to a fresh suit. The facts of the present suit are practically the same as those of the earlier suit, except that some more properties are claimed to belong to the deceased Roshan Ali.

In paragraph 9 of his judgment the learned Subordinate Judge says :

"In the present suit, the parties have agreed that the evidence oral and documentary, recorded in the former suit of the fourth defendant, Original Suit No. 24 of 1914, should be treated as evidence in this suit as well, as the main issue in the latter, i.e., that relating to the alleged Hibba of Roshan Ali, is the same as the main issue in the former and the evidence adduced in the former suit has to be recorded herein as well. Defendants Nos. 1 to 3 have, however, supplemented their above evidence in the former suit by some fresh oral and documentary evidence now, . . . while the plaintiff has contented himself with adducing some documentary evidence"

A preliminary decree was given for the one-fourth share of the plaintiff. First defendant appealed and one of the grounds of appeal was that

"The lower Court acted illegally in treating the evidence recorded in O.S. No. 24 of 1914 as evidence in this suit"

The appeal coming on for hearing before OLDFIELD and KRISHNAN, JJ., their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.

The greater part of the evidence in this case was taken in a previous judicial proceeding to which the same persons were

parties and in which the same main issues were raised. That evidence was admitted by the lower Court by consent. The first point taken here is that it was inadmissible. Authority on the question is conflicting in *Ponnuswami Pillay v. Singaram Pillay*(1), *Sri Rajah Prakasarayanam Garu v. Venkata Rao*(2) and *Krishna Reddy v. Sundara Reddy*(3). We therefore refer to a Full Bench the question whether such evidence is admissible.

ON THIS REFERENCE—

P. Somasundaram, for the *Advocate-General*, for appellant. I submit that the evidence is inadmissible. Such evidence can be admissible only when it satisfies any of the provisions of section 83, Indian Evidence Act. Evidence taken in another case is hearsay: see *Stephen's Digest of the Law of Evidence*, *Ponnuswami Pillay v. Singaram Pillay*(1) is in my favour.

P. Narayanamurti for the first respondent. *Sri Rajah Prakasarayanam Garu v. Venkata Rao*(2) and *Krishna Reddy v. Sundara Reddy*(3) are both in my favour. See also *Ramaya v. Devappa*(4) and *Lakshman v. Amrit*(5) *Ex parte Bottomley*(6) and *Reg v. Bertrand*(7) were also referred to.

OPINION.

WALLIS, C.J.—The decision in *Ponnuswami Pillay v. Singaram Pillay*(1) that the consent of the parties to a suit cannot make admissible the evidence given in a previous judicial proceeding between the same parties where some of the issues were the same was based mainly on the provisions of sections 165 and 83 of the Indian Evidence Act. Section 165, which enables the presiding Judge to ask any questions, 'about any fact relevant or irrelevant' contains a proviso, 'that the judgment must be based on facts declared by this Act to be relevant and duly proved.'

The effect of this section merely is that, while the presiding Judge in the course of the trial may ask questions about irrelevant

(1) (1918) I.L.R., 41 Mad., 731.

(3) (1914) M.W.N., 931.

(5) (1900) I.L.R., 24 Bom., 591.

(2) (1915) I.L.R., 38 Mad., 160.

(4) (1906) I.L.R., 30 Bom., 109.

(6) [1900] 2 K.B., 14.

(7) (1867) L.R., 1 P.O., 520.

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facts, including under the scheme of the Act statements made to the witness by other parties or hearsay, he must base his judgment upon facts, which are relevant to the issues and are duly proved. It does not throw any light on the question, what facts should be considered to be duly proved. Section 38, which occurs under the heading 'Statements by persons who cannot be called as witnesses' provides that "evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states" in the circumstances set out in the rest of the section. As pointed out in *AMIR ALI* and *WOODROFFE'S Commentaries*, the word 'relevant' as used in the Act is equivalent to 'having probative force', and the effect of the section is to make the evidence admissible in the circumstances specified, independently of the consent of the parties. Though differently worded this section has really much the same effect as Order XXXVII, rule 8, of the Rules of the Supreme Court, which enables the Court to order evidence taken in another case to be read. This is in accordance with the old Chancery practice which is stated as follows in *Daniel's Chancery Practice*, Chapter XII, section 2 (1), page 515:

"Evidence taken in another Court may be read in a cause on production of a copy of the pleadings if the two suits are between the same parties or their privies, and the issue is the same; and such depositions are admissible in evidence in the former cause," citing *Williams v. Williams*(1). Such orders are only made in cases similar to those specified in section 38, but if the Court could make such depositions admissible even without the consent of parties, the case for admitting them by consent is even stronger. Rules 1 and 18 of Order XXXVII, which require the examination of the witnesses to be viva voce in open Court, except in cases where proof is to be made by affidavit or evidence taken on commission to be admitted, and provide that these two modes of proof shall not be adopted except in the cases specified, both contain a saving clause enabling it to be done in any case by the consent of parties. This is a recognition of the principle that such matters may properly be regulated by the consent of the parties.

(1) (1864) 12 W.R., 263.

[The admission by consent of evidence taken in other cases raising the same issues is of daily occurrence in England, and must now be taken to be the settled practice which is the law of the Court. If there is not much direct authority on the point, that would appear to be because it has never been seriously questioned. In *Conradi v. Conradi*(1), a divorce suit in which a new trial had been ordered, the question arose whether according to the practice of that Court the Judge's notes of the deposition of a witness at the earlier trial, who had since died, could be read at the second trial except by consent. Lord PENZANCE, who had been a Common Law Judge, observed that he had known of its having been made a condition of granting a new trial that the Judge's notes of the previous trial should be admitted. No such order could have been made except on the footing that the consent of the parties could render the evidence admissible.

There is in my opinion no sufficient reason for holding that a different rule is applicable in India where the practice in cases such as the present is scarcely less well established than in England, and is of such obvious convenience that very strong grounds should be shown for holding it inadmissible. The Indian Evidence Act, it is true, contains no express recognition of the practice, but, neither, so far as I can see, is any such express recognition to be found in *Taylor on Evidence*. The Indian statute and the English treatises both confine themselves to stating the well established rules of evidence, and do not deal with the question how far the strict requirements of the established rules may be departed from by consent in cases such as this. Far from the practice being opposed to public policy, evidence not taken before the Judge actually deciding the case has been made admissible in India by statute, as pointed out by SUNDARA AYYAR, J., in *Sri Rajah Prakasarayanam Garu v. Venkata Rao*(2) in cases where a suit is transferred from one Court to another and where there is a change of Judge in the trying Court owing to death, transfer or other cause. In these circumstances the practice seems to be in accordance with the principle embodied in the maxim '*Unusquisque potest re nuntiare juri pro se introducto*', seeing that it is not only not

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(1) (1868) L.R., 1 P. & D., 514. (2) (1915) I.L.R., 38 Mad., 160.

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opposed to public policy but entirely in accordance with it. The trend of the Indian decisions which are referred to by SUNDARA AYYAR, J., is also in its favour, and the judgment of Sir LAWRENCE JENKINS, C.J., in *Ramaya v. Devappa*(1) is to the same effect. *Ponnuswami Pillay v. Singaram Pillay*(2) must be overruled and the question answered in the affirmative.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—It is clear that in this country neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion, will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. A wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward. I agree that consent can cure what would otherwise be a defective method of letting in evidence in its substance and context relevant and germane to the issues; and that to hold otherwise would not only be contrary to the established practice both in England and in this country, but would prohibit litigants from adopting a method leading to the saving of time and expense, and in itself neither inconvenient nor unjust. I am of opinion, that *Sri Rajah Prakasrayanim Garu v. Venkata Rao*(3) was rightly decided, and that *Ponnuswami Pillay v. Singaram Pillay*(2) is contrary both to principle and practice.

KRISHNAN, J.

KRISHNAN, J.—This reference raises the question of the correctness of the ruling in *Ponnuswami Pillay v. Singaram Pillay*(2). The learned Judges who decided that case held on a construction of sections 33 and 165 of the Indian Evidence Act that in spite of the consent of parties the evidence given by a witness in a former proceeding was not admissible in a later proceeding between the same parties unless the

"conditions prescribed by section 33 of the Indian Evidence Act were found by the trial Judge to exist."

In arriving at this conclusion they expressly declined to follow an earlier ruling of this Court—*Sri Rajah Prakasrayanim*

(1) (1906) I.L.R., 30 Bom., 109. (2) (1918) I.L.R., 41 Mad., 731.
(3) (1915) I.L.R., 33 Mad., 160.

Garu v. Venkata Rao(1). With all respect to the learned Judges it seems to me that their view cannot be supported.

As pointed out in *Krishna Reddy v. Sundara Reddy*(2), the question involved here is one of mode of proof of relevant facts rather than one of the relevancy of the facts themselves. The former depositions were sought to be admitted as proof of facts relevant to the present case spoken to by the witnesses then. The primary rule to prove relevant facts by the evidence of witnesses is to call them before the trial Judge and examine them *vivo voce* in the manner stated in Chapter X of the Evidence Act. But that rule has several recognized exceptions, such as the examination of witnesses on commission, or the use of affidavits as evidence, the use of evidence taken by one Judge by another, as in cases where a suit is transferred from one Court to another or when there is a change of Judge in the trying Court. One of such exceptions recognized by law is the method of filing the record of evidence of a witness taken in a former judicial proceeding. This is allowed by section 33 of the Evidence Act, subject no doubt to certain restrictions and conditions. These limitations seem from their nature to be intended to protect the opposing party from being prejudiced by such admission as it may interfere with his right of cross-examination and of testing the credibility of the witness. I quite agree that if such evidence is to be admitted against the opposition of a party, the Judge should be satisfied that the conditions and restrictions imposed by section 33 are fully complied with; but I can see no difficulty in holding that a party may waive the benefit of those provisions which are intended for his benefit, at any rate in a civil suit where no question of public policy is involved whatever the position may be in a criminal trial. A civil suit is a proceeding *inter partes* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be; and when the trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal.

(1) (1915) I.L.R., 33 M.L., 161.

(2) (1914) M.W.N., 931.

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This view is in accordance with rulings of our Court in *Sri Rajah Prakasayanim Garu v. Venkata Rao*(1) and *Krishna Reddy v. Sundara Reddy* (2), and it has also the high authority of Sir LAWRENCE JENKINS in its favour. In *Ramaya v. Devappa*(3) that learned Judge says :

"Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used."

It is also in accordance with the established practice both here and in England and we should not lightly depart from such practice as it tends to the saving of time and expense. Again, where such evidence has been admitted and acted upon by the trying Judge without objection, it is clear from *Lakshman v. Amrit*(4) and the authorities cited in it that the Appellate Court should not allow any objection to be taken to the procedure.

The learned Judges in *Ponnuswami Pillay v. Singaram Pillay*(5) consider that what they call 'the stringent provisions' of section 165 of the Evidence Act, that is, the first proviso in it, prevent the views above stated from being taken. I agree with the learned Chief Justice that that section has really no bearing on the question before us.

The section is enacted to enable the presiding Judge to ask any question he pleases whether relevant or irrelevant and to order the production of any document or thing which he wishes to have. The provision relied on in *Ponnuswami Pillay v. Singaram Pillay*(5) is the proviso to that section; and as such it has no general application but merely prohibits the Judge from basing his judgment on the facts so obtained by him unless they are relevant and duly proved. It comes into operation only when the Judge has acted under the section.

I therefore agree that our answer to the reference must be in the affirmative and that *Ponnuswami Pillay v. Singaram Pillay*(5) must be overruled.

M. H. H.

(1) (1915) I.L.R., 38 Mad., 160.

(3) (1906) I.L.R., 30 Bom., 109.

(2) (1914) M.W.N., 931.

(4) (1900) I.L.R., 24 Bom., 591.

(5) (1918) I.L.R., 41 Mad., 781.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY
COMPANY, LIMITED, MADRAS
(DEFENDANT), PETITIONER,

1919.
December,
10.

v.

MATTAI SUBBA RAO (PLAINTIFF), RESPONDENT.*

Railways Act, Indian (IX of 1890), sec. 72—Risk note—Consignment of goods—Loss, deterioration, or damage, meaning of—Liability of Railway Company—Insurers—Bailees—Competency of Company to contract for less liability than as bailees.

A consignor sent a bale of gunny bags through the defendant Railway Company. The risk note provided that the Company should not be responsible for any loss, destruction or deterioration of or damage to the consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of a Railway administration or to theft by or to the wilful neglect of its servants, etc. The bale was damaged by the dropping of a package of acid by the negligent act of the Company's servant. On a claim against the Company for damages, the latter pleaded that they were not liable on the ground, *inter alia*, that there was no 'loss' of the article consigned within the meaning of the risk note.

Held, that the plaintiff could recover, only if the bale of gunnies was lost, that is, entirely deprived of value.

The distinction between 'loss' and 'destruction, deterioration, and damage' pointed out.

It cannot be said that there is no loss if the outer cover which encloses a parcel is delivered, whatever may happen to the contents.

East Indian Railway Company v. Nilakanta Roy, (1914) I.L.R., 41 Cal., 576; *B.B. & C.I. Railway Company v. Ambalal Sewaklal*, Ind. Ry. Cas., 48 and C.S. 809 of 1914, Madras High Court (unreported), dissented from.

Per SESHAGIRI AYYAR, J.—The term 'loss' would include cases where the article consigned is lost to the consignor as such article or has lost its identity as such.

Asfar & Co. v. Blundell, [1896] 1 Q.B., 123 and *Hearn v. The London and South Western Railway Company*, (1855) 10 Exch., 793, referred to.

Under the Indian Law, a Railway Company has not the liabilities of an insurer, but only those of a bailee, and, under section 72 of the Indian Railways Act, can enter into an agreement limiting its responsibility, provided it is in a form approved by the Governor-General in Council.

Sheikh Mahamad Rather v. The British India Steam Navigation Co., (1909) I.L.R., 32 Mad., 95 (F.B.), commented on.

* Civil Revision Petition No. 742 of 1917.

MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY v. **P**ersons who undertake to do certain things and who employ servants to do those things must be held responsible for the carelessness or negligence of those servants in the course of their employment.

Joseph Band v. Craig, [1919] 1 Ch. 1, referred to.

SUBBA RAO. PETITION under section 25 of the Provincial Small Cause Courts Act to revise the judgment and decree in S.C.S. No. 751 of 1916, on the file of the Additional District Munsif, Rajahmundry.

The material facts appear from the judgment of OLDFIELD, J. The risk note was as follows :—

Risk Note, Form B, dated 5th June 1916.

MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LIMITED.

RISK NOTE, FORM B.

(Approved by the Governor-General in Council under section 72 (2) (b) of the Indian Railway Act, IX of 1890.)

(To be used when the sender elects to despatch at a "Special reduced" or "Owner's risk" rate articles or animals for which an alternative "Ordinary" or Risk acceptance rate is quoted in the tariff.)

Cocanada station, 5th June 1916.

Whereas the consignment of 6 bales of gunnies tendered by me as per forwarding Order No. 576 of this date, for despatch by the Madras and Southern Mahratta Railway Company, Limited, or their transport agents or carriers to Rajahmundry station and for which I have received railway receipt No. 576 of same date, is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment. $\frac{1}{110}$, the undersigned, do, in consideration of such lower charge, agree and undertake to hold the said Railway Company and all other railway administrations working in connexion therewith, and also all other transport agents or carriers employed by them respectively, over whose railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Cocanada station to Rajahmundry station harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or one or more complete packages forming part of a consignment due either to the wilful neglect of a railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and

after transit over the said railway or other railway lines in connexion herewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: provided the term 'wilful neglect' be not held to include fire, robbery from a running train, or any other unforeseen event or accident.

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(Signature of sender in Telugu).

Chamier for the petitioner.—The Railway Company is not liable except for loss of the entire consignment. When the outer covering, such as the gunny that covered the articles packed, is delivered, there has been no loss within the meaning of the risk note. It has been so decided in *B.B. & C.I.Ry. v. Ambalal Sewaklal*(1), which view was followed in *East Indian Railway Company v. Nilakanta Roy*(2) and in a case in the Original Side of the Madras High Court decided by KUMARASWAMI SASTRIYAR, J.(3).

Secondly, there is no wilful negligence on the part of the Company's servants: see *Heaven v. Pender*(4). The onus of showing negligence is on the plaintiff. The decisions in *East Indian Railway Company v. Nilakanta Roy*(2) and *Hirji Khetsey & Co. v. B. B. & C. I. Railway Co.*(5) are distinguishable, as they are cases of liability as bailees under the Indian Contract Act, sections 151, 152, etc.; here, there is the risk note limiting the liability. See *Lewis v. The Great Western Railway Co.*(6) and *Asfar & Co. v. Blundell*(7).

Ramdoss for the respondent.—The word 'Loss' in the exception to the risk note includes destruction, deterioration and damage; general words following specific words ought to be restricted to the specific words. See Maxwell's Interpretation of Statutes (5th Edition), pages 537 and 538. 'Loss' is defined in the Century Dictionary as the generic word, of which destruction, deterioration, damage, and waste are species. See Wharton's Law Lexicon, 4 Halsbury, 27.

'Loss' does not mean disappearance of the article. See as to losses under the Insurance law. Loss may be either partial or

(1) Ind. Ry. Cas., 48.

(3) C.S. No. 809 of 1914.

(5) (1915) I.L.R., 39 Bom., 191.

(7) [1896] 1 Q.B., 123.

(2) (1914) I.L.R., 41 Cal., 576.

(4) (1888) 11 Q.B.D., 603.

(6) (1877) 8 Q.B.D., 195.

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total. If goods are not merchantable, it is loss. See Arnold on Marine Insurance, page 1266.

Even if the Railway Company are mere bailees and no insurers, they cannot contract themselves out of their liabilities even as bailees under the Indian Contract Act. Section 152 of the Indian Contract Act, i.e., the minimum liability; a Railway Company cannot in law contract for a less liability, though it may contract for a higher liability than that imposed by section 152 of the Act. See *Kariadan Kumber v. The British India Steam Navigation Co., Ltd.*(1). If the Company contract for a lesser liability, it will be ultra vires and void.

Chamier in reply.—The question of reasonableness of the rules made under the Indian Railways Act, sections 54 and 72, does not arise, as the rules after they are made are approved by the Governor-General in Council under the Act. The view of SANKARAN NAYAR, J., in *Sheik Mahamad Ravuther v. The British India Steam Navigation Co., Ltd.*(2) is not accepted by the learned Chief Justice and WALLIS, J. (as he then was). 'Loss' means total disappearance in this risk note.

OLDFIELD, J.

OLDFIELD, J.—The decision of the second Additional District Munsif, Rajahmundry, comes before us under section 25, Provincial Small Causes Courts Act, IX of 1887. He has held the defendant Railway Company liable on a risk note in respect of one out of a consignment of bales of gunny bags, of which plaintiff was consignee. The risk note, Exhibit B, is in form B and is a contract by the consignor in consideration of the lower charge he has paid to hold the company

"Harmless and free from all responsibility for any loss, destruction, or deterioration of, or damage to the consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of a Railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connexion therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: provided the term 'wilful neglect' be not held to

(1) (1912) 25 M.L.J., 162.

(2) (1909) I.L.R., 32 Mad., 95 (F.B.).

include fire, robbery from a running train or any other unforeseen event or accident."

Two questions have been argued. Firstly, was the injury, which one bale admittedly sustained, due to the wilful neglect of the company's servants? Secondly, did that injury amount to loss within the meaning of the exception, which provides for the company's liability?

The first of these questions can be answered shortly in the affirmative. The lower Court held that there had been wilful neglect by the company's servants in (1) unloading inward goods on the outward platform, (2) placing a leaking acid package on the bale of gunnies. We cannot follow the first portion of this finding and confine ourselves to the second. Something has been said regarding the burden of proof. But it is unnecessary to discuss its incidence, because the company admitted in its written statement that the package of acid was dropped by its coolie and fell on the bale and defendants' first witness deposed to that effect. The acid according to the evidence had leaked on the shoulder of the coolie, having burnt through his coat and he put it down on the bale, disregarding the certainty that it would leak on it also and injure it. We have no doubt that in doing so he was wilfully negligent.

The more difficult question remains whether the injury to the bale is loss, for which the company is liable under the exception in the risk note; and the difficulty arises from the fact that, whilst the exception provides only for the case of loss, the general portion of the note exempts from liability in respect of all claims, not only for loss, but also for destruction, deterioration or damage. It is therefore for plaintiff to establish that the bale is lost; and the lower Court has found that it is so. The contention for the company is that this finding is wrong and that, the bale being merely damaged, its liability is not established.

This finding in favour of loss appears to rest on the result of an inspection, to which the lower Court refers as showing that the bale was completely useless, and also on its statement that the acid penetrated the bale completely and affected all the gunnies. This apparently is also based on the statement of plaintiff's first witness in examination in chief that the bale was burnt in the middle, that the acid affected it right through,

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that not one bag was whole and all the bags seemed to have been damaged. But there is then the fact that as the same witness said in cross-examination,

"I saw the burnt bale in Court. It was not yet opened. I cannot say whether whole bags were found in it."

It has not been suggested before us that the bale was opened later for the Court's inspection and we cannot understand how the lower Court could satisfy itself as its judgment implies or how it could neglect the witness's later statement. Its finding on the question of fact must be rejected on the ground that it was reached without reference to material evidence; and we must therefore remand the case. In doing so it is advisable that we should deal with the legal question which arises and indicate the principle, on which the inquiry on remand should proceed.

To return to the terms of the risk note, it would appear at first sight as though a distinction is drawn between loss and destruction, deterioration and damage and the exception is not intended to apply to cases, in which only the three last mentioned can be established. But, whatever the implication from the separation of these terms, it is clear that the distinction proposed cannot be supported by their use in ordinary parlance. For, whilst loss cannot include deterioration and will always include destruction, it will in some cases include damage, when the extent and nature thereof are sufficient. Shortly we have to decide the point, if any, at which damage becomes loss.

One ground of decision has been suggested, which can be dismissed shortly:—that there is no loss, whatever happens to the contents, if the character of the package as such is unaffected by damage sustained by its outward envelope alone. This is based on *B. B. & C. I. Ry. v. Ambalal Sewaklal*(1) followed in *East Indian Railway Company v. Nilakanta Roy*(2), and in this Court in C.S. No. 309 of 1914 by KUMARASWAMI SASTRI, J., though only on the ground that, sitting alone, he was not prepared to dissent from the decisions of two Benches in the cases referred to. Those decisions do not commend themselves to us. For they are based on no earlier authority and, with all

(1) Ind. Ry. Cas., 48.

(2) (1914) I.L.R., 41 Cal., 576.

due respect, it is unreasonable to suppose that the parties, entering into such contracts as Exhibit B, have regard to the worthless outer covering, not its contents; the bag for instance, not the grain within it; or in the present case the rough gunny covering and iron hoops, not the bags inside, of which the bale really consisted.

Another principle suggested is that damage can be identified with loss, only if the goods concerned have been deprived of the merchantable character, in which they were accepted for transmission; and, if the contract before us were one of insurance, this would be sound. *Asfur and Co. v. Blundell*(1) and *Cologan v. London Assurance Company*(2). But there is no question here of insurance in connexion with railway contracts, since railways in India are not common carriers. *The Irrawady Flotilla Company v. Bugwandas*(3); and the suggestion must therefore be defended on its merits. The objection to it, which must in my opinion prevail, is that even in the absence of a special contract a railway is, under section 72 (1), Railways Act (IX of 1890), liable only as a bailee under sections 151, 152 and 161, Indian Contract Act. It follows that a railway will ordinarily be liable in damages only according to the actual condition of the goods; for their full value, if they are rendered totally valueless; for such portions of it, if they have merely sustained deterioration, as would afford reasonable compensation, without reference to their loss or retention of their merchantable character. It is next material that in the present case the contract embodied in the risk note, Exhibit B, was made in consideration of the railway's acceptance of a reduced charge; and it therefore cannot be regarded as intended to increase its responsibility. It is then impossible to accept respondent's contention, which by treating 'loss' in the exception in Exhibit B as equivalent to the 'loss, destruction, deterioration or damage' in the general portion and to the 'loss, destruction or deterioration' in section 72 (1) of the Railways Act would leave the railway under the liability it would have been under, if Exhibit B had never been given. This entails acceptance of the only alternative construction of Exhibit B, that proposed by the railway and already

(1) [1896] 1 Q.B., 123.

(2) (1816) 5 M. & S., 446.

(3) (1891) I.L.R., 18 Cal., 620.

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referred to as consistent with ordinary parlance. It is said that an unreasonable contract results from it. But the form has, as the Act requires, been approved by Government, and it has not been shown how the acceptance of a smaller responsibility in consideration of a lower charge than that which is normally payable and which respondent's consignor could have paid, if he desired a full indemnity, is oppressive. For these reasons I hold that respondent can recover only if his bale of gunny bags is entirely deprived of value.

The lower Court must therefore submit a finding on the issue:—

“Was respondent's bale of gunny bags when delivered to him of no value?”

The bale is, it is alleged, with the respondent. The lower Court will give him an opportunity to produce it in Court and, if it is so produced, will inspect it and the bags composing it, noting their condition in its finding. In any case, fresh evidence may be adduced by both parties regarding its condition and that of its contents. Findings due in two months. Seven days for objections.

SESHAGIRI
ATTYAR, J.

SESHAGIRI ATTAR, J.—The question raised in this case is one of considerable importance: therefore I have taken the liberty of writing a separate judgment although I do not differ from the conclusions arrived at by my learned brother. The facts are fully set out in the judgment just now delivered. I will first say a few words upon some subsidiary points raised by Mr. Ramdoss before dealing with the main question. It was contended by the learned Vakil for the respondent that a Railway Company is not competent to limit its liability to less than the minimum care which the Indian Contract Act imposes on bailees. It is now well settled that under the Indian Law, a Railway Company has not the liabilities of an insurer but only those of a bailee. See *India General Steam Navigation Company v. Bhagwan Chandra Pal*(1). The observations of SANKARAN NAYAR, J., in *Sheik Mahamad Ravuther v. The British India Steam Navigation Co., Ltd.*(2) were relied on for the proposition that a common carrier cannot exempt himself from liability for

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negligence if such an exemption would be inconsistent with the provisions of the Indian Contract Act. The first observation with reference to this *dictum* is that the learned Judge was dealing with the case of a carrier by sea. The principles applying to carriers by land are not the same which govern the liability of a carrier by sea. In the next place two other learned Judges differed from him on this very question. In a later case *Kariadan Kumber v. The British India Steam Navigation Co., Ltd.*(1), Justice SADASIVA AYYAR and Justice TRYABJI did not act upon this *dictum* of SANKARAN NAYAR, J. I must therefore hold that the contract is enforceable. Reliance was placed on certain English decisions which hold that an exemption from contract by a carrier from liability must be reasonable and just.* There is great difference between the English law and the Indian law on this subject. If I understand the position aright, a Railway Company in England would be authorized by Parliament to make its own rules and regulations. It would be created by an Act of Parliament and would have full power to regulate its internal management. Under these circumstances Courts may be at liberty to decide whether the regulations framed by the Company are just and reasonable and whether they are *intra vires* the Act of Parliament. In this country, the position is very different. Under section 72 of Act IX of 1890, a Railway Company may enter into an agreement to limit its responsibility provided it is in a form approved by the Governor-General in Council. It is not denied that the rule with which we are concerned has been sanctioned by the Governor-General in Council. Therefore *prima facie* the rule must be regarded as being within the powers of the Railway Company. It is on the respondent to show that the rule in question which the legislative authority has sanctioned is inconsistent with any portion of the Railway Act, and the learned vakil for the respondent has not satisfied me on this point. I must therefore hold that the rule is *intra vires*. Reference may also be made to *Toonya Ram v. East Indian Railway Company*(2), *Tippanna v. The Southern Maratha Railway Company*(3) and *East Indian Railway Company v. Bunyad Ali*(4).

(1) (1913) 25 M.L.J., 162.

(2) (1903) I.L.R., 30 Cal., 257.

(3) (1898) I.L.R., 17 Bom., 417.

(4) (1896) I.L.R., 18 All., 42.

(1) (1918) I.L.R., 40 Cal., 716.

(2) (1909) I.L.R., 32 Mad., 95 (F.B.).

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Another point relied on on behalf of the respondent is that the word 'loss' in the exemption clause of the Risk Note (Form B) includes 'Destruction, deterioration and damage.' The note is not a very carefully drafted one, and it may be possible for the Government of India to scrutinize its language on some future occasion. But as it stands at present I am compelled to hold that the word 'loss' has a meaning distinct from the other three words mentioned by me. All the four words are placed seriatim in the earlier portion. But when it comes to imposing liability, notwithstanding the contract to the contrary, the draftsman has used the word 'loss' alone and has left out the words 'destruction, deterioration and damage.' I take it that this was done on purpose. Reasonable meaning can be attached to the note as it stands by imputing to the draftsman the intention to hold the company liable only for the loss of a complete consignment of one or more complete packages and by exempting the company from liability where there has been 'destruction, deterioration and damage' to such a complete consignment of one or more complete packages. I am not concerned in seeing whether this is good policy, or whether the consigning public will not be injured by it. But construing the language of the note as it stands I can give it only the meaning which I have indicated and not the meaning which the learned vakil for the respondent has suggested.

One or two minor points raised by Mr. Chamier may now be dealt with. The learned Counsel contended that there was no wilful negligence on the part of the Railway Company and quoted *Heaven v. Pender*(1), for this contention. The District Munsif has found on the facts that there was wilful negligence; and on the evidence which has been fully commented on before us it seems to me that the Railway Company acted carelessly in the matter. The servant who was employed to carry an acid substance, unable to bear the injury which it inflicted on his shoulders, threw the acid over the gunny bags. His act was wilful in the sense that he must have known that the corrosive substance would cause injury to the article over which it was thrown. In *Lewis v. The Great Western Railway Company*(2) Lord Justice BRAMWELL said:

(1) (1883) 11 Q.B.D. 403.

(2) (1877) 3 Q.B.D. 195.

"wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct must be wilful."

Lower down the learned Lord Justice said:

"I am much inclined to think that would be wilful misconduct because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not I think that would be wilful misconduct."

Applying this definition I am satisfied that there was wilful default on the part of the servant.

Mr. Chamier next suggested that the act of the servant should not be charged against the Company. It is a well known rule of law that persons who undertake to do certain things and who employ servants to do those things must be held responsible for the acts of those servants done in the discharge of the duty entrusted to them. It may be different no doubt if the servant acted in violation of his duties. The very recent case of *Joseph Rand v. Craig*(1) establishes this proposition very clearly. SWINFEN EADY, M.R., pointed out that if the act was done deliberately by the servant to benefit himself that should not be attributed to the master. But if it is a case of carelessness or negligence in the course of employment, the master would be held liable. The latter is what actually happened in the present case. Therefore the Company is liable for the conduct of the servant.

Now comes the main question as to whether the package can be said to have been lost. The judgment of KUMARASWAMI SASTRI, J., in Civil Suit No. 309 of 1914, was quoted before us and also *East Indian Railway Company v. Nilakanta Roy*(2). The learned Judge felt bound by the Calcutta decision and by a judgment of the Bombay High Court to hold that if the outer cover which encloses a parcel was delivered the article cannot be said to have been lost by the Railway Company. The Bombay and the Calcutta cases do not discuss the matter and it seems to me that they have put too narrow a construction upon the expression 'loss'. I am inclined to the view that the term 'loss' should be construed as including cases where the article consigned is lost to the consignor as such article. If the

(1) [1919] 1 Ch., 1.

(2) (1914) I.L.R., 41 Calo., 576.

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goods entrusted to the care of the Company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to me that the Company should be held to have lost the goods. In *Asfar and Co. v. Blundell* (1) Lord ESHER gave this meaning of the term 'loss'. "The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged; but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss." Although the learned Master of the Rolls was dealing with the case of an article carried by sea, I do not see why the definition of the term 'loss' should not be utilized in cases of other carriers. In *Hearn v. The London and South-Western Railway Company* (2) Baron PARK expressed himself to the same effect. In my opinion therefore if it is proved that the article has lost its identity as such it would amount to loss. On the question of the burden of proof the case in *Hirji Khetsey and Co. v. B. B. and C. I. Railway Co.* (3) lays down that it is the Railway Company that has to show that there was no loss. But I am not satisfied that in this case the District Munsif has considered the evidence very fully, on this question of loss. I agree that he should be asked to return a fresh finding on the question suggested by my learned colleague.

In compliance with the order contained in the above judgments, the Principal District Munsif of Rajahmundry submitted a finding to the effect that the bags could not be said to have been so much damaged to be of no value at all.

The Court delivered the following JUDGMENT:—

We accept the finding and allow the petition, dismissing the suit with costs throughout.

(1) [1896] 1 Q.B., 123.

(2) (1855) 10 Exch., 798.

(3) (1915) I.L.R., 39 Bom., 191.

APPELLATE CIVIL.

Before Sir John Wallis, Chief Justice and Mr. Justice Krishnan.

NARAYANAN CHETTY AND ANOTHER, APPELLANTS
(DEFENDANTS NOS. 3 AND 4)

1920,
January 5.

v.

SUPPIAH CHETTY AND TWO OTHERS, RESPONDENTS
(PLAINTIFF AND DEFENDANTS NOS. 1 AND 2).*

Limitation Act (IX of 1908), Sch. I, Articles 60, 63—Interest due on "Thavanai" transactions with Nattukottai Chetties—Hindu widow—Interest on her husband's assets—Acquiescence in treating it as part of her husband's estate—Effect on her death.

If a Hindu widow acquiesces in treating the interest on the investments of her husband's assets as part of her husband's estate, it will descend on her death, to her husband's heirs.

If money is deposited with Nattukottai Chetties on "Thavanai" with the understanding that at the end of each "Thavanai" period the interest for that period is not payable but is to be added to the principal, and both are to be treated as a fresh deposit, article 60 of the Limitation Act is applicable to the recovery of such interest and it becomes payable only on demand. Article 63 does not apply.

APPEAL from the decree of A. NARAYANAN NAMBIYAR, Temporary Subordinate Judge of Sivaganga, in Original Suit No. 83 of 1917.

One Raman Chetty died about thirty years ago, leaving a widow Velliammai, who died in December 1914. In 1901, Raman Chetty's uncles deposited about Rs. 2,000, belonging to Raman Chetty, at two months' thavanai, with a firm called T. Rm. When this firm was about to be closed in 1908, the amount was transferred on the same terms to the firm of the defendants, which was then managed by their father. The arrangement that was made between all the parties was that in case the widow adopted a boy the whole of the deposit with interest should be handed over to the boy, otherwise the widow was to receive Rs. 50 a year for her maintenance. The widow did not adopt anybody, but continued to receive only the Rs. 50, and died in December 1914 without drawing any portion of the principal or interest till her death. She had also deposited in

* Appeal No. 370 of 1918.

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her own name on the same terms with the abovementioned firms, about Rs. 500, being the amount realized by the sale of her jewels. The plaintiff, who was the heir of her husband, brought this suit in April 1917 for the recovery of about Rs. 12,000, being the principal and interest due on both the abovementioned deposits, alleging that he made an unsuccessful demand therefor on the defendants in 1915. The defendants pleaded, *inter alia*, (1) that the Rs. 500 which was deposited by the widow was her stridhanam, and that the plaintiff not being her heir was not entitled to it, (2) that the interest due on the deposit of her husband's money was due to her and was her money, and that it was not payable to the plaintiff for the same reason, (3) that no demand was made in 1915, and (4) that even if one had been made the recovery of interest on that deposit was barred under article 68 of the Limitation Act. The Subordinate Judge found that the Rs. 500, was the widow's stridhanam, that the plaintiff was, on his own admission, not the heir thereto; that the widow allowed the interest to accumulate along with the principal and thereby showed an intention to incorporate it with the corpus; that demand was made by the plaintiff in 1915; and that the suit was not barred by limitation. He accordingly gave the plaintiff a decree for the sum claimed, less the Rs. 500 and interest thereon. Defendants Nos. 3 and 4 preferred this appeal.

G. Krishnaswami Ayyar, for appellants.

T. V. Muthukrishna Ayyar and N. Muthuswami Ayyar, for first respondent.

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from the judgment of the Temporary Subordinate Judge of Sivaganga in a suit brought by the next reversioner of the deceased Raman Chetty to recover from the defendants, who are members of a Nattukottai Chetty trading family, a certain sum which they alleged to have been deposited after Raman Chetty's death by Raman Chetty's uncles as forming part of the estate. The Subordinate Judge has decreed the suit in part.

The first point taken by Mr. Krishnaswami Ayyar for the defendants is that although the plaintiff as reversioner may be entitled to recover the principal, he is not entitled to recover the interest which accrued due during the lifetime of the widow as that formed part of her estate and was descendible to her

heirs in the absence of any intention having been manifested on her part to incorporate it with the estate of her deceased husband. The evidence is that after her husband's death his uncles deposited the money with another firm of Nattukottai Chetties, who closed their business, and that the deposit with them was transferred to the defendants' firm, and the evidence is that they were instructed to pay Rs. 50 a year to the widow for her maintenance, which sum she admittedly received. Now there is no evidence that she ever claimed to be entitled to any more. Whether it was so or not, the evidence shows that the intention of the uncles was that the whole sum should go to her son if she adopted one, which she never did. In these circumstances, the inference appears clear that the widow rightly or wrongly acquiesced in the interest on this sum being treated as part of her husband's estate and as incorporated with her husband's estate and descendible to his heirs. She never even claimed to receive it. The case therefore is clearly distinguishable from the cases to which we have been referred: *Subramanian Chetti v. Arunachalam Chetti*(1), *Ieri Dutt Koer v. Hunsbutti Koerain*(2), *Saodamini Dasi v. The Administrator-General of Bengal*(3), *Veeraraghava Reddi v. Kota Reddi*(4) and *Sri Vikrama Deo Garu v. Sri Vikrama Deo Maharajulagaru*(5), which were cases in which the income from the husband's estate had come into the possession of the widow and she had disposed of it in one way or other. In *Ieri Dutt Koer v. Hunsbutti Koerain*(2), she manifested her intention that it should be incorporated with the husband's estate and it was held that she could not go back on this. In the other cases it was held that she had manifested her intention to treat it as her own separate property descendible to her own heirs. In the view we take of this case, it is unnecessary to consider what would be the rule applicable if the evidence merely were that the widow had failed to collect the interest on money forming part of her husband's estate. On the one hand, there is a dictum of the Privy Council in *Ieri Dutt Koer v. Hunsbutti Koerain*(2), which might be relied on. On the other hand, there is the elaborate discussion of Sir SUBRAHMANYA AYYAR, J.,

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(1) (1905) I.L.R., 28 Mad., 1. (2) (1884) I.L.R., 10 Cal., 324 (P.C.).
(3) (1893) I.L.R., 20 Cal., 433 (P.C.). (4) (1916) 81 M.L.J., 465.
(5) (1917) 83 M.L.J., 665.

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in *Subramanian Chetti v. Arunachalam Chetti*(1), which treats the statement of the Privy Council as a mere *obiter dictum* but is also itself *obiter*. For the purpose of the present case, it is enough to say that the widow clearly acquiesced in the interest being treated as part of her husband's estate.

The next question is one of limitation. This Court in recent years on several occasions, had to consider what was the nature of the deposits with Nattukottai Chetties on what are called *thavanais*, and in a case in *Muthiah Chettiar v. Ramanathan Chettiar*(2), this Court held that such cases were governed by article 60 both as to principal and interest. In the present case Mr. Krishnaswami Ayyar has taken the point that so far as interest is concerned, these transactions are governed by article 68

"For money payable for interest upon money due from the defendant to the plaintiff."

It is said in *Muthiah Chettiar v. Ramanathan Chettiar*(2), with reference to *thavanai* transactions that

"the idea is that the money should remain until demanded and the interest should be added at the expiration of each *thavanai*."

As I understand it, that means that the understanding between the parties is that, at the end of each *thavanai* period, the interest for that period instead of being payable in cash to the creditor should be added to the deposit so that both should be treated as a fresh deposit; and if that be so, then the article applicable continues to be only article 60 and not article 68 which is "for money payable for interest," and the starting point under that article is when the interest becomes due. As I understand it, that means, when the interest becomes actually payable. If the agreement between the parties is that the interest is not to be payable until demanded but is to be added to the deposit as an increment to the deposit, then I think that article 68 does not apply and article 60 does. That is the view which has hitherto been taken in this Court and this is the first time that any one has suggested that article 63 would be applicable. I think that very serious consequences would result if that article were held applicable because very large amounts of money have been deposited with Nattukottai Chetties on these

(1) (1908) I.L.R., 28 Mad., 1.

(2) (1918, 7 L.W., 330.

terms and nobody has ever thought that it was necessary to make constant demands upon them.

Mr. Krishnaswami Ayyar also argued that it is not within the competence of the managers of the joint Hindu Nattukottai Chetty trading families to accept money on deposit on *thavanai* terms, that it is not competent for them to do one of the most ordinary things in the transaction of their business. That position is quite untenable.

For these reasons I think that the appeal fails and must be dismissed with costs.

KRISHNAN, J.—I agree.

KRISHNAN, J.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Chief Justice, and Mr. Justice Krishnan.

AMINUDDIN SAHIB, PETITIONER (SIXTH RESPONDENT
IN APPEAL No. 176 OF 1919),

1920.
January 22,
23 and 28.

v.

PYARI BI AND ANOTHER RESPONDENT (APPELLANTS
IN APPEAL No. 176 OF 1919).*

Limitation Act (IX of 1908), sec. 12 (2)—Appellant filing a copy of decree appealed from, obtained by another party—Deduction of time taken to get that copy.

An appellant who is required to file with his memorandum of appeal a copy of the decree appealed from, may file a copy obtained by another party; and under section 12 (2) of the Limitation Act he is entitled to a deduction of time taken to obtain that copy.

Ram Kishan Shastari v. Kashi Bai, (1907) I.L.R., 29 All., 284, followed. *Ramamurthi Aiyar v. Subramania Aiyar*, (1902) 12 M.L.J., 385, dissented from.

CIVIL MISCELLANEOUS PETITION praying that in the circumstances of the case, the High Court will be pleased to dismiss Appeal No. 176 of 1919, preferred from the decree of the Temporary Subordinate Judge of Vellore, in Original Suit No. 18 of 1917.

The appellants who were some of the defendants in the Original Court, filed with their memorandum of appeal a copy of the decree obtained by some other defendants against whom

* Civil Miscellaneous Petition No. 187 of 1920 in Appeal No. 176 of 1919.

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the suit was dismissed, the application made by the appellants themselves for a copy of the decree having been dismissed for not furnishing in time the requisite number of stamps called for by the lower Court. Thereupon, the sixth respondent in the appeal filed this petition praying that for the above reason, the appeal may be dismissed with costs.

L. A. Govindaraghava Ayyar for *T. Narasimha Ayyangar* and *A. Viswanatha Ayyar*, for the petitioner.—The appeal is out of time. The copy of the lower Court's decree filed with the memorandum is not one applied for by the appellants, nor is it one obtained with a view to appeal. It is one obtained by some defendants against whom the suit was dismissed. The application for a copy of the decree made by the appellants themselves was dismissed as they did not furnish the requisite stamps in time. The appellants are not entitled to a deduction of time taken to obtain the copy procured by another party: see *Ramamurthi Aiyar v. Subramania Aiyar*(1).

G. Krishnaswami Ayyar for the respondents.—Neither the Civil Procedure Code nor the Limitation Act enjoins that the copy of the decree which an appellant must file with his appeal should be one obtained by the appellant himself or should be one applied for for filing an appeal. The only requisite is that a copy of the decree must be filed with the appeal, and under section 12 (2) the appellant is entitled to a deduction of time that was requisite to obtain that copy. There is no warrant for importing into these Codes limitations which are not to be found in them. No reasons are given in the case quoted by the petitioner; it has been dissented from in *Ram Kishan Shastari v. Kashi Bai*(2).

WALLIS, C.J.

The ORDER of the Court was delivered by

WALLIS, C.J.—This case raises a question as to the meaning of the words "time requisite for obtaining a copy of the decree appealed from" in section 12 (2) of the Limitation Act which provides for the exclusion of such time in computing the period of limitation prescribed for the appeal. The appellant in this applied within the prescribed period for a copy of the decree but allowed the application to be dismissed for non-payment of the copying charges. He subsequently filed the appeal together with

(1) (1902) 12 M.L.J., 385.

(2) (1907) I.L.R., 29 All., 264.

a copy of the decree which had been obtained by another party, and claimed a deduction under the section, of the time taken in obtaining such a copy. It was held in *Ramamurthi Aiyar v. Subramania Aiyar*(1) that he was not entitled to the deduction, but the Allahabad High Court in *Ramkishan Shastari v. Kashi Bai*(2) dissented from this ruling for which no reasons are given and we are unable to follow it. As has often been pointed out this and other sections of the Limitation Act must be read together with the corresponding provisions of the Code of Civil Procedure. If we so read them, it is clear that the copy of the decree appealed from which is mentioned in the section, is the copy of the decree appealed from which has to accompany the memorandum of appeal under Order XLI, rule 1 (formerly section 541), Civil Procedure Code. The Code does not require that the copy of the decree accompanying the memorandum should have been obtained on the application of the appellant himself and there are no grounds for importing this restriction into section 12 of the Limitation Act. The appellant was in order when he presented a copy obtained by another party with his memorandum, and was entitled under the section to the deduction claimed. We must therefore overrule the objection that the appeal is out of time.

N.B.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Ayyar.

P. SUBRIYANARAYANA RAO NAIDU (PLAINTIFF),
APPELLANT,

v.

P. BALASUBRAMANIA MUDALI AND SIX OTHERS
(DEFENDANTS), RESPONDENTS.*

Hindu Law—Right of residence—Unmarried sisters' right—Decree against mother of last male owner on her personal debt—Sale of house in execution—Auction purchasers' right to oust unmarried sisters in possession—Right of residence of other females against purchasers.

An auction purchaser of an ancestral house, sold in execution of a money-decree passed on a personal debt of the mother who inherited the property a

(1) (1902) 12 M.L.J., 385.

(2) (1907) I.L.R., 29 All., 264.

* City Civil Court Appeal No. 20 of 1919.

1919.
December
19, and 1920,
January 30.

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heir to her son, is not entitled to oust the unmarried sisters of the latter, who reside in the house.

APPEAL against the order of Rao Bahadur C. R. TIRUVENKATA ACHARIYAR, City Civil Judge of Madras, in Original Suit No. 327 of 1918.

The material facts appear from the judgment of SADASIVA AYYAR, J.

Messrs. Venkatasubba Rao and Radhakrishna Ayya for the appellant.

K. Rajah Ayyar for first, sixth and seventh respondents.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. He purchased in Court auction sale the plaint house in execution of a decree passed against the defendants Nos. 2, 3 and 4. The defendants Nos. 3 and 4 had no rights in the property and we may take it that the plaintiff purchased the right, title and interest of the second defendant in the house. The house belonged to the second defendant's husband Ekambara Mudali and then to Ekambara Mudali's only son who died a minor. On her minor son's death, the second defendant as his heir became the qualified female owner of the house. The minor left his two sisters, defendants Nos. 6 and 7 unmarried. The money-decree against the second defendant was passed for a personal debt of the second defendant, the mother and next heir of the last male owner. The plaintiff, purchaser in Court auction, obtained delivery of the downstairs portion, but the upstairs portion of the house now in dispute was occupied by the defendants Nos. 6 and 7, the two unmarried sisters of the last male owner, and they refused to vacate as they claimed a right under the Hindu Law to reside in the house which belonged to their father and their brother till their (the said defendants') respective marriages. Hence the suit brought to eject them on the ground that they had no such rights under the Hindu Law.

The learned City Civil Judge decided this interesting question of Hindu Law against the plaintiff and in favour of the defendants Nos. 6 and 7 and dismissed the suit; hence this appeal.

So far as the widows of undivided co-parceners are concerned (including a widowed mother), the authorities are very clear that a private sale by the surviving male co-parcener which was

not for family necessity or an execution sale held for a decree debt which did not arise out of family necessity would not entitle the purchaser to oust such widows as the latter were entitled to reside in the ancestral family house till at any rate, other adequate provision is made for their residence. The question of unmarried girls who were not related to the surviving male co-parcener as direct descendants from him but as sisters or cousins (that is, as daughters of deceased undivided co-parceners) seems not to have formed the direct subject of any reported decision. In the case of the wife or widow of the surviving co-parcener, it has been held in *Jayanti Subbiah v. Alamelu Mangamma*(1) that the wife cannot set up any right of residence against the purchaser in execution for her husband's debts. I shall presently consider the ratio of that decision. But before leaving this part of the subject, I would finally remark that the general question was elaborately considered by Sir BARNES PEACOCK, C.J. (with whose judgment MITTER, J., concurred) in *Mungola Dabes v. Dinonath Bose*(2). The very general language of the learned Chief Justice's dictum is to the effect that the father's widow and

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"the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence and in which he left the females of his family at his death cannot be turned out of that residence at least until some other place has been provided for them."

If this general dictum applies, the unmarried daughters of the father being also

"females of the family entitled to maintenance" and residence can resist being turned out of the dwelling selected by their father for his own and their residence. No doubt there is a distinction between the widows of co-parceners and the father's widow on the one side and unmarried females on the other side because the former are entitled to maintenance and residence till death or remarriage, whereas unmarried females are entitled to maintenance and residence only until their marriage. But as the learned City Civil Judge points out, the difference in the length of the period and in the

(1) (1904) I.L.R., 27 Mad., 45.

(2) (1869) 12 W.R., O.J., 35.

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circumstances when the right of maintenance and residence ceases, cannot affect, on principle, the right to resist the eviction from the family dwelling house so long as the right of maintenance and residence subsists.

Mr. Radhakrishna Ayyar for the appellant argued that if every female entitled to maintenance and residence can exercise the right, of obstruction to ejectment, it would be very unfair on purchasers from the surviving member of a Hindu family and on purchasers in execution of debts due by such member and even the wife of the debtor and the unmarried daughters of the debtor might claim to resist the purchaser. I might here remark that even as regards the mother and the co-parcener's widow of the debtor the right of residence is curtailed (a) by restricting it to cases where the debt for which the property is sold is not contracted for necessity and (b) by the rule that the females cannot claim a right of residence in the whole of the premises if a portion of the house could be set apart for them and would afford reasonably sufficient accommodation and (c) that if other reasonable accommodation even outside the family dwelling house is offered, they may be bound to accept such a substitute, at least in certain circumstances.

As regards the wife, I shall now return to *Jayanti Subbiah v. Alamelu Mangamma*(1), where BASHYAM AYYANGAR, J., delivered the judgment which was concurred in by BENSON, J. While affirming the general principle which had been laid down in *Venkatammal v. Andyappa Chetti*(2) and *Ramanadan v. Rangammal*(3), the learned Judge distinguished the case of the wife of the debtor for whose debt the property was sold on the following grounds: (so far as I am able to follow his reasoning) (a) the debt contracted by the husband himself is necessarily binding upon the wife absolutely; (b) on his death without male issue, his estate devolves on her by right of inheritance and so no right of maintenance or residence apart from ownership as heir can be invoked in her favour as in the case of a co-parcener's widow; (c) the mother's right may be traced to the father's co-parcenary right just as in the case of the other co-parceners;

(1) (1904) I.L.R., 27 Mad., 45. (2) (1883) I.L.R., 6 Mad., 130.
(3) (1889) I.L.R., 12 Mad., 260.

and is not derived from the debtor directly; (d) the wife's right of maintenance during her husband's lifetime

"is only a matter of personal obligation on the part of the husband quite independent of the possession of the ancestral property by him."

The learned Judge also fortified himself by the dictum of KERNAN, J., in *Venkatammal v. Andyappa Chetti*(1) that if the debt in respect of which the sale took place was a debt due by the husband of the woman who claims the right of residence,

"no doubt could be entertained that she had no such right."

After making the above distinctions, he disallowed the right of the widow of the debtor to resist possession by the purchaser in Court auction. In doing so, he dissented from the decision in *Manilal v. Bai Tara*(2). (J. C. Ghose in his very learned work on Hindu Law seems to be inclined in favour of the Bombay decision and against BASHYAM AYYANGAR, J.'s opinion.)

I shall not lengthen this judgment by elaborately considering whether all the four distinctions (a) to (d) relied on by the learned Judge are tenable. It is sufficient to state that the wife and unmarried daughters of the debtor stand on a different footing from the widows of deceased co-parceners (including the mother) and from unmarried sisters. If even the undivided sons of the debtor cannot attack the sale in execution of the father's debt (not illegal or immoral), I do not see how unmarried daughters can be allowed to attack it or put forward a right of residence against the purchaser. As regards the wife, she is under even a greater obligation (under the Hindu Law) than the sons, not to question the validity of her husband's debts. The mother and the widows of co-parceners and the unmarried sisters are under no such obligation with respect to the debt of the surviving male owner which was not incurred for family necessity. I need hardly say that if the sale for their brother's debt itself would not deprive defendants Nos. 6 and 7 of their right of residence, a sale for the debt of the brother's next female heir and legal representative (which is the present case) cannot be held to deprive them of such right. The question whether a private sale of a person's ancestral family dwelling house without necessity (apart from the question of its being

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(1) (1893) I.L.R., 6 Mad., 130. (2) (1893) I.L.R., 17 Bom., 398.

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sold in execution of a decree for his debt) or without the purchase money being required to discharge his own antecedent debts can deprive even his wife and unmarried daughters of their right of residence is a somewhat more difficult question on which it is unnecessary to express a final opinion in this case.

In the result, I would dismiss the appeal with costs.

WALLIS, C.J.

WALLIS, C.J.—I entirely agree.

K.B.

APPELLATE CIVIL.

*Before Sir John Wallis, Chief Justice and Mr.
Justice Krishnan.*

SUBRAMANYAM, APPELLANT (FOURTH DEFENDANT),

v.

NARASIMHAM AND THREE OTHERS, RESPONDENTS
(PLAINTIFF AND DEFENDANTS NOS. 1 TO 3).*

*Limitation Act (IX of 1908), sec. 12 (2), (3) Christmas Holidays—Deduction of,
in computing time for appeal.*

The defendant, against whom a judgment and decree were passed on 21st December 1919, i.e., on the first day of the Christmas vacation, applied for copies of the same on the 7th January 1920, i.e., some days after the re-opening.

Held, that in computing the time for appeal, the defendant was not entitled to deduct the period of the Christmas vacation as 'time requisite for obtaining copies' within section 12 of the Limitation Act.

SECOND APPEAL sought to be preferred against the decree of the District Court of Kistna in Appeal Suit No. 33 of 1918, preferred against the decree of the Subordinate Judge of Bezwada, in Original Suit No. 23 of 1916.

The facts are given in the judgment.

The respondent in the above Second Appeal took the objection that the Second Appeal was filed out of time.

B. Somayya for appellant.

Venkataramana Rao for respondent.

* Stamp Register No. 15323 of 1919.

WALLIS, C.J.—The judgment of the lower Appellate Court in this case was pronounced on 21st December 1918, the first day of the Christmas vacation, and under section 12 (2) of the Limitation Act time began to run from the following day. The fact that the judgment was pronounced in the vacation made no difference in this respect, as the only provision with regard to the vacation is that under section 4, if the prescribed period expires on a day when the Court is closed, the appeal may be preferred on the day when the Court re-opens. The appellant applied for copies of the decree and judgment on the 7th January 1919 which he duly obtained, but even excluding the time taken in obtaining them, he is admittedly out of time, unless he is entitled to add the days when the Court was closed for the Christmas vacation and to treat them as part of the time requisite for obtaining copies of the decree and judgment within the meaning of section 12. It has been held by SANKARAN NAYAR and AYLING, JJ., in *Tanjore Palace Estate v. Andi Ramiah Chetty*(1) that he is not entitled to do this, and we entirely agree with that decision. It was no doubt held in *Saminatha Ayyar v. Venkatasubba Ayyar*(2) where the judgment under appeal was delivered late on the day before the Christmas vacation and an application was made for copies on the 7th of January, the day the Court re-opened, that the appellant was entitled to exclude, not only the time actually taken in obtaining the copies, but also the whole of Christmas vacation during which the Court was closed when he could not have applied for copies even if he had wished to do so. That case may be distinguished on the ground that there the copies were applied for on the re-opening day and in this case not until some days late; otherwise we should have to consider whether we ought to follow it. What we have to see in all these cases is what was the time requisite for obtaining copies within the meaning of the section, and by 'requisite' I understand reasonably requisite. It was observed by WILSON and BEVERLEY, JJ., in *Gunga Dass Dey v. Ramjoy Dey*(3) that no hard and fast rule can be laid down to meet all cases that occur under this provision, but I think it may be said that generally, if not invariably as

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(1) (1911) 11 I.C., 339.

(2) (1904) I.L.R., 27 Mad., 21.

(3) (1886) I.L.R., 12 Cal., 30.

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held in *Bechi v. Ahsan Ullah Khan*(1) the time requisite for obtaining copies cannot include any period antecedent to the appellant's asking for copies in the usual way. The appellant is under no duty to make an early application, he may apply at any time, even on the last day of the prescribed period if he so chooses; and even if the period expires on a day when the Court is closed, he may apply for copies on the re-opening day and still be within time, as held in *Siyadat-un-Nissa v. Muhammad Mahmud*(2), *Tukaram Gopal v. Pandurang Sadaram*(3) and *Pandharinath v. Shankar*(4). In the present case the appellant had some eighty days between the re-opening of the Court and expiry of the prescribed period in which he could have applied for copies, and he did in fact apply for them a few days after the re-opening. In these circumstances I fail to see how the Christmas vacation can be included in the time reasonably requisite for obtaining them, unless we are prepared to go so far as to say that all days on which the Court was closed during the prescribed period before the appellant applied for the copies must be included in the time requisite for obtaining copies on the ground that the appellant could not have applied for copies on those days even if he had desired to do so. This would defeat the intention of the Legislature that time should run on days when the Court is closed and would be a very strained interpretation of the words 'time requisite' as used in the section which, in my opinion, means time reasonably requisite on the facts of the case. The appeal is barred and dismissed with costs.

KRISHNAN, J. KRISHNAN, J.—I agree and have nothing further to add.

N.R.

(1) (1890) I.L.R., 12 All., 461 (F.B.).

(2) (1901) I.L.R., 25 Bom., 594.

(3) (1897) I.L.R., 19 All., 342.

(4) (1901) I.L.R., 25 Bom., 586.

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 Act XV of 1856 (Hindu Widows' Re-marriage), with footnotes. As. 2. (Anna 1.)
 Act XVIII of 1856 (Calcutta Land Revenue), as modified up to 15th July 1908. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. As. 7. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XVII of 1879 (Dekkhan Agriculturists Relief), as modified up to 1st January 1915. As. 10. (As. 2.)
 Act XVIII of 1879 (Legal Practitioners), as modified up to 1st July 1911. As. 6 p. 6. (Anna 1.)
 Act VII of 1880 (Indian Merchant Shipping), as modified up to 15th October 1891. As. 10. (As. 2.)
 Act XII of 1880 (Kasis), with footnotes. Anna 1 p. 6. (Anna 1.)
 Act XIII of 1880 (Vaccination), as modified up to 1st September 1909. As. 4 p. 9. (Anna 1.)
 Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. As. 12. (As. 2.)
 Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st March 1909. Re. 1 as. 2. (As. 3.)
 Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. As. 10. (Anna 1.)
 Act II of 1882 (Indian Trusts), as modified up to 1st June 1909. As. 10. (Anna 1.)
 Act IV of 1882 (Transfer of Property), as modified up to 1st December 1905. As. 15. (As. 2.)
 Act V of 1882 (Indian Easements), as amended by the Repealing and Amending Act, 1891 (XII of 1891). As. 8. (Anna 1.)
 Act XII of 1882 (Indian Salt), as modified up to 1st August 1909. As. 7. (As. 2.)
 Act XV of 1882 (Presidency Small Cause Courts), as modified up to 1st June 1906. As. 10. (As. 2.)
 Act V of 1883 (Indian Merchant Shipping), as modified up to 1st September 1909. As. 6. (Anna 1.)
 Act VIII of 1883 (Little Cocos and Preparis Islands Laws), as modified up to 1st October 1902. Anna 1 p. 3. (Anna 1.)
 Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September 1906. As. 2 p. 6. (Anna 1.)
 Act IV of 1884 (Explosives), as modified up to 1st October 1911. As. 4 p. 9. (Anna 1.)
 Act VII of 1884 (Indian Steamships), as modified up to 1st July 1890. As. 6. (Anna 1.)
 Act IX of 1884 (Legal Practitioners), as modified up to 30th June 1909. Anna 1 p. 6. (Anna 1.)
 Act XII of 1884 (Agriculturists' Loans), as modified up to 1st February 1903. As. 2. (Anna 1.)
 Act VII of 1885 (Panch Mahal Laws), as modified up to 1st June 1911. Anna 1 p. 8. (Anna 1.)
 Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. As. 5. (Anna 1.)
 Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st May 1911. As. 6. (Anna 1.)
 Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. As. 9. (As. 2.)
 Act XIII of 1886 (Indian Securities), as amended by Act XII of 1891. As. 2 p. 9. (Anna 1.)
 Act VII of 1887 (Suite Valuation), as modified up to 1st November 1904. Anna 1 p. 9. (Anna 1.)
 Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. As. 6. (Anna 1.)
 Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 8. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act III of 1888 (Police), as modified up to 1st January 1909. Anna 1 p. 9. (Anna 1.)
 Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. Anna 1 p. 9. (Anna 1.)
 Act II of 1889 (Measures of Length), with footnotes. Anna 1 p. 8. (Anna 1.)
 Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st August 1908. As. 6. (Anna 1.)
 Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. As. 2 p. 9. (Anna 1.)
 Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. As. 5 p. 6. (Anna 1.)
 Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. As. 8. (Anna 1.)
 Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. As. 2 p. 6. (Anna 1.)
 Act IX of 1890 (Indian Railways), as modified up to 1st June 1909. Re. 1 as. 2. (As. 2.)
 Act X of 1890 (Press and Registration of Books), as modified up to 1st December 1903. As. 2 p. 3. (Anna 1.)
 Act XI of 1890 (Prevention of Cruelty to Animals), as modified up to 15th September 1915. As. 2. (Anna 1.)
 Act XIII of 1890 (Excise Malt Liquors), as modified up to 1st October 1908. Anna 1 p. 6. (Anna 1.)
 Act X of 1891 (Indian Criminal Law Amendment), as modified up to 1st August 1909. Anna 1. (Anna 1.)
 Act XII of 1891 (Amending Act), showing the Schedules as modified up to 31st May 1902. As. 12. (Anna 1 p. 6.)
 Act XIV of 1891 (Oudh Courts), as amended by the Oudh Courts Act (1891) Amendment Act, 1897. Anna 1 p. 3. (Anna 1.)
 Act I of 1894 (Land Acquisition), with footnotes, brought down to 1st August 1903. As. 7. (Anna 1.)
 Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. As. 9. (As. 2.)
 Act IX of 1894 (Prisons), as amended by the Burma Laws Act, 1898. As. 8. (Anna 1 p. 6.)
 Act XII of 1896 (Excise), as modified up to 1st March 1907. As. 8. (As. 2.)
 Act XX of 1896 (Sindh Incumbered Estates), as modified up to 1st June 1906. As. 4. (Anna 1.)
 Act IV of 1897 (Indian Fisheries), with footnotes. Anna 1 p. 9. (Anna 1.)
 Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. As. 2 p. 9. (Anna 1.)
 Act X of 1897 (General Clauses), as modified up to 1st February 1910. As. 5 p. 6. (Anna 1 p. 6.)
 Act III of 1898 (Lepers), as modified up to 1st September 1909. As. 4. (Anna 1.)
 Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. Re. 3 as. 10. (As. 8.)
 Act II of 1899 (Indian Stamp), as modified up to 1st March 1907. Re. 1. (As. 2.)
 Act VIII of 1899 (Indian Petroleum), as modified up to 1st July 1911. As. 7 p. 6. (Anna 1 p. 6.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. As. 2 p. 9. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XVI of 1899 (Northern India Canal and Drainage), with footnotes. Anna 1. (Anna 1.)
 Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900. Anna 1. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st July 1910. As. 6 p. 6. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration), as modified up to 1st July 1910. Re. 1 as. 4. (As. 2.)
 Act II of 1902 [Cantonments (House-accommodation)], as modified up to 1st June 1910. As. 6 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. As. 5 p. 6. (Anna 1.)
 Act I of 1910 (Indian Press), with footnotes. As. 3 p. 6. (Anna 1.)
 Regulation III of 1818 (Bengal State Prisoners), as modified up to 1st August 1909. As. 2 p. 9. (Anna 1.)
 Regulation III of 1872 (Sonthal Parganas Settlement), as modified up to 1st March 1909. As. 6 p. 6. (Anna 1.)
 Regulation V of 1873 [Bengal (Eastern) Frontier], as modified up to 1st July 1903. Anna 1 p. 9. (Anna 1.)
 Regulation III of 1876 (Andaman and Nicobar Islands), as modified up to 1st February 1897. As. 5 p. 6. (Anna 1.)
 Regulation I of 1886 (Assam Land and Revenue), as modified up to 1st June 1894. As. 13. (As. 2.)
 Regulation V of 1886 (Ajmer Municipalities), as modified up to 1st February 1911. As. 15. (As. 2.)
 Regulation VI of 1886 (Ajmer Rural Boards), as amended by Reg. 9 of 1893. As. 5 p. 6. (Anna 1.)
 Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October 1899. As. 4 p. 9. (Anna 1.)
 Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April 1902. As. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December 1893, with footnotes brought down to 1st December 1901. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1850 (Judicial Officers' Protection), with footnotes. In Nagri. Pies 6. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1850 (Removal of Caste Disabilities), with footnotes. In Nagri. Pies 3. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1908. In Urdu. Pies 6. (Anna 1.)
 Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1908. In Nagri. Pies 6. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XXXVII of 1850 (Public Servants' Inquiries), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
 Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November 1904. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Urdu. Pies 6. (Anna 1.)
 Act XIII of 1855 (Indian Fatal Accidents), as modified up to 1st December 1903. In Nagri. Pies 6. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XXIII of 1855 (Mortgaged Estates Administration), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Urdu. Pies 6. (Anna 1.)
 Act XV of 1856 (Hindu Widow's Re-marriage). In Nagri. Pies 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. In Urdu. As. 2 p. 6. (Anna 1.)
 Act XX of 1856 (Bengal Chankidari), as modified up to 1st November 1903. In Nagri. As. 2 p. 6. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1857 (Opium), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1859 (Forfeiture), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1859 (Workman's Breach of Contract), as affected by Act XVI of 1874. In Nagri. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December 1904. In Nagri. Pies 3. (Anna 1.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Urdu. Re. 1 as. 5. (As. 5.)
 Act XLV of 1860 (Indian Penal Code), as modified up to 1st April 1903. In Nagri. Re. 1 as. 5. (As. 5.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Urdu. As. 2 p. 9. (Anna 1.)
 Act V of 1861 (Police), as modified up to 7th March 1903. In Nagri. As. 2 p. 9. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1861 (Stage-carriages), as modified up to 1st February 1898. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1863 (Excise), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
 Act XXXI of 1863 (Official Gazettes), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XXXI of 1863 (Official Gazettes), with footnotes. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Urdu. Anna 1. (Anna 1.)
- Act III of 1864 (Foreigners), as modified up to 1st April 1915. In Nagri. Anna 1. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Urdu. Pies 8. (Anna 1.)
- Act XV of 1864 (Indian Tolls), as modified up to 30th June 1909. In Nagri. Pies 8. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Urdu. Pies 9. (Anna 1.)
- Act III of 1865 (Carriers), as modified up to 31st May 1903. In Nagri. Pies 9. (Anna 1.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Urdu. As. 11 p. 3. (As. 2.)
- Act X of 1865 (Indian Succession), as modified up to 1st April 1909. In Nagri. As. 11 p. 3. (As. 2.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Urdu. Pies 9. (Anna 1.)
- Act XXI of 1866 (Native Converts' Marriage Dissolution), as modified up to 1st March 1911. In Nagri. Pies 9. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st December 1896. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. In Urdu. Anna 1. (Anna 1.)
- Act XXII of 1867 (Sarais and Paracos), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paracos), as modified up to 1st August 1908. In Nagri. Pies 6. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XXV of 1867 (Press and Registration of Books), as modified up to 1st October 1907. In Nagri. Anna 1 p. 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Urdu. Pies 3. (Anna 1.)
- Act V of 1870 (Unclaimed Deposits), as modified up to 1st October 1908. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Urdu. As. 5 p. 9. (Anna 1.)
- Act VII of 1870 (Court-fees), as modified up to 1st February 1909. In Nagri. As. 5 p. 6. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act I of 1871 (Cattle-trespass), as modified up to 1st May 1910. In Nagri. Anna 1 p. 9. (Anna 1.)
- Act V of 1871 (Prisoners), as modified up to 1st May 1894. In Urdu. Anna 1 p. 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Urdu. Pies 9. (Anna 1.)
- Act XXIII of 1871 (Pensions), as modified up to 1st September 1909. In Nagri. Pies 9. (Anna 1.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (As. 2.)
- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Nagri. As. 8. (As. 2.)
- Act IV of 1872 (Punjab Laws), as modified up to 1st November 1904. In Urdu. As. 2 p. 6. (Anna 1 p. 6.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Urdu. As. 9 p. 9. (As. 3.)
- Act IX of 1872 (Indian Contract), as modified up to 1st February 1908. In Nagri. As. 9 p. 9. (As. 3.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Urdu. As. 3. (Pies 9.)
- Act XV of 1872 (Indian Christian Marriage), as modified up to 1st December 1904. In Nagri. As. 4. (As. 2.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
- Act V of 1873 (Government Savings Bank), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July 1899. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1903. In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1873 (Agra Village and Road Police). In Urdu. Anna 1. (Anna 1.)
- Act IX of 1874 (European Vagrancy). In Urdu. As. 2. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Urdu. Pies 8. (Anna 1.)
- Act IX of 1875 (Indian Majority), as modified up to 1st May 1906. In Nagri. Pies 8. (Anna 1.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Urdu. As. 3 p. 9. (Anna 1 p. 6.)
- Act XI of 1876 (Presidency Banks), as modified up to 1st March 1907. In Nagri. As. 3 p. 6. (Anna 1 p. 6.)
- Act XVIII of 1876 (Oudh Laws). In Urdu. As. 2. (Anna 1.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1877 (Specific Relief), as modified up to 1st February 1904. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1878 (Opium), as modified up to 1st October 1907. In Nagri. Anna 1 p. 6. (Anna 1.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1903. In Nagri. As. 4. (Anna 1 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Urdu. As. 2. (Anna 1.)
- Act XI of 1878 (Indian Arms), as modified up to 1st May 1904. In Nagri. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1902. In Nagri. As. 2. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Urdu. As. 2 p. 6. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st May 1896. In Nagri. As. 2 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XII of 1880 (Kazis), with footnotes. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1880 (Vaccination). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XIII of 1880 (Vaccination). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Urdu. As. 4 p. 6. (Anna 1 p. 6.)
 Act V of 1881 (Probate and Administration), as modified up to 1st July 1910. In Nagri. As. 4 p. 6. (Anna 1 p. 6.)
 Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Urdu. As. 9. (Anna 1 p. 6.)
 Act XVIII of 1881 (Central Provinces Land Revenue), as modified up to 1st November 1898. In Nagri. As. 9. (Anna 1 p. 6.)
 Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Urdu. As. 4. (Anna 1.)
 Act XXVI of 1881 (Negotiable Instruments), as modified up to 1st September 1909. In Nagri. As. 4. (Anna 1.)
 Act II of 1892 (Indian Trusts), as modified up to 1st June 1909. In Urdu. As. 3 p. 6. (Anna 1.)
 Act II of 1892 (Indian Trusts), as modified up to 1st June 1909. In Nagri. As. 3 p. 6. (Anna 1.)
 Act IV of 1892 (Transfer of Property), as modified up to 1st March 1900. In Urdu. As. 6 p. 9. (As. 2.)
 Act IV of 1892 (Transfer of Property), as modified up to 1st March 1900. In Nagri. As. 6 p. 9. (As. 2.)
 Act XIX of 1893 (Land Improvement Loans), as modified up to 1st September 1906. In Urdu. Anna 1. (Anna 1.)
 Act XIX of 1893 (Land Improvement Loans), as modified up to 1st September 1906. In Nagri. Anna 1. (Anna 1.)
 Act IV of 1894 (Indian Explosives), as modified up to 1st September 1906. In Urdu. Anna 1 p. 3. (Anna 1.)
 Act IV of 1894 (Indian Explosives), as modified up to 1st September 1906. In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Urdu. Pies 6. (Anna 1.)
 Act XII of 1884 (Agriculturists' Loans), as modified up to 1st September 1906. In Nagri. Pies 6. (Anna 1.)
 Act II of 1835 [Negotiable Instruments (Amendment)]. In Urdu. Pies 9. (Anna 1.)
 Act III of 1835 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act X of 1835 [Oudh Estates (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1885 (Indian Telegraph), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (Anna 1.)
 Act XXI of 1885 [Madras Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act IV of 1886 [Indian Contract (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1886 (Births, Deaths and Marriages Registration). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 9. (Anna 1.)
 Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Urdu. As. 3 p. 3. (Anna 1.)
 Act XI of 1886 (Indian Tramways), as modified up to 31st December 1900. In Nagri. As. 3 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1886 (Securities), as amended by the Repealing and Amending Act, 1891. In Nagri. Pies 9. (Anna 1.)
 Act VII of 1887 (Suits' Valuation). In Urdu. Pies 9. (Anna 1.)
 Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Urdu. As. 2 p. 3. (Anna 1.)
 Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1896. In Nagri. As. 2 p. 3. (Anna 1.)
 Act X of 1887 (Native Passenger Ships). In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XII of 1887 (Bengal, Agra and Assam Civil Courts). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Urdu. As. 3 p. 6. (Anna 1.)
 Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. In Nagri. As. 3 p. 9. (Anna 1.)
 Act XV of 1887 (Burma Military Police). In Urdu. Pies 9. (Anna 1.)
 Act XV of 1887 (Burma Military Police). In Nagri. Pies 9. (Anna 1.)
 Act XVIII of 1887 (Allahabad University). In Urdu. Anna 1. (Anna 1.)
 Act III of 1888 (Police), as modified up to 1st January 1909. In Urdu. Pies 3. (Anna 1.)
 Act III of 1888 (Police), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
 Act IV of 1888 (Indian Reserve Forces), as modified up to 1st March 1893. In Urdu. Pies 3. (Anna 1.)
 Act IV of 1888 (Indian Reserve Forces), as passed. In Nagri. Pies 3. (Anna 1.)
 Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Urdu. Pies 6. (Anna 1.)
 Act I of 1889 (Metal Tokens), as modified up to 1st April 1904. In Nagri. Pies 6. (Anna 1.)
 Act II of 1889 (Measures of Length). In Urdu. Pies 3. (Anna 1.)
 Act II of 1889 (Measures of Length). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Urdu. Anna 1 p. 9. (Anna 1.)
 Act IV of 1889 (Indian Merchandise Marks), as modified up to 1st February 1904. In Nagri. As. 2. (Anna 1.)
 Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Urdu. Pies 6. (Anna 1.)
 Act VI of 1889 (Probate and Administration), as modified up to 1st January 1909. In Nagri. Pies 6. (Anna 1.)
 Act VII of 1889 (Succession Certificate), as modified up to 1st December 1903. In Urdu. Anna 1 p. 9. (Anna 1.)
 Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Urdu. Pies 9. (Anna 1.)
 Act XV of 1889 (Indian Official Secrets), as modified up to 1st April 1904. In Nagri. Pies 9. (Anna 1.)
 Act XVI of 1889 (Central Provinces Land Revenue). In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XVI of 1889 (Central Provinces Land Revenue). In Nagri. Anna 1 p. 6. (Anna 1.)
 Act XX of 1889 [Indian Lunatic Asylums (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act I of 1890 (Revenue Recovery). In Urdu. Pies 3. (Anna 1.)
 Act II of 1890 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
 Act V of 1890 (Forest). In Urdu. Pies 6. (Anna 1.)
 Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
 Act VI of 1890 (Charitable Endowments), as modified up to 1st August 1908. In Nagri. Pies 9. (Anna 1.)
 Act VIII of 1890 (Guardians and Wards). In Urdu. As. 2 p. 3. (Anna 1 p. 9.)
 Act IX of 1890 (Indian Railways), as modified up to 1st June 1905. In Urdu. As. 8. (As. 2.)
 Act IX of 1890 (Indian Railways), as modified up to 1st May 1896. In Nagri. As. 8. (As. 2.)
 Act X of 1890 [Press and Registration of Books (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XI of 1890 (Prevention of Cruelty to Animals). In Urdu. Pies 6. (Anna 1.)
 Act XX of 1890 (United Provinces). In Urdu. Anna 1. (Anna 1.)
 Act X of 1891 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1891 (Oudh Courts). In Urdu. Pies 6. (Anna 1.)
 Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Urdu. Pies 3. (Anna 1.)
 Act XVIII of 1891 (Bankers' Books Evidence), as modified by Acts I of 1893 and XII of 1900. In Nagri. Pies 6. (Anna 1.)
 Act II of 1892 (Marriages Validation). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1892 [Bengal Court of Wards (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act IV of 1893 (Partition). In Urdu. Pies 3. (Anna 1.)
 Act I of 1894 (Land Acquisition). In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
 Act of 1894 (Land Acquisition). In Nagri. Anna 1 p. 6. (Anna 1 p. 6.)
 Act III of 1894 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Urdu. As. 2 p. 9. (Anna 1.)
 Act VIII of 1894 (Indian Tariff), as modified up to 1st April 1916. In Nagri. As. 2 p. 6. (Anna 1.)
 Act IX of 1894 (Prisons). In Urdu. As. 2 p. 3. (Anna 1.)
 Act IX of 1894 (Prisons). In Nagri. As. 2 p. 3. (Anna 1.)
 Act VII of 1895 [Punjab Laws Act (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VII of 1895 [Punjab Laws Act (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1895 (Pilgrim Ships). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act II of 1896 (Cotton-duties). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act II of 1896 (Cotton-duties). In Nagri. Anna 1. (Anna 1.)
 Act VI of 1896 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1896 (Inland Bonded Warehouses). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1896 (Inland Bonded Warehouses). In Nagri. Pies 3. (Anna 1.)
 Act XII of 1896 (Excise), as modified up to 1st March 1907. In Urdu. As. 2 p. 9. (As. 2.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XII of 1896 (Excise), as modified up to 1st March 1907. In Nagri. As. 3 p. 3. (As. 2.)
 Act I of 1897 [Public Servants (Inquiries) Amendment]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1897 [Public Servants (Inquiries) Amendment]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1897 (Epidemic Diseases). In Urdu. Pies 3. (Anna 1.)
 Act III of 1897 (Epidemic Diseases). In Nagri. Pies 3. (Anna 1.)
 Act IV of 1897 (Fisheries). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1897 (Fisheries). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1897 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1897 [Negotiable Instruments (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1897 (Reformatory Schools). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1897 (Reformatory Schools). In Nagri. Pies 6. (Anna 1.)
 Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Urdu. Pies 9. (Anna 1.)
 Act IX of 1897 (Provident Funds), as modified up to 1st April 1903. In Nagri. Pies 9. (Anna 1.)
 Act X of 1897 (General Clauses). In Urdu. Anna 1. (Anna 1.)
 Act X of 1897 (General Clauses). In Nagri. Anna 1. (Anna 1.)
 Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1898 [Stage-carriages Act (1861) Amendment]. In Nagri. Pies 3. (Anna 1.)
 Act III of 1898 (Lepers), as modified up to 1st September 1909. In Urdu. Pies 6. (Anna 1.)
 Act III of 1898 (Lepers), as modified up to 1st September 1909. In Nagri. Pies 6. (Anna 1.)
 Act IV of 1898 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Urdu. Re. 1 as. 4. (As. 8.)
 Act V of 1898 (Code of Criminal Procedure), as modified up to 1st August 1909. In Nagri. Re. 1 as. 6. (As. 8.)
 Act VI of 1898 (Indian Post Office). In Urdu. As. 3 p. 3. (Anna 1.)
 Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)
 Act IX of 1898 (Live-stock Importation). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1898 (Live-stock Importation). In Nagri. Pies 3. (Anna 1.)
 Act X of 1898 (Indian Insolvency Rules). In Urdu. Pies 3. (Anna 1.)
 Act I of 1899 [Indian Marine Act (1887) Amendment]. In Urdu. Pies 6. (Anna 1.)
 Act I of 1899 [Indian Marine Act (1887) Amendment]. In Nagri. Pies 6. (Anna 1.)
 Act II of 1899 (Stamps), as modified up to 1st March 1907. In Urdu. As. 7 p. 6. (Anna 1 p. 6.)
 Act II of 1899 (Stamps), as modified up to 1st March 1907. In Nagri. As. 7 p. 6. (Anna 1 p. 6.)
 Act IV of 1899 (Government Buildings). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1899 (Government Buildings). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Urdu. Anna 1 p. 6. (Anna 1.)
 Act VIII of 1899 (Indian Petroleum), as modified up to 1st January 1909. In Nagri. Anna 1 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act IX of 1899 (Indian Arbitration). In Urdu. Pies 9. (Anna 1.)
 Act IX of 1899 (Indian Arbitration). In Nagri. Pies 9. (Anna 1.)
 Act XI of 1899 [Court-fees (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act XI of 1899 [Court-fees (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act XII of 1899 (Currency Notes Forgery). In Urdu. Pies 3. (Anna 1.)
 Act XII of 1899 (Currency Notes Forgery). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1899 (Glanders and Farcy), as modified up to 1st August 1915. In Nagri. Pies 9. (Anna 1.)
 Act XIV of 1899 [Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1899 [Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVIII of 1899 [Land Improvement Loans (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XX of 1899 (Presidency Banks). In Urdu. Pies 3. (Anna 1.)
 Act XX of 1899 (Presidency Banks). In Nagri. Pies 3. (Anna 1.)
 Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XXI of 1899 [Central Provinces Tenancy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act XXIV of 1899 (Central Provinces Court of Wards). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Urdu. As. 2 p. 3. (Anna 1.)
 Act III of 1900 (Prisoners), as modified up to 1st March 1905. In Nagri. As. 2 p. 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act IX of 1900 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Urdu. Pies 6. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Nagri. Pies 9. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1901 (Assam Labour and Emigration). In Urdu. As. 5. (As. 2.)
 Act VI of 1901 (Assam Labour and Emigration). In Nagri. As. 5. (As. 2.)
 Act VII of 1901 (Native Christian Administration of Estates). In Urdu. Pies 3. (Anna 1.)
 Act VII of 1901 (Native Christian Administration of Estates). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Urdu. Anna 1. (Anna 1.)
 Act VIII of 1901 (Indian Mines). In Nagri. Anna 1. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act X of 1901 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act II of 1902 [Cantonments (House-accommodation)]. In Urdu. Anna 1. (Anna 1.)
 Act II of 1902 [Cantonments (House-accommodation)]. In Nagri. Anna 1. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Urdu. Pies 3. (Anna 1.)
 Act IV of 1902 (Indian Tramways). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1902 [United Provinces (Designation)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1902 [Indian Tariff (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act II of 1903 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VII of 1903 (Indian Works of Defence). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1903 (Probate and Administration). In Nagri. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Urdu. Pies 3. (Anna 1.)
 Act IX of 1903 (Indian Tea Cess). In Nagri. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Urdu. Pies 3. (Anna 1.)
 Act X of 1903 (Victoria Memorial). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1903 [Lepers (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1903 (Indian Foreign Marriages). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Urdu. Anna 1 p. 6. (Anna 1.)
 Act XV of 1903 (Indian Extradition), as modified up to 1st August 1915. In Nagri. Anna 1 p. 6. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1904 [Transfer of Property (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Urdu. Pies 9. (Anna 1.)
 Act VII of 1904 (Ancient Monuments Preservation). In Nagri. Pies 9. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1904 (Indian Universities). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Urdu. Pies 3. (Anna 1.)
 Act XI of 1904 (to revive and continue section 8-B of the Indian Tariff Act, 1894). In Nagri. Pies 3. (Anna 1.)
 Act XV of 1904 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act XV of 1904 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1905 (Indian Railway Board). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1905 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Urdu. Pies 9. (Anna 1.)
- Act III of 1906 (Indian Coinage). In Nagri. Pies 9. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1906 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act III of 1907 (Provincial Insolvency). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Urdu. Pies 3. (Anna 1.)
- Act IV of 1907 [Repealing and Amending (Rates and Cesses)]. In Nagri. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1908 [Legal Practitioners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act III of 1908 [Indian Trusts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1908 (Code of Civil Procedure). In Urdu. Re. 1 as. 2. (As. 6.)
- Act V of 1908 (Code of Civil Procedure). In Nagri. Re. 1 as. 2. (As. 6.)
- Act VI of 1908 (Explosive Substances). In Urdu. Pies 3. (Anna 1.)
- Act VI of 1908 (Explosive Substances). In Nagri. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1908 (Incitements to Offences). In Nagri. Pies 3. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Urdu. As. 2. (Anna 1.)
- Act IX of 1908 (Indian Limitation). In Nagri. As. 2. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Urdu. Pies 3. (Anna 1.)
- Act X of 1908 (Indian Salt Duties). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1908 (Assam Labour and Emigration). In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1908 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XVI of 1908 (Indian Registration). In Urdu. As. 2. (As. 2.)
- Act XVI of 1908 (Indian Registration). In Nagri. As. 2. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Urdu. As. 2 p. 3. (As. 2.)
- Act XVII of 1908 (Indian Emigration). In Nagri. As. 2 p. 3. (As. 2.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act I of 1909 [Indian Steamships Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1909 (Whipping). In Nagri. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1909 [Amending (Army) Act]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1909 (Anand Marriage). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act VII of 1909 (Anand Marriage). In Nagri. Pies 3. (Anna 1.)
- Act I of 1910 (Indian Press). In Urdu. Pies 6. (Anna 1.)
- Act I of 1910 (Indian Press). In Nagri. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Urdu. Pies 6. (Anna 1.)
- Act II of 1910 (Indian Paper Currency). In Nagri. Pies 6. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act III of 1910 [Indian Penal Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Urdu. Pies 3. (Anna 1.)
- Act V of 1910 (Dourine). In Nagri. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VI of 1910 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1910 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act IX of 1910 (Indian Electricity). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1910 [Glanders and Farcy (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1910 [Prisons (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1910 [Indian Emigration (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act XV of 1910 (Cantonments). In Urdu. Pies 9. (Anna 1.)
- Act XV of 1910 (Cantonments). In Nagri. Pies 9. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Urdu. Pies 3. (Anna 1.)
- Act XVI of 1910 (Indian Census). In Nagri. Pies 3. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Urdu. Anna 1 p. 9. (Anna 1.)
- Act II of 1911 (Patents and Designs). In Nagri. Anna 1 p. 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Urdu. Pies 9. (Anna 1.)
- Act III of 1911 (Criminal Tribes). In Nagri. Pies 9. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act V of 1911 [Tramways (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act VII of 1911 [Indian Paper Currency (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act VII of 1911 [Indian Paper Currency (Amendment)]. In Nagri. Pies 3. (Anna 1.)
- Act X of 1911 (Prevention of Seditious Meetings). In Urdu. Pies 3. (Anna 1.)
- Act X of 1911 (Prevention of Seditious Meetings). In Nagri. Pies 3. (Anna 1.)
- Act XI of 1911 [University (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1911 (Factories). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act XII of 1911 (Factories). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act XIII of 1911 [Christian Marriage (Amendment)]. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1911 [Christian Marriage (Amendment)]. In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XIV of 1911 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1911 [Court-fees (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1911 [Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1911 [Bengal, Agra and Assam Civil Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Aircraft). In Urdu. Pies 3. (Anna 1.)
 Act XVII of 1911 (Aircraft). In Nagri. Pies 3. (Anna 1.)
 Act I of 1912 [Indian Stamp (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1912 [Indian Stamp (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1912 (Co-operative Societies). In Urdu. Anna 1. (Anna 1.)
 Act II of 1912 (Co-operative Societies). In Nagri. Anna 1. (Anna 1.)
 Act III of 1912 [Indian Post Office (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1912 [Indian Post Office (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1912 (Lunacy). In Urdu. Anna 1 p. 9. (Anna 1.)
 Act IV of 1912 (Lunacy). In Nagri. Anna 1 p. 9. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Urdu. Pies 6. (Anna 1.)
 Act V of 1912 (Provident Insurance Societies). In Nagri. Pies 6. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VI of 1912 (Indian Life Assurance Companies). In Nagri. Anna 1 p. 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1912 (Wild Birds and Animals Protection). In Nagri. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1912 (Delhi Laws). In Nagri. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1913 [Extradition (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Urdu. Pies 3. (Anna 1.)
 Act V of 1913 (White Phosphorus Matches Prohibition). In Nagri. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1913 (Musalman Wakf Validating). In Nagri. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1913 [Indian Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act I of 1914 [Civil Procedure Code (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act II of 1914 (Destructive Insects and Pests). In Urdu. Pies 3. (Anna 1.)
 Act V of 1914 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VII of 1914 [Indian Telegraph (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act VII of 1914 [Indian Telegraph (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1914 (Indian Motor Vehicles). In Nagri. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Urdu. Pies 6. (Anna 1.)
 Act IX of 1914 (Local Authorities Loan Act). In Nagri. Pies 6. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Urdu. Pies 3. (Anna 1.)
 Act XIII of 1914 (Indian Life Assurance). In Nagri. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1914 [Post Office and Telegraphs (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XV of 1914 [Indian Army (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XV of 1914 [Indian Army (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act XVI of 1914 [Indian Aircraft (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislation Continuance). In Urdu. Pies 3. (Anna 1.)
 Act I of 1915 (Emergency Legislation Continuance). In Nagri. Pies 3. (Anna 1.)
 Act III of 1915 [Foreigners (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act III of 1915 [Foreigners (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act IV of 1915 [Defence of India Criminal Law (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act IV of 1915 [Defence of India Criminal Law (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patents and Designs Temporary Rules). In Urdu. Pies 3. (Anna 1.)
 Act VI of 1915 (Indian Patents and Designs Temporary Rules). In Nagri. Pies 3. (Anna 1.)
 Act VII of 1915 (Delhi Laws). In Urdu. Pies 3. (Anna 1.)
 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Urdu. Pies 6. (Anna 1.)
 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Nagri. Pies 6. (Anna 1.)
 Act XIII of 1915 (North-West Frontier Constabulary). In Urdu. Pies 9. (Anna 1.)
 Act XIII of 1915 (North-West Frontier Constabulary). In Nagri. Pies 9. (Anna 1.)
 Act XIV of 1915 (Enemy Trading). In Urdu. Pies 3. (Anna 1.)
 Act XIV of 1915 (Enemy Trading). In Nagri. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Urdu. Pies 3. (Anna 1.)
 Act I of 1916 (Indian Trusts Amendment). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act II of 1916 (Defence of India Amendment). In Urdu. Pies 3. (Anna 1.)
- Act II of 1916 (Defence of India Amendment). In Nagri. Pies 3. (Anna 1.)
- Act IV of 1916 (Indian Tariff Amendment). In Urdu. Anna 1. (Anna 1.)
- Act IV of 1916 (Indian Tariff Amendment). In Nagri. Anna 1. (Anna 1.)
- Act VII of 1916 (Indian Medical Degrees). In Urdu. Pies 3. (Anna 1.)
- Act VII of 1916 (Indian Medical Degrees). In Nagri. Pies 3. (Anna 1.)
- Act VIII of 1916 (Presidency Banks Amendment). In Urdu. Pies 3. (Anna 1.)
- Act VIII of 1916 (Presidency Banks Amendment). In Nagri. Pies 3. (Anna 1.)
- Act X of 1916 (Enemy Trading). In Urdu. Pies 6. (Anna 1.)
- Act X of 1916 (Enemy Trading). In Nagri. Pies 6. (Anna 1.)
- Act XI of 1916 (Imports and Exports). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1916 (Imports and Exports). In Nagri. Pies 3. (Anna 1.)
- Act XII of 1916 (Indian Lunacy). In Urdu. Pies 3. (Anna 1.)
- Act XII of 1916 (Indian Lunacy Amendment). In Nagri. Pies 3. (Anna 1.)
- Act XIV of 1916 (Bills of Exchange). In Urdu. Pies 3. (Anna 1.)
- Act XIV of 1916 (Bills of Exchange). In Nagri. Pies 3. (Anna 1.)
- Act XV of 1916 (Hindu Disposition of Property). In Urdu. Pies 3. (Anna 1.)
- Act XV of 1916 (Hindu Disposition of Property). In Nagri. Pies 3. (Anna 1.)
- Act I of 1917 (Inland Steam Vessels). In Urdu. Anna 1 p. 6. (Anna 1.)
- Act I of 1917 (Inland Steam Vessels). In Nagri. Anna 1 p. 6. (Anna 1.)
- Act II of 1917 (Motor Spirit Duties). In Urdu. Pies 3. (Anna 1.)
- Act II of 1917 (Motor Spirit Duties). In Nagri. Pies 3. (Anna 1.)
- Act III of 1917 (Indian Defence Force). In Urdu. Pies 6. (Anna 1.)
- Act III of 1917 (Indian Defence Force). In Nagri. Pies 6. (Anna 1.)
- Act IV of 1917 (Indian Army Suspension of Sentences). In Urdu. Pies 3. (Anna 1.)
- Act IV of 1917 (Indian Army Suspension of Sentences). In Nagri. Pies 3. (Anna 1.)
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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 21— <i>Want of territorial jurisdiction—Objection whether allowable by appellate or revisional Court—Objection whether allowable in execution proceedings—Powers of executing Court to which decree transferred.</i>] The provisions of section 21, Civil Procedure Code, apply to objections regarding want of territorial jurisdiction. Such an objection, not taken as provided by the section, must be considered cured for all purposes, and cannot be allowed in execution proceedings. A party who does not raise an objection to jurisdiction when a preliminary mortgage decree is made absolute, is not entitled to plead in execution that the order was passed without jurisdiction.	
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SEC. 92— <i>Suit by two persons, one of whom had no interest under the section—Leave under the section obtained subsequently by two others having such interest—Latter joined as additional plaintiffs—Suit, whether maintainable.</i>] Where a suit was instituted under section 92, Civil Procedure Code, by two plaintiffs, one of whom had no interest such as that required by that section, and two other persons having the requisite interest subsequently obtained leave under the section and were joined as additional plaintiffs in the suit. Held, that the suit was maintainable under section 92 of the Code, and ought to be tried on the merits. <i>Ramayyengar v. Krishnayyengar</i> (1887) I.L.R., 10 Mad., 185, applied.	
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SEC. 92, AND O. I., R. 10 (2)— <i>Suit by plaintiffs after obtaining consent of Advocate-General—Application by Advocate-General to be added as co-plaintiff—Power of Court to add parties.</i>] In a suit under section 92, Civil Procedure Code, instituted by persons who had obtained the requisite consent of the Advocate-General, the Court can, on the application of the Advocate-General, add him as a co-plaintiff.	
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O. XXI, R. 108, AND O. XXXIV, R. 1— <i>Transfer of Property Act (IV of 1882), ss. 52 and 91, clause (f)—Ite Pendens—Sale in execution of a money decree pending a suit on mortgage of the property sold—Possession obtained by purchaser—Sale in execution of mortgage decree—Right of the latter purchaser to oust the former from possession—Order as to possession—Appeal—Suit.</i>] Where lands were attached in execution of a money decree, and afterwards a suit for sale on a	

mortgage of the same lands was filed, but the attaching creditor was not made a party thereto, the purchaser of the lands in execution of the money decree is not entitled to retain possession of them as against the subsequent purchaser in execution of the mortgage decree. Where claim proceedings under Order XXI, Civil Procedure Code, fall also under section 47 of the Code, Order XXI, rule 108, does not prevent an appeal against an order therein, as it falls under section 47 of the Code.

Veyindramuthu Pillai v. Maya Nadan ... (1920) I.L.R., 48 Mad., 696

CRIMINAL PROCEDURE CODE, SEC. 190 (c).—*District Magistrate receiving information of offence, as President of District Board—Right to take cognizance under section 190 (c).*] The fact that a District Magistrate, who happens to be also the President of a District Board, receives in the latter capacity information as to the commission of an offence by a servant of the Board, does not debar him from taking cognizance of the offence under section 190 (c) of the Criminal Procedure Code. *Thakur Pershad Singh v. The Emperor* (1906) 10 C.W.N., 775, dissented from.

Sundarasan v. King-Emperor ... (1920) I.L.R., 48 Mad., 709

(ACT V OF 1898), ss. 303 AND 307—*Verdict of jury—Reasons for their verdict—Power of Sessions Judge to question jury as to their reasons for their verdict—Question, if permissible, for determining whether reference to High Court necessary.*] A Sessions Judge is not entitled under section 303 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict, even if he intended to make a reference to the High Court under section 307 of the Code. Reference No. 30 of 1919, dissented from; *Emperor v. Stranadu* (1907) I.L.R., 80 Mad., 469, and *Public Prosecutor v. Abdul Hameed* (1918) I.L.R., 86 Mad., 589, followed. Though a Sessions Judge is neither bound nor entitled to put such questions to the jury, still his having done so for the purpose of determining whether he should make a reference is not improper or a sufficient ground for not accepting the reference.

Subbiah Thevan v. The Assistant Sessions Judge of Tinnevely ... (1920) I.L.R., 48 Mad., 744

EXECUTION—*Pre-decree arrangement that decree should be inexecutable in part, whether recognisable in execution proceedings.*] An arrangement made prior to decree in a suit that the decree that might be passed should be inexecutable in part is one that cannot be enforced in execution; hence a sale held in execution of such a decree in spite of the arrangement is good. *Chidambaram Chetty v. Krishna Vathiyar* (1917) I.L.R., 40 Mad., 233 (F.B.), distinguished.

Arumugam Pillai v. Krishnasami Naidu ... (1920) I.L.R., 48 Mad., 725

HINDU LAW—*Adoption by widow who has no authority from her husband—Mitakshara law as administered in the Dravada district of the Madras Presidency—Consent of sapindas.*] Under the law of adoption as administered in the Dravada district a Hindu widow, in the absence of any authority from her husband to adopt a son to him, may make such an adoption with the consent of his sapindas. *The Collector of Madura v. Mootoo Ramalinga*

Sathupathy (1868) 12 M.I.A., 397. There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband; *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174; L.R., 4 I.A., 1. The absence of consent on the part of the nearest sapindas cannot be made good by the authorisation of distant relations whose assent is likely to be influenced by improper motives. *Veera Basavaraju v. Balasurya Prasad Rao* (1918) I.L.R., 41 Mad., 998 (P.O.); L.R., 45 I.A., 285. The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused. *Venkamma v. Subramanyam* (1907) I.L.R., 30 Mad., 50, 53; L.R., 34 I.A., 22, 26. It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it; *Sri Virada Pratapa Baghunatha Deo v. Sri Brozo Kishore Patta Deo* (1876) I.L.R. 1 Mad., 69. (P.O.). In this case, on a consideration of the evidence, the widow was proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of those five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained, and the adoption was invalid.

Krishnayya v. Lakshmiipathi ... (1920) I.L.R., 43 Mad. (P.O.), 650

HINDU LAW—Endowment—Trustees of Hindu Religious endowment—Right of Trustees to possession of endowed property—Madras Regulation VII of 1817, sec. 12.—Religious Endowments Act (XX of 1863), ss. 3 and 4—Limitation Act (IX of 1908), schedule I, article 141—Possession adverse to Trustees.] The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his. The appellant in this case claimed to be *hukdar* or trustee of the Thanappa Mudali Kattalai, an endowment for the performance of certain ceremonies in a temple at Madura, and to be entitled to the possession of four villages

forming part of the endowment. The villages came into the possession of the East India Company in 1801 and remained in their possession until 1849, when the general manager of the temple, was placed by the Company in possession. Since 1849 the villages were in the hands of the said manager and his successors, the respondents, the whole of the revenue had been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager, and the temple committee. Held, in a suit brought in 1908 by the appellant for possession of the villages, that the possession of those who had held the villages from 1849 was possession adverse to the appellant and his predecessors in title and that the suit was barred by limitation.

Ambalavana Pandara Sannidhi v. Meenakshi Sundareswaral Devasthanam of Madura ... (1920) I.L.R., 43 Mad. (P.O.), 665

INDIAN CONTRACT ACT (IX OF 1872), ss. 64 AND 65—Written Contract—Material alteration by one party, effect of—Breach of contract—Damages—Repayment of advance.] If a written contract is materially altered by one party without the knowledge and consent of the other, the former is not entitled to damages for breach of contract, but is entitled to a repayment of the advance made by him.

Anantha Rao v. Surayya ... (1920) I.L.R., 43 Mad., 708

LIMITATION ACT (IX OF 1908), SCH. I, ART. 141:—See HINDU LAW ... 665

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1886), SEC. 19—Compensation for tenants' improvements—Contracts made after Act, more favourable to tenant than the Act—Contract, or Act enforceable—Value whether at the time of eviction, or at date of contract, payable.] Section 19 of the Malabar Compensation for Tenants' Improvements Act does not prevent the tenant from claiming compensation under a contract made after passing of the Act, if it is more favourable to him than the Act. The value of improvements payable to a tenant is their value at the time of eviction. *Kerala Yarmah Valia Raja v. Ramunni* (1898) 8 M.L.J., 51 (F.B.), followed.

Ammalamma v. Raman Nair ... (1920) I.L.R., 43 Mad., 722

MALABAR LAW—Karnavan—Lease four years before expiry of a prior lease—No necessity or justification for such lease—Expiry of prior lease when grantor was karnavan, effect of, on subsequent lease—Lease, whether valid or binding on succeeding karnavan.] Where a karnavan granted a lease to take effect on the expiry of a prior lease whose term was to expire four years later, and it was found that there was no necessity or justification for granting the subsequent lease four years prior to the expiry of the term of the prior lease, Held, that the subsequent lease was not valid or binding on the succeeding karnavan, even though the prior lease expired when the grantor continued to be the karnavan.

Kunhammad v. Kunhummi ... (1920) I.L.R., 43 Mad., 715

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 55—Provincial Insolvency Act (III of 1907), sec. 36—Mortgage within two years of insolvency of mortgagor—Good faith and consideration for mortgage—Onus of proof on mortgagee—Mortgagee admitted to proof by Official Assignee—Application

by Official Assignee to expunge proof of mortgage—Onus of proof.] Under section 55 of the Presidency Towns Insolvency Act, as under section 26 of the Provincial Insolvency Act, a mortgagee setting up a mortgage executed within two years of the insolvency of the mortgagor, has the onus cast on him to show that the transaction was one executed in good faith and for consideration. The fact that the Official Assignee is moving to expunge a proof which he has admitted under section 26 of the former Act, does not shift the burden of proof from the mortgagee to the Official Assignee. *The Official Assignee v. Annapuranam* (1913) 20 I.C., 901, followed. An admission of proof by the Official Assignee is in no sense an adjudication and it is open to him as well as to other creditors to have an adjudication by the Court on notice, and in such adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise.

Official Assignee of Madras v. Sambanda Mudaliar ... (1920) I.L.R., 48 Mad., 739

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 115—Immunity of Official Assignee from stamp duty, whether applicable to his attorney—*Nattukottai Chettis*, whether bankers—Loans advanced on or without deposit of goods—Entry in same account—Banker's lien on goods for general balance of accounts—Indian Contract Act (IX of 1872), sec. 171.] An attorney representing the Official Assignee, is entitled to the same privileges as to stamp duty as the latter has under section 115 of the Presidency Towns Insolvency Act. Consequently, the attorney need not pay stamp duty for a copy of the order passed by a Judge of the High Court in the exercise of his insolvency jurisdiction. It is perfectly general knowledge, and it has been recognised in judicial decisions, that *Nattukottai Chettis* are the Indian bankers of this part of the country. *Vellayappa Chettiar v. Unnamalai Achi* (1916) 6 L.W., 687, and *Annamalai Chetti v. Annamalai Chetti*, (1919) 10 L.W., 67, referred to. The garnishee, a *Nattukottai Chetti*, had, in addition to money-lending business, customers who deposited money with him, kept pass books and went with them and drew money, and he paid interest on the deposits and bought and sold hundies and lent money on securities. *Held*, the garnishee was a banker. It appeared that diamonds were deposited by a customer with the garnishee from time to time and advances made thereon and the diamonds were redeemed from time to time but also that loans were made by him without deposit of diamonds and entered in the same account. *Held*, on the insolvency of the customer, that under section 171, Indian Contract Act, the garnishee was entitled as a banker to retain the deposits as security for his general balance of account with the insolvent, and that no contract to the contrary had been proved in the case.

Official Assignee of Madras v. Ramaswamy Chetty ... (1920) I.L.R., 43 Mad., 74

REGISTRATION ACT (III OF 1877), SS. 17, 49—Agreement between first and second mortgagees of the same property to share equally money realised from their mortgages—Suit by one of them to recover money realised by the other—Agreement also affecting the mortgaged property.] The appellants were the first mortgagees of certain immoveable property, and the respondents held a second mortgage of the same property; and they came to an

agreement "that both parties should as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realized on the date of realization." The agreement was found to be made for valuable consideration. The appellants having realized part of the estate, the respondents sued them in order to obtain their share of the proceeds to which they claimed to be entitled by virtue of the agreement. An objection was raised by the appellants that the agreement required registration, and not being registered could not be used as evidence. *Held*, on the construction of the agreement, that if the whole effect of the agreement was to provide merely that the realised money was to be divided in equal shares, there was nothing to require it to be registered and if on the other hand there were two distinct provisions, the one relating to rights of property, and the other with regard to the division of the money realized, then as the proceedings in the suit related merely to the question of the realized money, the agreement need not be registered for the purpose of being given in evidence in this suit, although it might require registration in a suit relating to the regulation of the rights against the estate itself.

Pyrravan Chetti v. Subramanian Chetti ... (1920) I.L.R., 48 Mad. (P.O.), 660

REGISTRATION ACT (XVI OF 1908), SEC. 17, SUB-SEC. (2)—Certifying adjustment of decree—Civil Procedure Code (V of 1908), Order XXI, rule 2—Whether exempted from registration.] A compromise made after decree, affecting any immoveable property of the value of over Rs. 100, and embodied in a petition presented under Order XXI, rule 2, Civil Procedure Code, which has been recorded by the Court, is exempt from registration. *Hemanta Kumari Debi v. Midnapur Zamindari Company* (1919) 46 I.A., 240, followed. *Chelamanna v. Rama Rao* (1913) I.L.R., 36 Mad., 46 and *Raja Venkatappa Nayanam Varu v. Raja Thimma Nayanam Varu* (1914) 27 M.L.J., 656, overruled.

Poorvanayi Ayisa v. Kundron Choken ... (1920) I.L.R., 48 Mad. (F.B.), 686

RELIGIOUS ENDOWMENTS ACTS (XX OF 1868), SS. 8 AND 41—See HINDU LAW ... 665

SALE OF LAND—Non-payment of price—Right of vendee to sue for possession—Decree for possession, whether can direct payment of price or be conditional on payment—Transfer of Property Act (IV of 1882), ss. 54 and 55.] A vendee who has not paid the purchase money of the lands bought by him, is entitled to a decree against the vendor for possession of such lands. The Court cannot make the decree conditional on payment of the purchase money, nor can it decree payment of the price to defendant in the vendee's suit.

Krishnamma v. Mali ... (1920) I.L.R., 43 Mad., 712

SALE IN EXECUTION OF DECREE—Benami purchase—Purchase on behalf of another person—Certified purchaser—Agreement to convey made after sale to carry out agreement made before sale—Civil Procedure Code, 1908, sec. 66, sub-sec. (1).] Section 66 of the Code of Civil Procedure, 1908, sub-section (1) enacts that "No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff, or on behalf of some one through whom the plaintiff claims." The

appellant purchased at an execution sale certain immovable property which he had before the sale agreed with the respondents to convey to them. After the sale agreements were made by which the appellant bound himself to carry out the original agreement with the respondents. In suits by the respondents against the appellant for specific performance the defence was that the suits were barred by section 63, sub-section (1). *Held* that the fresh agreements made after the sale, though carrying out those made before the sale, were not affected by section 63 and the suits were therefore not barred. *Venkatappa v. Jalayya* (1919) I.L.R., 42 Mad., 615, approved.

Vadivelu Mudaliyar v. Peria Manicka Mudaliyar ... (1920) I.L.R., 43 Mad. (P.C.) 643

TRANSFER OF PROPERTY ACT (IV of 1882), ss. 52 AND 91, CLAUSE. (f):—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 103 AND O. XXXIV, R. 1 ... 696

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53—*Fraudulent alienation to defeat and delay creditors—Attachment of alienated property—O. XXI, R. 63, suit under—Plea of attaching creditor as to fraudulent nature of alienation, validity of.* In a suit by an alienee, whose claim to property attached under a decree has been rejected, to set aside the order and establish his title, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors. *Subramania Ayyar v. Muthia Chettiar* (1918) I.L.R., 41 Mad., 612 (F.B.) and *Palaniandi Chetty v. Appavu Chettiar* (1916) 30 M.L.J., 565, overruled.

Ramanami Chettiar v. Malappa Reddiar ... (1920) I.L.R., 43 Mad. (F.B.), 760

TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54 AND 55:—*See* SALE OF LAND ... 712

WILL—*Fixed deposit—Direction to pay to another after death of depositor, whether a will.* A person depositing money with a fund filled in a form provided by the fund, whereby he nominated another as the person entitled to receive the money after his death. *Held* that this amounted to a will, and if made in the town of Madras, the nominee could not recover the deposit unless the nomination was duly executed and attested as a will and probate thereof obtained. *Per* KRISHNAN, J.—The direction created neither a charge nor a trust in favour of the nominee or a contract on which he could sue. *Towers v. Hogan* (1889) 23 L.R., Ir., 53 and *In re Williams* (1917) 1 Ch., 1, followed; *Florino Martices v. Pinto* (1917) 33 M.L.J., 476, distinguished.

Nana Tawker v. Bhawani Boyes ... (1920) I.L.R., 43 Mad., 728

PRIVY COUNCIL.*

RAMATHAI VADIVELU MUDALIAR (DEFENDANT),

v.

PERIA MANICKA MUDALIAR (PLAINTIFF).

[On appeal from the High Court of Judicature
at Madras.]

1920,
February 2
and 20.

Sale in execution of decree—Benami purchase—Purchase on behalf of another person—Certified purchaser—Agreement to convey made after sale to carry out agreement made before sale—Civil Procedure Code, 1908, section 63, sub-section (1).

Section 63 of the Code of Civil Procedure, 1908, sub-section (1) enacts that "No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff, or on behalf of someone through whom the plaintiff claims."

The appellant purchased at an execution sale certain immovable property which he had before the sale agreed with the respondents to convey to them. After the sale agreements were made by which the appellant bound himself to carry out the original agreement with the respondents. In suits by the respondents against the appellant for specific performance the defence was that the suits were barred by section 63, sub-section (1).

Held that the fresh agreements made after the sale, though carrying out those made before the sale, were not affected by section 63 and the suits were therefore not barred.

Venkatappa v. Jalayya (1919) I.L.R., 42 Mad., 615, approved.

Two Consolidated Appeals (47 of 1918) from a judgment and two decrees (10th April 1916) of the High Court (KUMARASWAMI SASTRI and SRINIVASA AYYANGAR, JJ.) at Madras which reversed two judgments and decrees of the Subordinate Judge of Chingleput.

The only point for report is whether the facts proved by the plaintiffs bring them within section 63 of the Code of Civil Procedure, 1908.

The facts are fully stated in the judgment of the Judicial Committee.

* *Present*:—Viscount CAVE, Lord MOULTON, Sir JOHN EDGAR and Mr. AMES ALL.

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B. Dube, for the appellant, contended that the purchase was "made on behalf of the plaintiffs," and was therefore barred by sub-section (1) of section 66 of the Civil Procedure Code, 1908; and referred to *Kishan Lal v. Garuruddhwaja Prasad Singh*(1), *Ganga Baksh v. Rudar Singh*(2) and *Suraj Narain v. Ratan Lal*(3). A suit on the ground that the property was purchased on behalf of the plaintiff, and one where the purchaser bought holding an agreement with the plaintiff to make the property over to him when bought, are practically the same, and are, it is submitted, both within section 66. Section 54 of the Transfer of Property Act, 1882, prevents any interest in the property being given by such a transaction.

Kenworthy Brown and Palat, for the respondents, contended that it having been found as a fact that they agreed to convey the property, section 66, sub-section (1), was not applicable. Its object was to make illegal benami purchases at sales in execution: see *Ganga Sahai v. Kesri*(4). It was quite legal for the purchaser to buy for himself, and afterwards to transfer it to the plaintiff. Moreover, it was in evidence that a fresh agreement was made after the certified purchase. That is a perfectly legal transaction: see *Venkatappa v. Jalayya*(5); and section 66 would not apply.

B. Dube replied.

The JUDGMENT of their Lordships was delivered by

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Viscount CAVE.—These are consolidated appeals from two decrees of the High Court of Judicature at Madras reversing two decrees of the Subordinate Judge of Chingleput, and giving judgment in both suits for the plaintiffs. The following statement of the facts is founded upon the findings of the High Court, which, for reasons which will hereafter appear, their Lordships accept as correct:—

One Sundarammal was the owner of certain lands in the village of Kovur and elsewhere in the Chingleput district,

(1) (1899) I.L.R., 21 All., 236. (2) (1900) I.L.R., 22 All., 424.
(3) (1918) I.L.R., 40 All., 159 (P.C.); L.R., 44 I.A., 201.
(4) (1915) I.L.R., 37 All., 545 (P.C.); L.R., 42 I.A., 177.
(5) (1919) I.L.R., 42 Mad., 615 (F.B.).

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subject to a first mortgage for Rs. 25,000 and interest and to a second mortgage for Rs. 9,500 and interest, and had incurred other debts. In the year 1902, the second mortgagees brought a suit to enforce their mortgage, obtained a decree for the sale of the mortgaged property, and themselves purchased it at the auction at a low price. Thereupon Sundarammal, in order to get this sale set aside under section 310-A of the Civil Procedure Code and to provide for her other debts, entered into an agreement with four persons named Murugappa, Kandasami, Munisami and Ponnambala, for the sale of the whole property to them at the price of Rs. 65,000, being a sum sufficient to pay off the mortgage and other debts and to provide a small balance for the vendor. These persons were friends of Sundarammal, and it was understood that they should dispose of the lands piecemeal and, after paying out of the proceeds of sale the mortgage and other debts of Sundarammal and any money due to themselves, should pay over to her any balance which might remain. The property was accordingly conveyed to the four persons abovenamed (who will be referred to as 'the vendees') on 10th August 1902; and on 15th August 1902, they paid into Court a sum of Rs. 15,598, being a sum sufficient to satisfy the second mortgagees, and got the sale to those mortgagees set aside. On 27th September 1902 the vendees divided amongst themselves about sixty acres of the land, which were taken to represent in value the amount which they had paid for redeeming the second mortgages; and some time afterwards, as no sale could be made of the remaining lands in Kovur, the vendees made a similar division of those lands among themselves, on the understanding that each of them should be responsible for his share of the debts. On this division a part of the land was reserved for Sundarammal, apparently in satisfaction of her interest in the ultimate balance to arise on realization. Murugappa died, and his interest in the lands became vested in his widow and certain alienees from her. Meanwhile, the first mortgagees, who had not been parties to the arrangements above recited, became dissatisfied; and in the year 1904 they took proceedings to enforce their mortgage, and on 14th March 1904 obtained a decree for sale. The sale was fixed for 8rd May 1905; and it is obvious that the persons claiming under the deed of 1902 ran the risk, unless they made

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some arrangement, of losing the benefit of their purchase and of the monies which they had found to satisfy the second mortgagees. They accordingly determined to bid for the property, and for that purpose got together a sum of about Rs. 10,000, which they contributed in unequal shares. It was then ascertained that the appellant Vadivelu and two other persons named Vythilingam and Dharmakartha Kandasami were also proposing to bid, and it was in order to meet this difficulty that the agreement giving rise to these suits was entered into. The agreement was entered into orally between the three persons last named, that is to say, the appellant, Vythilingam and Dharmakartha Kandasami, and the four original vendees or their representatives, and was to the effect that the vendees should not bid for the property but should permit the above named three persons to buy, that if they bought the vendees should advance to them the above sum of about Rs. 10,000 to assist them in providing the deposit and completing the purchase, and that whichever of them became the purchaser of any property allotted on the first or second division to any of the original vendees (with an exception to be immediately mentioned) should convey such property to such vendee or his representative, on payment by him of such proportion of the auction price as might be found to be due from him on an adjustment of accounts. An exception was made in the case of Ponnambala, one of the four vendees, who was not anxious to get back the property allotted to him on the second division; and, so far as he was concerned, the arrangement applied only to the property passing under the first division, and it was understood that, as regards the properties allotted to him on the second division, the appellant should stand in his shoes.

The auction accordingly took place, and the appellant was declared the purchaser of lot 3, comprising about 115 acres of the Kovur lands, for Rs. 21,500, other lots being purchased by Vythilingam and Dharmakartha Kandasami. The vendees duly made the contribution of Rs. 10,000 which they had promised; the balance required was raised from other sources, and sale certificates were issued to the purchasers and possession given to them. The lots purchased by Vythilingam and Dharmakartha Kandasami have been dealt with in accordance with the agreement, and need not be further referred to.

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In February or March 1906, there was an adjustment of accounts between the appellant and the vendees or their assignees, in accordance with the arrangement above referred to. The decision of the questions which arose on the adjustment was entrusted to a panchayat; and it appears from the evidence that the appellant and the other persons concerned signed a written undertaking to abide by the award of the panchayatdars. In the course of this adjustment a slight variation was made in the allotment which had been previously made of the lands; and this variation was accepted by all parties and embodied in the award which fixed the amount payable by each of the vendees on taking his conveyance. The appellant was then quite willing to deal with the allotted lands in the manner agreed before the auction sale and was a party both to the agreement to abide by the award of the panchayatdars and to the agreement to vary the allotments.

In the year 1907, the appellant having shown reluctance to carry out the arrangement, a suit (No. 6 of 1907) was brought against him by certain persons who were nominees of Munisami and Kandasami. This suit did not go to trial but was settled by a compromise, by which the appellant agreed to convey to the plaintiffs in that suit about fifty acres of the lands purchased by the appellant. At the time of this compromise the other persons representing the original vendees, that is to say, Ponnambala and the persons claiming under Murugappa, insisted upon the appellant conveying to them also their respective shares in the property; and the representative of the appellant, while pointing out that an agreement to execute such a conveyance could not be included in the *razinama* in which the compromise then in question was to be embodied, undertook that the conveyance should afterwards be made. At the same time a variation was made in the original agreement so far as the representatives of Murugappa were concerned, those persons undertaking to take over from the appellant certain further properties and to pay an additional Rs. 2,600 for them.

Notwithstanding the abovementioned transactions, the appellant afterwards refused to convey to Ponnambala and to the representatives of Murugappa the properties to which they were entitled under the arrangement; and ultimately, viz., in

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the years 1912 and 1913, these suits were brought to enforce such a conveyance. The plaintiffs in one suit were the persons claiming under Murugappa, and the plaintiffs in the other suit were Ponnambala and persons claiming under him, the appellant being the defendant in both suits.

At the hearing of the suits two main points were raised by the appellant, viz., (1) that the appellant had not in fact entered into the agreement alleged or received the contribution of Rs. 10,000; and (2) that in any case the suits were barred by section 66 of the Code of Civil Procedure. The Subordinate Judge, by whom the suits were tried, found the first issue in favour of the appellant, and accordingly it was unnecessary for him to deal with the second question. On appeal, the High Court overruled this decision and held that the appellant had received the Rs. 10,000 and had agreed to convey the properties in manner alleged by the plaintiffs. The Court also held that section 66 of the Civil Procedure Code was not a bar to the suits, and accordingly passed decrees in favour of the plaintiffs. Thereupon this appeal was brought.

Upon the issue of fact their Lordships have no hesitation in accepting the decision of the High Court. The finding of that Court is precisely in accordance with and is practically based upon a statement made by the appellant himself in the suit No. 6 of 1907 above referred to. The appellant in the course of the trial maintained that the statement which he had himself put forward in 1907 was wholly untrue and was made for some indirect purpose; but the High Court declined to accept this explanation, which was not supported by the other facts in the case, and their Lordships entirely agree with this view.

The alternative defence is based on section 66 of the Code of Civil Procedure, which is in the following terms:

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The question to be determined is whether the facts proved by the plaintiffs in these suits bring them within this section.

This point was dealt with in the judgment of the High Court as follows:

"On the first question, from the facts which we find to have been proved in this case, it is clear that section 66 is not a bar to the plaintiffs' claim for specific performance of the contract. Their case is not that the first defendant or Vythilingam or Dharmakarthas Kandasami were merely *benamidars*, but that they were to be real purchasers; but they agreed to convey to the plaintiffs in each of these suits or to their predecessors in title such portions of the property for which (as we find) they had already paid or had to pay under that agreement the balance of the purchase money. That, we think, is a sufficient answer to the plea under section 66 of the Civil Procedure Code."

It was argued by counsel for the appellant that the agreement relied upon by the plaintiffs, even as found by the High Court, amounted in substance to an agreement that the appellant should purchase as to certain parts of the property on behalf of the respondents or of the persons whom they represent; and he was able to point to certain expressions both in the plaints and in the evidence of some of the plaintiffs' witnesses which supported that view of the transaction. If the agreement entered into before the auction stood alone, there would be considerable force in this contention. The object of section 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale. It was decided in *Venkatappa v. Jalayya* (1), that an agreement subsequent to a purchase is not affected by the section, and there can be no question as to the correctness of that decision. In the present case agreements were entered into after the sale, namely, first at the time of the panchayat in 1906, and secondly, on the occasion of the compromise of the suit of 1907, by which the appellant bound himself to carry out the original contract with the respondents, with certain variations which were then agreed to and accepted by all parties. These

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sequent agreements are unaffected by the section and are accordingly enforceable against the appellant.

For the above reasons their Lordships will humbly advise His Majesty that these consolidated appeals fail and should be dismissed with costs.

Appeals dismissed.

Solicitors for the appellants:—*Barrow, Rogers and Nevill.*

Solicitors for the respondents:—*T. L. Wilson & Co.*

J. V. W.

PRIVY COUNCIL.*

KRISTNAYYA AND ANOTHER (DEFENDANT),

v.

LAKSHMIPATHI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature
at Madras,
and another appeal, two appeals consolidated.]

*Hindu Law—Adoption by widow who has no authority from her husband—
Mitakshara law as administered in the Dravada district of the Madras Presi-
dency—Consent of sapindas.*

Under the law of adoption as administered in the Dravada district a Hindu widow, in the absence of any authority from her husband to adopt a son to him, may make such an adoption with the consent of his sapindas; *The Collector of Madura v Mootoo Ramalinga Bathupathy* (1864) 12 M.I.A., 397.

There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband; *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (1876) I.L.R., 1 Mad., 174; L.R., 4 I.A., 1.

The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relations whose assent is likely to be influenced by improper motives; *Peera Basavaraju v. Balasurya Prasad Rao* (1918) I.L.R., 41 Mad., 998 (P.C.); L.R., 45 I.A., 265.

The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest

*Present:—Viscount CAVE, Lord Moulton, Sir JOHN EDGE and Mr. AMBER ALI.

judgment on the matter. But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused; *Venkamma v. Subramaniam* (1907) I.L.R., 30 Mad., 50, 53; L.R., 34 I.A., 22, 26.

It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it; *Sri Virada Pratapa Baghunatha Deo v. Sri Bruso Kishore Patta Deo* (1876) I.L.R., 1 Mad., 69 (P.C.).

In this case, on a consideration of the evidence, the widow was proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained, and the adoption was invalid.

CONSOLIDATED APPEAL No. 150 of 1917 from a judgment and decree (27th October 1915) of the High Court at Madras, which substantially affirmed a judgment and a preliminary decree (4th December 1911) and a final decree (13 March 1912) of the Temporary Subordinate Judge of Masulipatam.

The question for determination in this appeal is whether the adoption of the first appellant, Krishnayya, is valid under the Hindu Law as administered in the Madras Presidency. The factum of the adoption is not now disputed. It was made on 20th February 1908, by Narasamma, a widow who admittedly had no power to adopt from her late husband, but who is purported to have made the adoption with the alleged assent of her husband's sapindas. It is not disputed that at the time of the adoption there were five next reversioners, but the adoption was admittedly made with the assent of only one of them and of some of the remoter sapindas. Both Courts in India have concurrently found that the widow never applied to the remaining four next reversioners for their assent, and have consequently held that the adoption in question is invalid.

The Subordinate Judge held that the adoption was made without consulting the plaintiffs (who were the four next reversioners who were not asked to give their assent) and that therefore the adoption did not comply with the requirements of the Mitakshara Law in Madras. He accordingly declared the adoption null and void, and made a preliminary decree substantially allowing the plaintiffs' claim. A final decree was made on 18th March 1912.

Against the decree of the Subordinate Judge the plaintiffs as well as the defendants appealed to the High Court. The appeals were all heard together by Sir JOHN WALLIS, C.J., and SESHAGIRI

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AYYAR, J., the latter delivering the judgment and the CHIEF JUSTICE concurring. The High Court agreed with the view of the Hindu Law taken by the Subordinate Judge and held that it 'was the duty of Narasamma to have applied to the plaintiffs for their consent, and as we have found that that has not been done we hold that the adoption is invalid.' In the result therefore the appeal of the defendants failed.

Defendants Nos. 1, 2 and 4 appealed to His Majesty in Council.

The further facts, and material portions of the judgments of the Courts appear in the judgment of the Judicial Committee and a pedigree is set out showing the relationship of the parties.

ON THIS APPEAL

De Gruyther, K.C. and *B. Dube*, for the appellants, contended that the Courts below having found that the adoption was not made by the widow from capricious or corrupt motives, nor in order to defeat the interest of any of the sapindas, but on a consideration of her husband's spiritual welfare and with the consent of a family council of her near and distant kinsmen, the adoption ought not to have been held invalid according to the Mitakshara Law applicable to Madras. There was in fact a sufficient consent to validate the adoption: reference was made to *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (2), *Venkatakrishnamma v. Annapurnamma* (3) and Mayne's Hindu Law, 8th edition, paragraph 120. To obtain or even to ask the consent of the nearest sapinda was not essential. In *Venkamma v. Subramaniam* (4) it was not decided but it was merely an *obiter dictum*. In *Veerabasavaraju v. Balasurya Prasada Rao* (5), there was not the consent required by the law and it was inconsistent with the latest case, *Rangasami Gounden v. Nachiappa Gounden* (6); but that the respondents were applied to is, it is submitted, established by the evidence. The Subordinate Judge merely says an application was not probable because of enmity between the parties, which surely was a good

(1) (1868) 12 M.I.A., 397.

(2) (1876) I.L.R., 1 Mad., 174 (P.O.); L.R., 4 I.A., 1.

(3) (1900) I.L.R., 23 Mad., 486.

(4) (1907) I.L.R., 30 Mad., 59, 53 (P.O.); L.R., 34 I.A., 22, 26.

(5) (1918) I.L.R., 41 Mad., 993 (P.O.); L.R., 45 I.A., 265.

(6) (1919) I.L.R., 42 Mad., 523 (P.O.); L.R., 46 I.A., 72.

reason in law for not applying for the respondent's consent: KRISHNAYYA v. LAKSHMI-PATHI. it is possible they were asked but withheld their consent.

Dunne, K.C. and *J.M. Parikh*, for the respondents, contended that both Courts in India had concurrently found that the widow never applied to the plaintiffs for their consent, and as she was bound to do so, the adoption made with the consent of only one of the five next reversioners is invalid. Here there is no reason for disturbing concurrent findings: and the certainty that consent will be withheld is not a sufficient reason in law for not asking for it. Reference was made to *Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai* (1), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (2), and *Veera Basavaraju v. Balasurya Prasada Rao* (3). All the authorities show that the consent of the sapindas is essential to the obtaining of a valid adoption where the widow has no authority from her husband; the adoption under these circumstances is invalid.

De Gruyther, K.C., replied.

The JUDGMENT of their Lordships was delivered by

Viscount CAVE.—These are consolidated appeals from a decree of the High Court of Judicature at Madras, which affirmed, with variations, a decree of the Subordinate Judge of Masulipatam. The question for determination is whether the adoption of the first appellant, Adusumilli Krishnayya, is valid under the Hindu Law as administered in the Madras Presidency.

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The parties are subject to the Mitakshara Law of adoption as administered in the Dravida country; and that law, which has been considered by the Judicial Committee in several recent cases, is now free from doubt. It was decided in the Rāmād case, *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (4), that under the law here referred to a Hindu widow, although not authorized by her husband to adopt a son for him, may nevertheless make such an adoption with the consent of his sapindas. In a later case, *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (2), it was said that:—

"There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the

(1) (1908) I.L.R., 30 Cal., 303 (P.C.); L.R., 30 I.A., 41.

(2) (1876) I.L.R., 1 Mad., 174 (P.O.); L.R., 4 I.A., 1.

(3) (1918) I.L.R., 41 Mad., 998 (P.O.); L.R., 45 I.A., 265.

(4) (1868) 12 M.I.A., 397.

adoption was made by the widow, not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

The reference in the last-mentioned case to a 'family council' gave rise to some doubt whether, where there were agnatic relations closely related to the deceased, the assent of those standing in a remoter degree was either necessary or sufficient; but this doubt was resolved in the recent case of *Veera Basataraju v. Balasurya Prasada Rao*(1), where it was held that the absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relatives whose assent is more likely to be influenced by improper motives. This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded. Nor does it contemplate cases where the nearest sapinda happens to be in a distant country, and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must, however, be added that, save in exceptional cases such as those mentioned above, the consent of the nearest sapindas must be asked, and if it is not asked it is no excuse to say that they would certainly have refused: *Venkamma v. Subramaniam*(2). Regard must also be had to the following observations of the Board in *Baghanadha v. Brojo Kishore*(3):

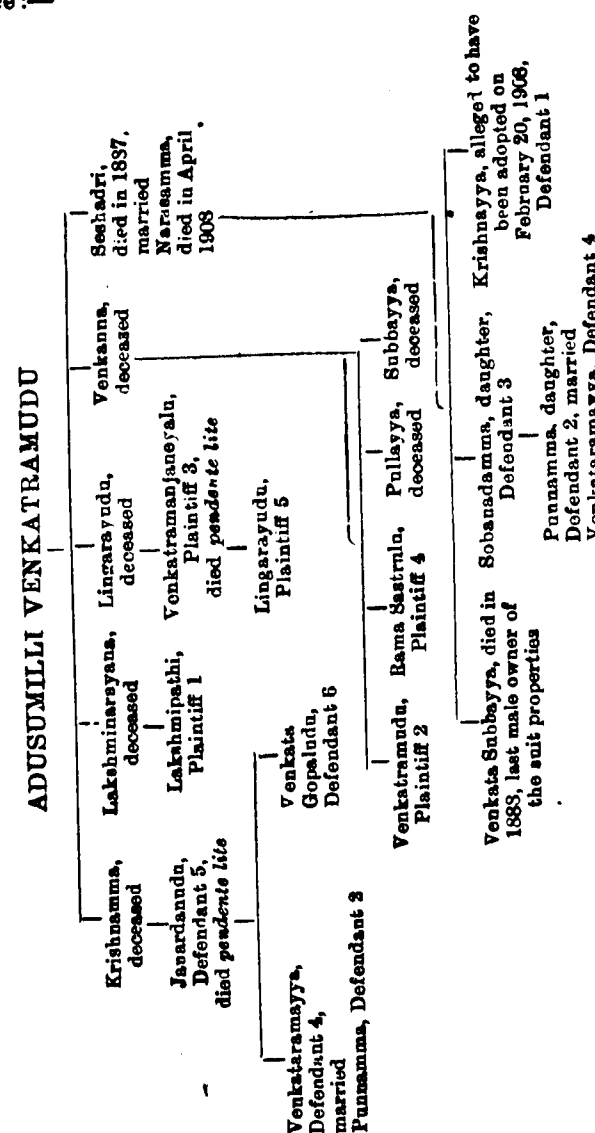
"But it is impossible not to see that there are grave social objections to making the succession of property—and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession—dependent on the caprice of a woman, subject to all the pernicious influences which interested

(1) (1918) I.L.R., 41 Mad., 998 ; L.R., 45 I.A., 265.
(2) (1907) I.L.R., 30 Mad., 50 (P.C.) ; L.R., 34 I.A., 22.
(3) (1876) I.L.R., 1 Mad., 69 ; L.R., 3 I.A., 193.

advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

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Turning now to the facts of the present case, the relationship between the parties will be explained by the following pedigree:—



Seshadri, who was separated from his brothers, died in the year 1887, leaving a widow, Narasamma, and an only son,

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Venkata Subbayya, who was then about thirteen years of age and unmarried. In the month of October 1888, this son was murdered, and his mother succeeded to the property of her husband, taking a Hindu widow's estate. Pulliah and Subbiah, two of the sons of Seshadri's brother Venkanna, were charged with the murder, but were acquitted. They were then charged with the theft of some jewels which were on the person of the murdered boy before his death, but Pulliah died before the trial and Subbiah was ultimately acquitted on this charge also. On 8th September 1901, Narasamma called a meeting of her husband's gnatis and obtained from 14 of them a deed authorizing her to receive in adoption to her husband any boy she might like. At that time the nearest sapindas of Seshadri were six in number, viz., the fifth defendant, Janardanudu, and the five plaintiffs; but of these only Janardanudu signed the deed, and the other signatories were gnatis of remoter degrees. Narasamma did not at once act on this authority, but upwards of six years afterwards, viz., on 20th February 1908 she adopted the defendant Krishnayya, who was then of age. Before making the adoption she entered into agreements with Krishnayya and his natural father under which the greater part of the property of Seshadri was put at her absolute disposal; and she, in fact, disposed of it in favour of the issue of her daughter. Narasamma died in April 1908, and shortly afterwards this suit was brought by the plaintiffs to set aside the adoption.

From the above statement of facts, standing alone, the obvious conclusion would be that the adoption was invalid for want of the assent of five out of the six nearest sapindas. But the defendants by their written statement in the case alleged that Narasamma had applied, first to Venkanna (the only brother of Seshadri who survived him), and after his death to the plaintiffs and Subbiah, for their authority to make an adoption; and that all those persons "out of dishonest and corrupt motives" and by reason of the longstanding enmity caused by the charges of murder and theft made against Pulliah and Subbiah, and with the desire to succeed to the property of Venkata Subbayya, had refused or neglected to grant the authority asked for. In support of this plea the defendants called evidence of four attempts to obtain the desired authority. First, it was alleged that Narasamma, through her gumasta,

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applied to Venkanna for his consent, and that he put off his reply and died shortly afterwards without giving the desired authority. Secondly, it was alleged that Narasamma personally requested the third plaintiff, Venkatramanjaneyalu, to consent to an adoption and to get the other plaintiffs and Subbiah to consent, that he promised to consult them and let her know, but that he never, in fact, gave her a reply. Thirdly, it was stated that the plaintiffs and Subbiah were invited to and were present at the meeting of gnatis on 8th September 1901, and that on being requested to agree to an adoption they replied that "there was no hurry" and shortly afterwards left the meeting. Fourthly, it was alleged that shortly before the actual adoption in 1903 Narasamma again sent an emissary to the plaintiffs (Subbiah being then dead) and asked for their consent to an adoption, but that they refused to give it except on payment of Rs. 10,000. The evidence relating to these allegations was examined both by the Subordinate Judge and by the High Court, and both tribunals came to the conclusion that none of the alleged requests had been proved. Notwithstanding these concurrent findings, their Lordships were pressed by counsel for the appellants to examine the evidence on this question; and as the findings of the Subordinate Judge were by no means clear and his reasons were somewhat inconsistent, they have considered the evidence which was brought to their notice by counsel on both sides. As the result of this consideration they have come to the following conclusions:—

1. The finding of the Courts on the question of these alleged applications was mainly based upon the view that, having regard to the hostility existing between the plaintiffs and Narasamma, it was unlikely that they would have been asked for their consent; but the evidence as a whole does not appear to support this view. The first plaintiff was not on unfriendly terms with Narasamma and at one time got her lands cultivated for her; and the Subordinate Judge in one part of his judgment says that there was 'no ill-feeling' between them. The third plaintiff was plainly on speaking terms with Narasamma and was from time to time consulted by her; and the Subordinate Judge himself says that

"it is not unlikely that he was requested by Narasamma to give his consent and also ascertain the wishes of his cousins, as probably

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the other persons were not quite so well disposed towards Narasamma as the third plaintiff."

As to the other plaintiffs there was no clear evidence; and although it is very probable that the charges made against their brothers caused an estrangement between the second and fourth plaintiffs and Narasamma, the Subordinate Judge expressed a doubt whether this feeling continued in the same intensity down to the year 1901. Upon the whole, the true inference appears to their Lordships to be that, while there was some unfriendliness between Narasamma and two of the plaintiffs, this did not extend to the other plaintiffs and was not in any case such as to prevent Narasamma from asking for their consent to an adoption. Further, in no case is there evidence of such malice on the plaintiffs' part as would prevent them from forming an honest judgment on the matter.

2. It appears probable that Venkanna was asked for his consent; but as he died without giving a reply and there is no evidence of ill-feeling on his part, this circumstance is immaterial.

3. It is also not improbable that shortly before the meeting of September 1901, the third plaintiff was consulted on the question of an adoption and was asked to ascertain the views of the other plaintiffs and Subbayya; but there is nothing to show that he did in fact ask for their consent or that his reply was delayed by reason of spite or malice. This circumstance, therefore, is also of little importance.

4. With regard to the meeting of 8th September 1901, the evidence is conflicting. The defendants' witnesses say that the plaintiffs were present, and on being consulted said that there was no hurry about the matter and went away; but this is denied by the surviving plaintiffs. The defendants' witnesses were not believed by the Subordinate Judge, and it must be held that this allegation is not proved.

5. As to the alleged request in 1908, the defendants' evidence is conflicting and unreliable, and this allegation also breaks down.

The result of the above survey of evidence is that, in their Lordships' view, Narasamma is proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest sapindas is proved to have

withheld his consent for any malicious or corrupt reason. It follows that the necessary assent of sapindas was not obtained, and the adoption was invalid.

Counsel for the appellants put forward an alternative argument, viz., that in view of the finding of the Courts in India that there was great hostility between the plaintiffs and Narasamma, it was unnecessary for her to ask for their consent; but this argument cannot be entertained. It is inconsistent, not only with the defendants' pleading, but with the whole of their evidence and arguments in the Courts below; and it is not open to them to make an entirely new case before this Board. In any case the argument derives no support either from the facts or from the law as above explained.

Apart from the absence of the necessary assent, other objections to the adoption were put forward on behalf of the respondents. It was said (1) that an authority given by sapindas to adopt "any boy at any time" is invalid [(see *Suryanarayana v. Venkataramana*)(1)]; (2) that an authority given by sapindas in 1901 could not validly be executed in 1908 when several of the signatories were dead and the opinion of others might have altered; and (3) that an authority to adopt asked and given for religious motives and in order to keep up the line of succession to Seshadri was not properly exercised by the adoption of Krishnayya on the terms that he should give up to the adopting widow or to her relatives the greater part of her late husband's estates. These questions, although raised in the Courts below, were not the subject of decision there; and their Lordships accordingly refrain from expressing any opinion upon them. But it is certain that these circumstances do not detract from the obligation imposed upon the Courts in cases of this character to require a strict compliance with the conditions imposed by law.

For the above reasons their Lordships will humbly advise His Majesty that these appeals be dismissed with costs.

Appeals dismissed.

Solicitor for the appellants:—*Douglas Grant.*

Solicitors for the respondents:—*Barrow, Rogers and Nevill.*

J.V.W.

PRIVY COUNCIL*

VYRAVAN CHETTI AND OTHERS (DEFENDANTS),

v.

SUBRAMANIAN CHETTI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court of Judicature
at Madras.]1920,
April 26.

Registration Act (III of 1877), ss. 17, 49--Agreement between first and second mortgagees of the same property to share equally money realized from their mortgages--Suit by one of them to recover money realized by the other--Agreement also affecting the mortgaged property.

The appellants were the first mortgagees of certain immoveable property, and the respondents held a second mortgage of the same property; and they came to an agreement "that both parties should as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realized on the date of realization." The agreement was found to be made for valuable consideration. The appellants having realized part of the estate, the respondents sued them in order to obtain their share of the proceeds to which they claimed to be entitled by virtue of the agreement. An objection was raised by the appellants that the agreement required registration, and not being registered could not be used as evidence.

Held, on the construction of the agreement, that if the whole effect of the agreement was to provide merely that the realized money was to be divided in equal shares, there was nothing to require it to be registered and if on the other hand there were two distinct provisions, the one relating to rights of property, and the other with regard to the division of the money realized, then as the proceedings in the suit related merely to the question of the realized money, the agreement need not be registered for the purpose of being given in evidence in this suit, although it might require registration in a suit relating to the regulation of the rights against the estate itself.

APPEAL No. 96 of 1919 from a judgment and decree (28th November 1917) of the High Court at Madras, which reversed a judgment and decree (30th August 1916) of the Temporary Subordinate Judge of Rāmnād.

The suit giving rise to this appeal was instituted by the respondents against the appellants for Rs. 28,576, due under an agreement, dated 14th March 1907, and they asked for a personal decree. The appellants and respondents were

* Present:—Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDER, and Mr. ANKER ALI.

mortgagees of the same property, the appellants having the prior mortgage, and the respondents a second mortgage. The respondents having already advanced to the mortgagors Rs. 10,000 agreed to advance a further sum (to be secured on the same property) and to pay thereout Rs. 39,000 in discharge of a mortgage of 27th August 1901. On 14th March 1907 this was done, the sum due to the appellants being thereby reduced to Rs. 57,000 (of which Rs. 1,100 was only secured by a promissory note) and that due to the respondents increased to a like sum. These transactions were recited in the agreement then executed by the appellants and respondents, and clauses (3) and (4) provided as follows:—

"(3) In respect of the (total) sum of Rs. 1,15,000 and subsequent interest due to both parties under documents as per particulars aforesaid from the two persons, Udayanasami Tevan Avargal and Sundara Nachiar Avargal (mortgagors) mentioned therein, both parties should, as regards rights stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves as per terms mentioned herein, whatever amount may be realized, on the date of realization. If the amount realized on the same date happens to be paid on subsequent dates, it should be received after calculating interest thereon at the current (account) rate obtaining among the people of our community in Madras.

"(4) In respect of the enjoyment on lease of Thiruvattiur village at a rent of Rs. 2,000 per fasli which alone (out of the villages) got on lease in the name of Vyraavan Chetti, of the other part from Sundara Nachiar Avargal was taken possession of, both parties are to credit in each fasli towards the debt, in equal halves, the rent amount from the current fasli 1316 at the rate of Rs. 625 which is deemed at present to belong to the one-fourth share of Sundara Nachiar Avargal out of the said amount."

The suit was brought on 29th November 1915. The written statement of defence admitted the execution of the agreement but pleaded that it was unenforceable as not being properly stamped and registered, and that the claim was excessive. A question as to the consideration for the agreement was raised by the appellants before the Subordinate Judge, but was overruled, as was an objection as to the stamp, but the want of consideration was not raised on the appeal to the High Court.

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The Subordinate Judge was of opinion that the agreement required registration under section 17 of the Registration Act and that it was accordingly invalid. He dismissed the suit but without costs.

From that decree an appeal was preferred by the respondents to the High Court and was heard by Sir JOHN WALLIS, C.J., and SADASIVA AYYAR, J., who differed in opinion on the question of registration. The Chief Justice held that the agreement did not require registration. After citing clause (3) of the agreement he said—

“This last stipulation makes it clear, I think, that the agreement was only intended to operate on sums realized by either party as they were realized, and not to affect the right of realization. The document goes on to provide that the amounts realized under certain leases should be divided in the same manner, and it is in respect of this realization that the suit is brought. The document does not, in my opinion, give either of the parties a right to sue on the mortgages or leases executed in favour of the other, or to set up this agreement as affecting their respective priorities in a suit by either of them on their respective mortgages, which would of course affect immoveable properties. It was, I think, intended merely as an agreement that whatever was realized should be equally divided. In this view I do not think it was a document requiring registration under section 17.”

SADASIVA AYYAR, J., was of opinion that even if the document came in some respects, as he was of opinion it did, within section 17 of the Registration Act, it was admissible in evidence for the purpose of the present suit. There was nothing, he said to prevent the plaintiffs from using it in evidence of the personal covenant to divide the realizations equally when and as realized.

The appeal was accordingly allowed, and the suit was remanded to the Subordinate Judge to try the questions relating to the amount due under the agreement, and to the interest chargeable. Against the order of remand the present appeal was brought to His Majesty in Council.

ON THIS APPEAL

DeGruyther, K. C. and *B. Dubé* for the appellants.

Sir Erle Richards, K. C. and *Kenworthy Brown* for the respondents.

The JUDGMENT of their Lordships was delivered by Lord BUCKMASTER.—Their Lordships think it unnecessary to trouble Counsel for the respondents in this case.

The appellants are the first mortgagees of certain property. The respondents hold a second mortgage upon the same estates. It is unnecessary to determine the circumstances under which those mortgages arose, or the history of the title of the mortgagor. It is sufficient to say that on 14th March 1907, an agreement was entered into between the first mortgagees and the second mortgagees which has given rise to the present dispute. The effect of that agreement was to put the first and the second incumbrances on a relative position of equality with regard to the security. The appellants having realized part of the estate, the respondents instituted the proceedings out of which this appeal has arisen for the purpose of obtaining their share of the proceeds to which they claimed to be entitled by virtue of the agreement. The answer that was raised was, first, that the agreement required registration, and not having been registered could not be given in evidence; and, secondly, that in any circumstances no consideration had even been given by which the agreement could be supported. With regard to the question of consideration it is sufficient to say that the learned Judge before whom the case was first heard found that there was consideration from the fact that contemporaneously with the execution of this agreement there had been an arrangement made by which the defendants had profited by loans that the plaintiffs had made to the extent of Rs. 42,000, and the question was not further raised in the High Court. The point therefore is not open to the appellants; but if it were, their Lordships think there was abundant evidence to support the conclusion of the Subordinate Judge.

The real question, therefore, which now arises is whether or no the agreement of 14th March 1907, required to be registered for the purpose of enabling it to be given in evidence upon these proceedings. That depends entirely upon the consideration of clause (3) of the agreement. Clause (3) of the agreement, after referring to the total amount of rupees that is owing to both the mortgagees and stating that interest is due to the first and second mortgagees under the documents, provides

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that their rights shall be arranged in the following way, that "both parties should, as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realized, on the date of realization."

The clause is open to two interpretations. It may be that the provision that the rights, both prior and subsequent, should stand on the footing of equality, is explained and limited by the following words, which state that the amounts of realization shall be divided and appropriated in equal halves, or it may mean that two separate and distinct results are effected by the clause: first, that the rights should stand on a footing of equality; and, secondly, that the proceeds should be equally divided. Whichever interpretation is taken there is no objection to the lack of registration in such proceedings as those out of which this appeal has arisen, for, if the whole effect of the agreement is to provide merely that the realized money is to be divided in equal shares, then there is nothing in this agreement which requires to be registered, and if, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realization moneys then, as these proceedings relate merely to the question of the realized money, it need not be registered for the purpose of being given in evidence in this suit, although it may be that it would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the estate itself.

For these reasons their Lordships think that the judgment of the High Court was quite right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants :—*Henry S. L. Polak.*

Solicitor for the respondents :—*Douglas Grant.*

J. V. W.

PRIVY COUNCIL.*

AMBALAVANA PANDARA SANNIDHI AVERGAL
(PLAINTIFF),

v.

MEENAKSHI SUNDARESWARAL DEVASTANAM OF
MADURA AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at
Madras.]

1920,
February
17, 19, 20
and
April 27.

Hindu Law—Endowment—Trustee of Hindu Religious endowment—Right of Trustee to possession of endowed property—Madras Regulation VII of 1817, sec. 12—Religious Endowments Act (XX of 1863), ss. 3 and 4—Limitation Act (IX of 1908), schedule I, article 141—Possession adverse to Trustee.

The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenues so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his.

The appellant in this case claimed to be *hukdar* or trustee of the Thanappa Mudali Kattalai, an endowment for the performance of certain ceremonies in a temple at Madura, and to be entitled to the possession of four villages forming part of the endowment. The villages came into the possession of the East India Company in 1801 and remained in their possession until 1849, when the general manager of the temple, was placed by the company in possession. Since 1849 the villages were in the hands of the said manager and his successors, the respondents, the whole of the revenue had been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager, and the temple committee.

Held, in a suit brought in 1908 by the appellant for possession of the villages, that the possession of those who had held the villages from 1849 was possession adverse to the appellant and his predecessors in title and that the suit was barred by limitation.

* *Present* :—Viscount CAVE, Lord Moulton, Sir JOHN EDOE and Mr. AMIR ALI.

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APPEAL No. 70 of 1917 from a judgment and decree (10th November 1914) of the High Court at Madras, which affirmed the decree (16th January 1911) of the District Judge of Madura.

The suit from which this appeal arose was brought by the appellant as *hukdar* or trustee of a religious and charitable endowment, for possession of four villages, Amur, Mallapuram, Chettikulam and Chinna Ulagani, situate near the town of Madura, and admittedly forming part of the endowment. The suit was dismissed by the District Judge. In the High Court (Sir JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J.) the Judges differed in opinion as to the title set up by the plaintiff, the Chief Justice being of opinion that apart from limitation it was established by the documentary and other evidence; but he held that the suit was barred by lapse of time. SESHAGIRI AYYAR, J., who put a different construction on the document, decided against the plaintiff's title.

The chief questions for determinations on this appeal were (1) as to the plaintiff's title to the lands as *hukdar*, (2) as to the defence of limitation, and (3) as to the trusts of the endowment, whether the funds were to be expended in the performances of the specific religious services and ceremonies, or whether (as pleaded by the defendants) they were available for the general upkeep and maintenance of the temples of which the defendants are in control under Act XX of 1863.

The plaintiff is the head of a monastic institution at Tiruvadur known as an *adhinam* or *mutt*, and he and his predecessors in office for the time being are hereinafter referred to as the Pandaram or Pandara Sannidhi. The ascetics of the next rank are called *Tambirans*, some of whom are in charge of minor *mutts* which are dependent on the *adhinam*. One of such dependent *mutts* is situated at Madura. It was presented early in the eighteenth Century to the Pandara Sannidhi by the family of Thanappa Mudali, the founder of the charity in question, known as the Thanappa Mudali Kattalai, of which the plaintiff claims to be the hereditary *hukdar* or trustee.

No endowment deed was produced. It was undisputed that down to the present time the Pandaram through a *Tambiran* appointed by him and residing in the *mutt* at Madura has

performed the functions of *vicharanai* or manager of the *kattalai*. This has been the uninterrupted practice for the whole period covered by the evidence. It was further undisputed that the Pandaram in his capacity as *hukdar* or trustee has held and now holds possession of Kudipatti and other villages, situated outside the Madura country, as part of the endowment.

Government subsequently decided to give up the actual management of the temples through its ordinary officials, and in 1842 it proceeded, in exercise of its powers under Regulation VII of 1817, to appoint a manager of the temples themselves. In 1849 it further transferred to the same officer the management of the villages in its possession belonging to the *kattalai*—which was recognized as an institution distinct from the temples—and required him to execute a *razinamah* or agreement for their due administration under the orders of Government. Notwithstanding that the actual management of the villages had been placed in the hands of the temple manager, Government through the District officers, still carried out the duties of general superintendence and control under Regulation VII of 1817. That regulation remained in force until the Religious Endowments Act of 1863 came into operation and repealed it so far as concerned the institution now in question.

When the Act of 1863 was passed the Government of Madras took action under section 7, and on 19th August 1864 appointed a committee,

“to take the place and to exercise the powers of the Board of Revenue and the local agents under the Regulation hereby repealed.”

This committee in due course was succeeded by the committee who are respondents to the present appeal. The committee acted on the theory that the *kattalai* endowments were owned by the temple and intended for its general upkeep, and “not simply for specific services or religious charity therein.”

The assumption by the committee of this attitude involved not only a denial of the plaintiff's right as *hukdar* and trustee, and an interference with his rights and duties, but also a diversion of the trust funds to purposes different from the original objects of the endowment.

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Thereupon on 14th December 1908 the Pandara Sannadhi instituted the present suit against the manager of the temple and the temple committee.

The District Judge was of opinion that the plaintiff had failed to make out his case; that the funds of the kattalai were available for the general purposes of the upkeep of the temples; that the Pandara Sannadhi had never been constituted trustee, nor had as such; and that the defendants were not estopped by the previous litigation and its result. As to the defence of limitation, he held that the Collector, the Managers, and the temple committee were in possession of the endowments in question under a claim of adverse title, and consequently that the plaintiff's rights and the interests of the trust were barred by the law of limitation. An appeal by the plaintiff to the High Court was heard by Sir JOHN WALLIS, C.J., and SESHAGIRI AYYAR, J.

The former came to the conclusion on the evidence as a whole that the Pandara Sannadhi was the rightful trustee or *hukdar* of the charity and its endowments. He said:—

"It is not disputed that the endowment of the four villages in suit, and another which has ceased to belong to it, was founded by one Thanappa Mudali, whose name it bears, long before Madura came under the Government of the East India Company at the beginning of the nineteenth century. According to the tradition he was a minister of the ruling Nayak at the beginning of the eighteenth century. It is also not disputed that the donors of endowments such as this for temple purposes were in the habit of appointing separate trustees or that many such endowments in different temples in Southern India were entrusted to the predecessors of the plaintiff Pandara Sannadhi, and were managed by him through the agency of *tambirans*, as his ascetic followers are called, who resided in mutts belonging to him in the neighbourhood of the temples in question. He has been compared in one of the cases to a bishop, but his position more resembles that of an abbot of a monastery with dependent priories or mutts in different parts of India, many of them in charge of a single ascetic or *tambiran*."

The Chief Justice accordingly was of opinion that the position of the Pandara Sannadhi was recognized, and that but for the question under the law of limitation he would have been for reversing the decree of the District Judge.

On the question of limitation the Chief Justice was of opinion that

"whatever the reasons which induced the Pandara Sannadhi to acquiesce in the suit villages being handed over to the manager of the temple in 1849 there is no doubt that they have since been in possession of the manager of the temple when there was one; and when there was not in the possession and management of the local temple committee under Act XX of 1863, who for some periods managed the affairs of the temple themselves instead of appointing a manager as they are required to do under the Act. Their possession, equally with that of the manager when there was one, was clearly on behalf of the temple, and also, as it seems to me on the facts already stated clearly adverse to the plaintiff."

In this view of the facts and the law, the learned Chief Justice held that the Pandara Sannadhi was too late in asserting his right to possession of the villages as trustee or *hukdar*, and that the suit was barred by limitation.

SESHAGIRI AYYAR, J., differed in opinion from the Chief Justice as to the title of the Pandara Sannadhi. But he agreed that in any case the suit was too late. He considered that the possession and management of Government up to 1849 was not in derogation of the rights of the true trustee, but that from that year there was adverse possession.

ON THIS APPEAL

De Gruyther, K.C., Kenworthy Brown and Narasimham, for the appellant, contended that the findings of the Chief Justice on the facts were all in favour of the appellant. He succeeded to the rights of his predecessor in the office of Pandara Sannadhi, which were those of the hereditary trustee of the kattalai, and all its endowments, and those rights included the rights in the villages now claimed by the appellant. The suit, it was contended, was not barred by limitation. There was no adverse possession by any one as against the hereditary trustee, to whose rights the appellant succeeded. The possession and management of the villages in suit by Government, whether under the Regulation VII of 1817 or otherwise, were not adverse to the Pandara Sannadhi, nor, it was submitted, did it become adverse when possession was handed over officially to the manager of the temple. Nor was possession adverse when held by the Temple Committee which was appointed under the

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Religious Endowments Act (XX of 1863) section 7 and did not bar the rights of the hereditary trustee of the endowment. Reference was made to *Sitharama Chetty v. Sir Subramania Iyer*(1). The respondents had no possession of the villages under any claim of title, they only had the duty of supervision, the rights of the trustee being undisturbed. Regulation VII of 1817, section 12, was not applicable to the present case: the Religious Endowments Act (XX of 1863), section 3, applied. The appellant asserts that the income of the endowment is being wrongly dealt with, which distinguishes *Balwant Rao v. Puran Mal*(2), from the present case. The endowment was created solely for the maintenance of the kattalai and the performance of the trusts thereof and not for the general purposes of the temple as asserted by the respondents. The ordinary meaning of the word 'kattalai' was rightly, stated in the case of *Vythilinga Pandara Sannadhi v. Somasundara Mudaliar*(3), and there is nothing to show it was used in any different sense here. The receipt of the income of the villages was not adverse to the appellant's possession as hukdar. Reference was made to *Jalandhar Thakur v. Jhurula Das*(4).

A. M. Dunne, K.C., and B. Dubé for the respondents, were not called upon.

The JUDGMENT of their Lordships was delivered by

Lord
MOULTON.

Lord MOULTON.—This is a suit brought by the *Pandara Sannidhi* of an important mutt situated in Tanjore to recover possession of four villages situated in the Madura district. He alleges that he is *hukdar* or trustee of the *Thanappa Mudali kattalai*, which is an endowment for the performance of certain ceremonies in a temple at Madura, and that these villages form part of that endowment, and that, therefore, as such trustee he is entitled to their possession. The defendants are the manager of the temple and the members of the Temple Committee appointed by the Government under Act XX of 1863. They deny that the plaintiff is trustee of the endowment, or that he has any right either to the management or to the possession

of the properties in question, and they further allege that if he had at any time such right his claim is barred by limitation.

In the Court of First Instance the District Judge decided in favour of the defendants on the ground that the plaintiff had failed to prove that he was trustee of the endowment, and also on the ground of the Statute of Limitations. On appeal to the High Court, both Judges agreed with his finding that the plaintiff's suit was barred by limitation, but they differed in opinion as to whether the plaintiff had proved his claim to be trustee of the endowment. In the result, therefore, the plaintiff's suit was dismissed in both Courts, and from these decisions the present appeal is brought.

The history of the villages in suit has been examined in great detail in the proceedings in the Courts below, and certain points in that history may be taken to have been established. The documents relating to the creation of the *kattalai* appear to be lost, but it is agreed that the founder was Thanappa Mudali, who was Prime Minister to the Ruler of Trichinopoly between the years 1704 and 1735. It is not clear at what date or how these villages became connected with the endowment, but it must have been at an early date because very shortly after the foundation of this *kattalai* the Muhammadan Government attached these villages, and retained possession of them until about 1790, when the Madras Government assumed possession of Madura district. Ultimately, in 1801, the villages came into the possession of the East India Company, and remained in their possession until 1849, when the general manager of the temple at Madura (who had been appointed by the Company in 1842 in exercise of the powers given them under Regulation VII of 1817) was placed by the Company in possession of the villages.

The income derived from the villages in suit has been applied in various ways during this period. During the time that they remained under attachment by the Muhammadan Government it would seem that a portion of the income was applied to the uses of the endowment, and the remainder was appropriated by that Government. There is no evidence as to what happened between 1790 and 1801. From 1801 to 1849, while the villages in question were in the possession of the East India Company, the revenue from them was applied in whole or in part by the Company to the uses of the endowment. In the

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(1) (1916) I.L.R., 39 Mad., 700 (717).

(2) (1884) I.L.R., 6 All. 1 (P.C.): L.R. 10, I.A. 90.

(3) (1894) I.L.R., 17 Mad., 199.

(4) (1915) I.L.R., 42 Cal., 244 (P.C.): L.R. 41, I.A. 267.

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earlier years it appears to have been handed over as a whole, but from the year 1817 the Government followed the practice of settling each year a budget showing the amount necessary for the expenses of the *kattalai* for that year, paying over only so much of the income as was sufficient to satisfy that budget, and retaining the remainder. Since 1849, the villages have been in the hands of the predecessors of the defendants, and the whole of the revenue has been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager and the Temple Committee.

Throughout the whole of the history of these villages from the date of the Muhammadan attachment to the present time, there is one fact that is clear from the evidence, i.e., that these villages have never been in the possession of the plaintiff or his predecessors. Other villages form part of the property of the endowment, and these have been in the possession of the plaintiff and his predecessors throughout. These latter villages appear not to have been attached by the Muhammadan Government but to have been left in the possession of the predecessors of the plaintiff on behalf of the endowment. But in all the records relating to possession the contrast between those that relate to the villages in suit and those that relate to these other villages is marked. The latter are entered as being in the possession of persons representing the predecessors of the plaintiff. This is never the case with regard to the villages in suit.

The argument in favour of the plaintiff's claim is therefore in reality an argument which is not founded on evidence relating to the past history of the villages, but is of a legal nature. It avers that he and his predecessors have held the position of general trustee of the endowment, and that as such the villages in suit whose revenues form part of that endowment must, as a matter of law, be his and he must therefore be entitled to possession. The people who manage the villages and collect the revenues are, he contends, acting for him, and cannot set up an adverse title, so that their possession has been, in the eye of the law, his own. In their Lordships' opinion, there is a fallacy in this reasoning. The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right

and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. It must be remembered that after all the general trustee is only a representative of the Idol who is a juridical personage, and who is the true owner, and there is nothing legally incongruous in that personage having other subordinate representatives who have the right to manage certain special portions of his property, and pay over the income so collected to the endowment, and even to some degree to control its use. Such rights would, as has been said, not be inconsistent with the existence of a general trustee, but they would be fatal to his claim to possession of the properties from which these revenues are derived. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his.

Their Lordships therefore do not consider it necessary to decide whether the claims of the plaintiff to be *hukdar* or general trustee of the endowment are or are not well founded. The history of these villages from the year when they came into the possession of the Company, and even from a far anterior date, indicates that their relationship to the endowment was such as has been just described. The possession was always in some other person than the predecessor of the plaintiff or any person appointed by him, or, indeed, any other person claiming title from the foundation of the endowment. The sole interest of the endowment in them has been an interest in the revenues collected from them by such other persons who were in possession of and managed the villages themselves. Their Lordships would be very unwilling to value lightly the testimony of a long course of dealing with the possession of these villages such as

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the history of this case has disclosed, which, as already stated, indicates that the relationship of the villages to the general endowment has throughout been of this nature. But they consider that it is not necessary to base their decision on the testimony of the earlier history. It suffices to consider the events that have happened from 1849 onwards.

In the year 1849 the Government, which was undoubtedly then in possession of the villages in suit, handed them over to the manager of the temple of Madura (the appointment of whom was in their hands), and there is no doubt that from that time they have been in the possession of such manager and the Temple Committee which is also appointed by Government. The *Pandara Sannidhi* made no opposition to their being so handed over. From that time forward it is beyond question that the plaintiff has been out of possession of these villages. If he has any right to claim possession in his suit he undoubtedly had the same right in 1849, and therefore, as at the date of the suit he had been out of possession of these villages for nearly sixty years, his claim is barred by the Statute of Limitations, and this appeal fails.

Originally a claim for some alternative relief was included in this action, but no case has been made out for it.

Their Lordships will therefore humbly advise His Majesty that this appeal should stand dismissed, and that the appellant should pay the costs.

Appeal dismissed.

Solicitor for the appellant :—*Douglas Grant.*

Solicitors for the respondents :—*T. L. Wilson & Co.*

J.V.W.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Chief Justice,
Mr. Justice Ayling and Mr. Justice Coutts Trotter.*

RAJA JAYA VEERA RAMA VENKATESWARA ETTAPPA
NAYAKAR AVARGAL, ZAMINDAR OF ETTIYAPURAM
(SIXTEENTH DEFENDANT), APPELLANT,

1920,
March 29 and
30 and April
12.

v.

OHIDAMBARAM CHETTY AND OTHERS (PLAINTIFFS AND
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (V of 1908), sec. 21—Want of territorial jurisdiction—Objection whether allowable by appellate or revisional Court—Objection whether allowable in execution proceedings—Powers of executing Court to which decree transferred.

The provisions of section 21, Civil Procedure Code, apply to objections regarding want of territorial jurisdiction. Such an objection, not taken as provided by the section, must be considered cured for all purposes, and cannot be allowed in execution proceedings.

A party who does not raise an objection to jurisdiction when a preliminary mortgage decree is made absolute, is not entitled to plead in execution that the order was passed without jurisdiction.

APPEAL against the Order of Mr. C. KRISHNASWAMI RAO, District Judge of Rāmnād at Madura, in E. P. No. 7 of 1918 (in O.S. No. 58 of 1899), Rāmnād Sub-Court.

The facts are set out in the order of Reference as well as in the Opinion.

This appeal was first heard by OLDFIELD AND SESHAGIRI AYYAR, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The first question for our decision is whether the decree under execution was passed by a Court having jurisdiction; and it is only necessary to state the facts to show that it was not. The suit, Original Suit No. 58 of 1899, was filed on a hypothecation in the Madura East Subordinate Court and a preliminary decree was passed there, on 10th May 1900. Subsequently the Rāmnād district was constituted by notification No. 304 at page 592, *Fort St. George Gazette*, Part I, dated 24th May 1910,

* Appeal against Order No. 263 of 1918 (F.B.).

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and by another notification No. 311 on page 593, the Madura East Court was abolished and the Subordinate Judge's Court of Rāmnād was established with jurisdiction over the whole of the Rāmnād district except the District Munsifi of Manamadurai. The suit property lies in that Munsifi and it, not being assigned to any other jurisdiction, fell to that of the District Court, which was established on the same date by notification No. 305. In 1916 application was made for final decree to the Subordinate Court of Rāmnād and the decree now under execution was passed there in 1917.

It is clear that the Subordinate Court of Rāmnād has never had jurisdiction over the suit property, and could never have entertained the suit, in which the decree relating to it has been passed. It is argued that as Notification No. 311 refers to the Rāmnād Subordinate Court as established, instead of the Madura East Subordinate Court, the former must be taken to have succeeded to the pending business of the latter. But, even if it were shown that Government have power by notification to regulate the distribution of judicial business in this manner, it would still be impossible to deduce an intention to do so from the words used. The lower Court contented itself with opining that the transfer of jurisdiction from the Rāmnād Subordinate Court to the Rāmnād District Court over the area in question did not take away the jurisdiction of the former over pending business; but the argument is vitiated by the misconception which runs through the judgment that the Rāmnād Subordinate Court passed the preliminary decree and we have in any case been shown no authority for the proposition of law, which is involved. The proceedings after the preliminary decree were proceedings in execution: *Hussain v. Karim*(1). They were therefore governed by sections 37 and 38, Civil Procedure Code, and, as there is no question of the decree having been sent for execution to the Rāmnād Subordinate Court, it could not execute it, because it did not pass it and because at the time of the application for final decree, it could not have had jurisdiction to try the suit in which the preliminary decree had been passed. There is no doubt that the final decree, in respect of which the present application is made, was passed without jurisdiction.

(1) (1916) I.L.R., 39 Mad., 544

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We have next to deal with the more difficult contention advanced by the respondent, that appellant cannot take objection to the decreeing Court's jurisdiction, because he did not do so at the earliest opportunity. Appellant was joined as sixteenth defendant by the Rāmnād Subordinate Court, when the final decree was passed, as a purchaser of part of the suit property. But he did not appear or state his objections; nor did he attack the jurisdiction of the Court or rely on any plea except limitation, when in I.A. Nos. 293, 294 of 1917 he applied for a review of the order, which had been passed. The objection to the Court's jurisdiction was, in fact, taken for the first time in the present proceedings and the argument for respondents is that with reference to *Gomatham Alamelu v. Komandur Krishnamacharlu*(1) and section 21, Civil Procedure Code, it cannot now be put forward.

It was decided generally in *Haji Musa Haji Ahmed v. Purmanand Nursey*(2) that the executing Court is entitled to inquire into the jurisdiction of the Court, which passed the decree; and some argument was addressed to us, regarding the policy of the law and the necessity for a strict interpretation of sections 18 and 21 and the corresponding section 16-A in the former Code. The main objection, however to their application to the facts before us was that, although they might deprive the party interested to object to the jurisdiction of his right to do so up to the termination of the proceedings or of any connected appeal, they do not deprive him absolutely of his right or bar its exercise at any later stage, such as that, which the present proceedings have reached. It is true that no such distinction was recognized or apparently suggested in *Gomatham Alamelu v. Komandur Krishnamacharlu*(1), and that decision was followed in *Subbiah Naicker v. Ramanathan Chettiar*(3), *Velayutha Muppan v. Subramaniam Chetti*(4), and *Venkatarama Vathiar v. Sambasiva Aiyar*(5) although, in the last mentioned the question was of fraud at the trial and there was no question of execution. But the sections in question statedly relate only to suits and it is settled law that section 141 cannot be invoked as authorizing

(1) (1904) I.L.R., 27 Mad., 118.

(2) (1891) I.L.R., 15 Bom., 216.

(3) (1914) I.L.R., 37 Mad., 482 at 470.

(4) (1918) 24 M.L.J., 70.

(5) (1919) 37 M.L.J., 349.

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the extension of the procedure in regard to suits to execution. The point is of importance, and we doubt whether *Gomatham Alamelu v. Komandur Krishnamacharlu*(1) was rightly decided. We therefore refer for the opinion of a Full Bench the questions set out in my learned brother's judgment.

SESHAGIRI AYYAR, J.—The decree under execution is a very old one. In Original Suit No. 58 of 1899, what is alleged by the respondent to be the preliminary decree was passed on the 10th May 1900 by the Madura Sub-Court, East, which then had jurisdiction over the mortgaged property. Subsequently there was a bifurcation of the district. In the division, all the taluks over which the Madura Sub-Court, East, had original jurisdiction, except the District Munsifi of Manamadurai, were transferred to the Rāmnād Sub-Court. About the same time, to the District Court of Rāmnād was assigned the two revenue subdivisions of Devakottah and Rāmnād. Devakottah included the Manamadurai District Munsifi. The notification of the Government of Madras was in May 1900. On 20th November 1910, an application was made to the Sub-Court of Rāmnād for the final decree and the order was passed on 29th March 1917.

The appellant before us obtained a money decree against the mortgagors in 1909. The equity of redemption was put up to auction and purchased by him.

Another transaction should be mentioned. On 1st August 1900, a usufructuary mortgage was executed by the mortgagors to the decree-holders in Original Suit No. 58 of 1899 and to other decree-holders against the same judgment debtors, with the object of enabling them to discharge all the encumbrances on the properties of the mortgagors. A suit was instituted on this mortgage. In Second Appeal No. 178 of 1912, the mortgage was held to be invalid. While the Second Appeal was pending, the purchaser of the equity of redemption obtained possession. This was in 1916. The present application is for sale of the mortgaged property in pursuance of the decree absolute in the suit of 1899.

Some important questions of law have been raised in the case. I must say that their consideration by the lower Court has by no means been adequate or satisfactory.

(1) (1904) I.L.R., 27 Mad., 118.

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The first point relates to the jurisdiction of the Ramnad Sub-Court to pass the order absolute on 19th March 1917. On this question I feel no doubt. The District Judge is wrong in saying that the original decree was passed by the Rāmnād Sub-Court. That decree was undoubtedly passed by the Madura Sub-Court, East. The question is whether the Rāmnād Sub-Court which clearly had no territorial jurisdiction over the property was competent to pass the final decree.

Mr. Anantakrishna Ayyar chiefly relied upon the notification of the Government, which is in these terms:—

"The Governor in Council, having resolved to abolish the Court of the Subordinate Judge of Madura, East, in the District of Madura and to establish *instead* a Subordinate Judge's Court in the District of Rāmnād hereby directs, etc."

The learned vakil contended that the expression '*instead*' must be regarded as expressing the intention of the Government that all the decrees passed by the Madura Sub-Court, East, were to be considered as if they were passed by the newly constituted Sub-Court of Rāmnād. Apart from the question whether it is competent to the Executive Government to confer jurisdiction in this way, I am unable to construe the word '*instead*' as suggested. All that the notification meant was that the congestion of work which would result from the abolition of the Madura Sub-Court, East, would be relieved by the constitution of the new Court.

On the question of law, I feel no difficulty in holding that the Rāmnād Sub-Court had no power to pass the decree absolute. It was held in *Subbiah Naicker v. Ramanathan Chettiar*(1) that a Court which has no territorial jurisdiction cannot attach and sell property. In *Veerappa Chetti v. Ramasami Chetti*(2) that case and other cases were fully considered and it was pointed out that a Court which has no territorial jurisdiction cannot sell property, although the decree for sale was passed by it when it had jurisdiction.

The Full Bench decision in *Seeni Nadan v. Muthusamy Pillai*(3) does not affect this conclusion. On the other hand, the actual decision in *Subbiah Naicker v. Ramanathan Chettiar*(1),

(1) (1914) I.L.R., 37 Mad., 462.

(2) (1919) M.W.N., 728.

(3) (1919) I.L.R., 42 Mad., 821 (F.B.).

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which was not overruled by the Full Bench, supports the view we are taking.

It was contended for the appellant that an application for an order absolute is not an application in execution, and that therefore it was barred by limitation when it was made to the Rāmnād Sub-Court. In this Presidency, from the Full Bench decision in *Mallikarjunadu Setti v. Lingamurti Pantulu*(1), it has always been held that an application for a final decree under the Transfer of Property Act was an application in execution. The latest decision upon that point is *Hussain v. Karim*(2), where all the cases are reviewed. Reference may also be made to *Manna Lal Parruck v. Sarat Chunder Mukerji*(3). This contention must be overruled.

The main answer of Mr. Anantakrishna Ayyar to the plea of want of jurisdiction was that the appellant was estopped from raising this contention. His argument was that, as there was no demur to the Rāmnād Sub-Court dealing with the application for an order absolute and as there was no appeal against the order, the appellant cannot raise it in execution. He relied upon the language of section 21 of the Civil Procedure Code for this contention. The plain terms of the section lend some support to his contention. He is also supported by *Gomatham Alamelu v. Komandur Krishnamachari*(4) and *Velayutha Muppan v. Subramaniam Chetti*(5).

On the other hand, certain observations in the decision of the Judicial Committee in *Ramabhadra Raju Bahadur v. Maharaja of Jeypore*(6), and the scheme of the Code, suggest that the legislature should not be presumed to have enacted that, by not objecting to jurisdiction, the parties are for ever concluded by the order passed. The result of such a view would be that, if both the plaintiff and the defendant agree, a matter relating to property outside the Presidency and the even outside India can be validly decided by our Courts. I think that as a conclusion like this is likely to affect seriously the administration of justice, it demands careful examination.

(1) (1902) I.L.R., 26 Mad., 244 (F.B.). (2) (1916) I.L.R., 39 Mad., 544.

(3) (1914) 19 C.W.N., 561 (P.C.). (4) (1904) I.L.R., 27 Mad., 118.

(5) (1918) 24 M.L.J., 70

(6) (1919) I.L.R., 42 Mad., 813 (P.C.).

The arrangement of sections in the Code of Civil Procedure is against interpreting section 21 in the way suggested by the learned vakil for the respondents. Sections 16 and 17 deal with suits relating to immoveable property. Section 18, clause 1, refers to uncertainty as to local jurisdiction and provides for recording a statement and then proceeding with the suit. Clause 2 empowers a party if there is no such record to contest the matter in appeal, if there has been a failure of justice. Section 19 deals with jurisdiction regarding suits for moveables. Section 20 deals with cases of contract, and refers to the accrual of the cause of action in either the place where the offer is made or the acceptance was concluded. Then comes section 21. The contention of the learned vakil for the appellant that this section is confined to cases relating to moveable property and to contracts and should not be extended to suits relating to immoveable property does not appear to me to be farfetched. Whereas section 18 speaks of local limits of jurisdiction, section 21 speaks of the place of suing, and there is some justification from the language of the Judicial Committee for the suggestion that jurisdiction was not intended to be synonymous with the place of suing. The observations in *Haji Musa Haji Ahmed v. Purmanand Nursey*(1) also support this view.

I feel considerable doubt whether section 21 of the Act should be read as enacting that in all cases where there is no objection to jurisdiction, the party is not entitled to question it at any subsequent stage of the proceedings.

In this connexion I may refer to the argument that it is only in cases where jurisdiction depends on the ascertainment of facts that the theory of acquiescence should be invoked. The reference to the objection being taken before the settlement of issue supports this contention. The general principle being that want of jurisdiction would make an adjudication by a Court a nullity, section 21 which must be regarded as an exception to this rule should be construed as referring only to cases in which want of jurisdiction has to be pleaded and to be established by evidence. But where everybody must be presumed to be acquainted with a notification like the one now in question, there can be no necessity for allegation or proof.

(1) (1891) I.L.R., 15 Bom., 216.

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There is one other matter which ought to be noticed, and that is that section 21 is not applicable to execution proceedings. I am not much impressed by the argument. The principle underlying the section, even though the section may not in terms be applicable, should be extended to execution proceedings also. Observations to this effect are to be found in *Veerappa Chetti v. Ramasami Chetti*(1). However even this question is not altogether free from doubt

I think therefore that the following questions should be referred for the opinion of the Full Bench :

(1) Whether section 21 of the Code of Civil Procedure governs cases of want of territorial jurisdiction ?

(2) Whether section 21 is applicable to execution proceedings ? and

(3) Whether a party who does not raise objection to jurisdiction when a decree is made absolute is not entitled to plead in execution that the order was passed without jurisdiction ?

ON THIS REFERENCE

A. Krishnaswami Ayyar and *S. Ramaswami Ayyar*, for the appellant.—My contention is that an order for sale cannot be made by a Court within whose jurisdiction the property does not lie. In 1899, plaintiff filed a suit in the Madura East Subordinate Court, and a preliminary decree was passed by that Court. In 1910, by the bifurcation, that Court ceased to exist. I contend that plaintiff ought to have applied to the District Court, Rāmnād, for the final decree and not to the Sub-Court. Section 21 does not apply. It is an application for execution, for proceedings after the preliminary decree are proceedings in execution: *Hussain v. Karim*(2), *Mallikarjunadu Setti v. Lingamurthi Pantulu*(3). The order absolute is without jurisdiction, as, under sections 37 and 38, Civil Procedure Code, the Rāmnād Sub-Court had no jurisdiction to execute the decree passed by the Sub-Court, Madura East. Hence the order absolute is null and void, and no question as to the applicability of section 21 arises.

(1) (1919) M.W.N., 728.

(2) (1916) I.L.R., 33 Mad., 544.

(3) (1902) I.L.R., 25 Mad., 244 (F.B.).

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O. V. Anantakrishna Ayyar, for the respondents.—Sections 37 and 38 do not apply. A final decree was wrongly passed. The decree by the Sub-Court, Madura East, was a final decree passed after an application made under Order XXXIV, rule 5, and the prayer was for a final decree. Rightly or wrongly the Sub-Court, Rāmnād, has treated it as a preliminary decree and passed a final decree under Order XXXIV, rule 5. A Court may conceive that the first decree was not a final decree. In this case the attention of the Court was drawn to the fact that a preliminary decree had been passed. Defendant himself calls it a preliminary decree. It cannot be contended at this stage that the proceedings for order absolute are proceedings in execution: *Ashfaq Husain v. Gauri Sahai*(1), referred to.

Mr. A. Krishnaswami was then called upon to deal with the questions in the Order of Reference.—Assuming this to be the final decree, the District Court, Rāmnād, was the proper Court. The final decree had to be passed by the Court which passed the original decree. Section 21, Civil Procedure Code, does not apply to cases of want of territorial jurisdiction. It applies only to cases where the jurisdiction depends upon the ascertainment of certain facts to be given in evidence; *Seeni Nadan v. Muthuswamy Pillai*(2) shows that the section cannot apply to such a case as this. See also *Mayor, etc. of London v. Cox*(3). Section 21 does not in terms apply to execution proceedings. The observations of *SESHAGIRI AYYAR, J.*, in *Veerappa Chetty v. Ramaswami Chetty*(4) are *obiter*.

As regards the third question in the Reference, I contend that the executing Court can question the jurisdiction of the Court which passed the decree. A decree without jurisdiction is a nullity; *Rangaswami Naicken v. Thirupati Naicken*(5), *Subrahmania Ayyar v. Vaithinatha Aiyar*(6), *Veeraraghava Ayyar v. Muga Sait*(7), *Haji Musa Haji Ahmed v. Purmanand Nursey*(8), *Lakshmanaswami Naidu v. Rangamma*(9) and *Dayaram v. Govardhandas*(10). Consent cannot give jurisdiction to a

(1) (1911) I.L.R., 33 All., 284 (P.C.) at 271.

(2) (1919) I.L.R., 42 Mad., 821 (F.B.).

(3) (1866) L.R., 2 H.L., 239 at 238. (4) (1920) I.L.R., 48 Mad., 185.

(5) (1905) I.L.R., 28 Mad., 26. (6) (1915) I.L.R., 38 Mad., 682.

(7) (1916) I.L.R., 39 Mad., 24 at 29. (8) (1891) I.L.R., 15 Bom., 216.

(9) (1903) I.L.R., 26 Mad., 31. (10) (1904) I.L.R., 28 Bom., 458.

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Court when the property is not within the jurisdiction of that Court. It is better that an executing Court should decide the question of want of jurisdiction rather than that a stranger should file a suit to disturb the decree. In any event section 21, Civil Procedure Code, applies only to a case where objection to jurisdiction exists at the date of the filing of the plaint or at the settlement of issues. Here the objection arose only after the date of the preliminary decree.

[COURTS TROTTER, J.—Does it not mean that questions as to jurisdiction arising after the preliminary decree cannot be raised at all?]

The section is curative and applies only to questions that can be raised at date of plaint.

C. V. Anantakrishna Ayyar, for the respondent.—Section 21, Civil Procedure Code, applies to cases of want of territorial jurisdiction. Its object is to prevent questions about territorial or other jurisdiction being raised at any late stage and to put an end to those objections. There is no provision in English law similar to section 21, Civil Procedure Code. The latter is similar to section 11 of the Suits Valuation Act, which provides for cases of want of objections to jurisdiction based on over-valuation or undervaluation. *Seeni Nadan v. Muthuswamy Pillai*(1), is distinguishable. The order for sale was passed by the Court in respect of properties which were situated within the jurisdiction of a Court to which the Civil Procedure Code was not applicable. The principle of the section applies to execution proceedings. If the objection is not raised in the appellate or revisional Court, it cannot be that the object of the section is to be rendered useless by allowing the objection to be raised in execution proceedings: see *Veerappa Chetty v. Ramaswamy Chetty*(2). An executing Court cannot go behind the decree and question the jurisdiction of the Court which passed the decree—vide the change of language in Order XXI, rule 7. See also *Veeraraghava Ayyar v. Muga Sait*(3), *Hari Govind v. Narasingrao Konherrao*(4) and *Kalipada Sarkar v. Hari Mohan Dalal*(5).

(1) (1919) I.L.R., 42 Mad., 821 (F.B.).

(2) (1920) I.L.R., 43 Mad., 135.

(3) (1916) I.L.R., 39 Mad., 24 at 29.

(4) (1914) I.L.R., 38 Bom., 194.

(5) (1917) I.L.R., 44 Cal., 627.

OPINION.

WALLIS, C.J.—In May 1900 the plaintiff duly instituted the present suit in the Subordinate Court of Madura West where the mortgaged property was situated and obtained a decree under section 88 of the Transfer of Property Act. In May 1910, this Court was abolished, and by virtue of section 37 of the Code of Civil Procedure this suit was transferred by operation of law to the newly constituted District Court of Rāmnād, as the place where the mortgaged property was situated was within the jurisdiction of that Court and was not within the jurisdiction of the newly constituted Subordinate Court of Rāmnād. In 1916 the plaintiff applied to the Subordinate Court of Rāmnād, which as we have seen, had no jurisdiction over the suit, for a decree for sale under Order XXXIV, rule 5, of the Code of Civil Procedure and obtained the decree in 1917. The mistake appears to have been occasioned by the fact that the new Subordinate Court of Rāmnād was described in the notification constituting it as created 'instead of' the Subordinate Court of Madura West, whereas its territorial jurisdiction was more limited. The sixteenth defendant, who did not appear, applied for a review of the decree but not for want of jurisdiction, and his petition was dismissed as out of time. He did not appeal against the decree, as he might have done, on the ground that it was made without jurisdiction or was erroneous or time-barred. The plaintiff then filed Execution Petition No. 24 of 1914 in the District Court of Rāmnād, which apparently returned it for presentation, or sent it directly, to the Subordinate Court of Rāmnād which had passed the final decree. It was filed in that Court as Execution Petition No. 203 of 1917, and that Court thereupon transferred the decree for execution to the District Court of Rāmnād within whose jurisdiction the mortgaged property is situated. These are the facts which have given rise to the reference.

As regards the first question, I am clearly of opinion that the provisions of section 21 of the Code of Civil Procedure apply to all objections based on the alleged infringement of the provisions of sections 16 to 18 of the Code of Civil Procedure as regards the institution of suits relating to immovable property. The words 'objection as to the place of suing' in their

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ordinary meaning include objections to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the immovable property which was the subject of the suit; and the words 'place of suing' are used in the heading prefixed to section 15, as descriptive of the subject matter of the provisions in sections 15 to 20 as to the Courts in which suits, including suits as to immovable property, are to be instituted.

I do not think the recent decision of the Privy Council in *Setrucherla Ramabhadraraju v. Maharaja of Jeypore*(1) is opposed to this view of the scope of section 21. In that case a suit had been instituted in the Subordinate Court of Vizagapatam on a mortgage of property which was partly situated in a Scheduled District over which the Subordinate Court had no jurisdiction and to which the Civil Procedure Code had not been applied. The contention for the appellant was that section 21 only applied where the right place of suing was one subject to the Code. On this ground their Lordships held that the objection was not an objection to the place of suing which could be cured by section 21 of the Code of Civil Procedure. They went further and held that the order for sale was bad as made under sections of the Code which did not apply to a Scheduled District. They had not to consider the application of section 21 where all the mortgaged property was within the jurisdiction of Courts governed by the Code of Civil Procedure.

As regards the second question, section 21 forbids any appellate or revisional Court to allow any objection as to the place of suing unless it was taken in the original Court and even then unless there was a consequent failure of justice. The effect of the section in my opinion is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court. The ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision, and if this is forbidden, a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing.

In view of the above answers to questions one and two,

(1) (1919) L.R., 46 I.A., 151.

question three would not arise but for a further question raised by Mr. A. Krishnaswami Ayyar at a late stage of the argument. He contended that, admitting that section 21 applied to suits about immovable property, it dealt only with the original institution of a suit and not with the prosecution of the suit in a wrong Court after the abolition of the Court in which it had been properly instituted. In support of this contention he relied on the fact that section 21 requires the objection to be taken "in all cases in which issues are settled at or before such settlement" as showing that the section was not intended to apply to an objection, such as the present, which only arose after the settlement of issues on the abolition of the Madura Subordinate Court and could not have been taken at or before such settlement. It is unnecessary to consider whether those particular words may not be read as applying only to cases where it is possible to take the objection at or before the settlement of issues, and whether the words 'place of suing' are not wide enough to include objections to the place of prosecuting as well as of instituting suits. Assuming, however, that section 21 does not apply, I am still of opinion that the present decree cannot be questioned in execution. An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the 'execution, discharge or satisfaction of the decree' which are required by section 47 to be dealt with in execution. The provision in section 225 of the old Code that a Court might proceed to execute decrees transferred to it without requiring further proof, among other things, of the jurisdiction of the Court which passed the decree lent some colour to the view that it was open to a Court to which a decree had been sent for execution to go into the question whether the Court which passed the decree had jurisdiction to do so, and influenced the decisions which are referred to in the order of reference. These words, however, have been omitted advisedly in the corresponding Order XXI, rule 7 of the new Code.

Without referring to the statement of objects and reasons, which is not permissible, *Krishna Ayyangar v. Nallaperumal Pillai*(1) we may, I think, infer that these words were omitted in

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the new Code because it was felt that it was not for the executing Court to go into questions of the jurisdiction of the Court which passed the decree, at any rate when, as in the present case, that Court was an ordinary Court in British India governed by the Code. This is the view taken in *Hari Govind v. Narsingrao Konherraol*(1) and *Kalipada Sarkar v. Hari Mohan Dalal*(2) is also a recent authority for the proposition that the Court executing the decree cannot go behind it. I would, therefore, answer the third question in the negative.

AYLING, J.

AYLING, J.—I agree.

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COUTTS TROTTER, J.—I agree.

M.H.H.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, C.J., Mr. Justice Oldfield and
Mr. Justice Seshagiri Ayyar.*

THAZHATHITATHIL POORVANAYI AYISSA AND TWO
OTHERS (DEFENDANTS), APPELLANTS,

v.

PUTHAN PURAYIL KUNDRON CHOKEN
(PLAINTIFF), RESPONDENT. *

*Registration Act (XVI of 1908), sec. 17, sub-sec. (2)—Certifying adjustment of
decrees—Civil Procedure Code (V of 1908), Order XXI, rule 2—Whether
exempted from registration*

A compromise made after decree, affecting any immoveable property of
the value of over Rs. 100, and embodied in a petition presented under Order
XXI, rule 2, Civil Procedure Code, which has been recorded by the Court, is
exempt from registration.

Hemanta Kumari Devi v. Midnapore Zamindari Company (1914) 46 I.A., 240.
followed.

Chelamanna v. Rama Rao (1913) I.L.R., 38 Mad., 46 and *Raja Venkatappa
Nayanim Varu v. Raja Thimma Nayanim Varu* (1914) 27 M.L.J., 656, overruled.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR,
Temporary Subordinate Judge of Tellicherry, in Appeal No. 75
of 1918 (Appeal Suit No. 591 of 1916 on the file of the District
Court of North Malabar), preferred against the decree of

(1) (1914) I.L.R., 39 Bom., 194. (2) (1917) I.L.R., 44 Cal., 627.

* Second Appeal No. 474 of 1919 (F.B.).

T. KRISHNAN NAYAR, District Munsif of Nadapuram, in Original Suit No. 437 of 1915.

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Plaintiff filed Original Suit No. 437 of 1915 for a decree directing the defendants to surrender to him certain properties which he claimed by virtue of a compromise arrived at in two other suits, Original Suit No. 250 of 1906 and Original Suit No. 503 of 1906, on the file of the District Munsif of Tellicherry. Exhibit D, the compromise, was filed in Original Suit No. 250 of 1906, as Miscellaneous Petition No. 2258 of 1911, and was as follows :—

“Petition submitted under Order XXI, rule 2, of the Code of Civil Procedure by the petitioners (1) Pokker, (2) the respondent Chokru, (3) Pelliyl Katheya residing at Potheri, (4) Paliyil Pakhichi residing at Valappil, (5) Paliyil Vyissa residing at Thazhath Edathil, (6) Changal Pathumma residing at Valappil and (7) younger sister Ayissa.

The properties covered by the decrees in Original Suit Nos. 250 and 503 of 1906 were divided by petitioners Nos. 2, 6, and 7 among themselves and first petitioner objected to it: The matter has been settled at the instance of mediators as follows :”

And then follow the various lands that are to be enjoyed by the petitioners and their shares. And finally it recites :

“The previous petitions are hereby cancelled. As the matter is thus settled, it is prayed that this petition may be recorded.”

On this petition appear the following endorsements :

“ORDER.

Miscellaneous Petition No. 809 of 1912.

Mr. Vaidyalinga Ayyar appears for all except second executant of this. Second executant appears now. This is kept for Vaidyalinga Ayyar's signature.

(Initialled) K.V.K.M.

District Munsif.

19th January 1912.

Vaidyalinga Ayyar signs this petition. Recorded.

(Initialled) K.V.K.M.

District Munsif.”

20th April 1912.

All other material facts are set out in the judgment of
AYLING, J.

The Second Appeal first came on for hearing before AYLING
and COUTTS TROTTER, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

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AYLING, J.—In the suit out of which this second appeal arises plaintiff sued for possession of certain properties which fell to his share under a compromise embodied in a document filed as Exhibit D. Exhibit D was not registered, but was filed in Court under Order XXI, rule 2, of the Code of Civil Procedure in execution proceedings arising out of a partition decree. To quote from the judgment of the Lower Appellate Court (paragraph 4).

"Plaintiff obtained decree for recovery of his share in joint properties including the plaint property in original Suit No. 250 of 1906. The properties were divided in execution of that decree and plaintiff was put in possession of his specific share. There was resistance. The co-sharers amicably settled all the disputes and effected the compromise contained in Exhibit D. That was presented to the Court and Court recorded it."

It is contended on behalf of appellants (defendants) that Exhibit D is invalid for want of registration and this contention was accepted by the District Munsif. The Lower Appellate Court has taken a different view, and holds:

"I do not understand how the compromise is not valid and title has not passed to plaintiff under it. The Court had nothing further to do in the matter, as plaintiff admitted having obtained his share under the decree by the compromise. This order of the Court embodying the agreement being judicial proceeding is exempted from registration."

The passage quoted indicates a certain confusion, or at any rate lack of distinction, between the document containing the compromise and the order of the Court recording it: but the Subordinate Judge, I take it, means to hold that by virtue of the order 'Recorded' passed on it, the compromise deed Exhibit D, obtains the same validity as if it had been legally registered. The correctness of this view has been strenuously debated before us. Counsel for appellants relies on a series of cases—*Muthayya v. Venkataratnam*(1), *Patla Muthammal v. Esup Rowther*(2), *Chelamanna v. Rama Rao*(3), and *Rajah Venkatappa Nayanam Varu v. Rajah Thimma Nayanam Varu*(4)—all based on *Pranal Anni v. Lakshmi Anni*(5), a ruling of

(1) (1902) I.L.R., 25 Mad., 552.

(2) (1908) I.L.R., 29 Mad., 365.

(3) (1913) I.L.R., 36 Mad., 46.

(4) (1914) 27 M.L.J., 556.

(5) (1899) I.L.R., 22 Mad., 508 (P.O.).

the Privy Council. As against these, two other cases of this Court are quoted, *Natesa Chetti v. Vengu Nachiar*(1), and *Sellappa Goundan v. Gurumurti*(2), which are based in their turn on the concluding passage of the judgment of the Privy Council in *Bindesri Naik v. Ganga Saran Sahu*(3).

Speaking for myself, with all deference to the learned Judges who have taken the opposite view, I cannot but feel that the contention of appellants' counsel and the decision of the District Munsif are correct. Section 17 of the Registration Act grants exemption from registration to 'decrees and orders of Courts.' But I do not see how it can be held that the Court's order 'Recorded' on Exhibit D can be interpreted as embodying and giving effect to the dispositions of property set forth in Exhibit D. The decree passed in Original Suit No. 250 of 1906 was final: and could only be modified by way of appeal or review, neither of which procedures was resorted to. It seems to me futile to suggest as the learned counsel for respondent has done, that the Court accepted the compromise arrived at by the parties, and by its order 'Recorded,' substituted as it were, a decree in accordance therewith for the decree it had itself passed. If this were so, why has not respondent sought to execute this substituted decree and how comes he to be seeking his remedy by separate suit? Exhibit D was admittedly presented under Order XXI, rule 2, as a certificate of adjustment of the decree: and, as I read the rule, the duty of the Court was simply to record the fact that the decree had been adjusted and that no further proceedings could be taken in execution of it.

But it is argued that Exhibit D should be regarded as a 'pleading' of parties: and that the Privy Council has held in *Bindesri Naik v. Ganga Saran Sahu*(3), that section 17 of the Registration Act does not apply to pleadings filed by parties any more than to orders of Courts. The concluding passage in their Lordships' judgment in that case has certainly been interpreted in this sense by the learned Judges in *Natesa Chetti v. Vengu Nachiar*(1). If this interpretation is correct, it is to my mind impossible to reconcile the dictum in *Bindesri Naik v. Ganga*

(1) (1910) I.L.R., 33 Mad., 102.

(2) (1914) 27 M.L.J., 396.

(3) (1898) I.L.R., 20 All., 171 (P.O.).

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Saran Sahu(1), with the decision of the Privy Council in *Pranal Anni v. Lakshmi Anni*(2). Personally I am inclined to think their Lordships in the former case merely intended to imply that the exemption from registration extended to an order of Court, even if it was necessary to import into it the contents of pleading so as to make it intelligible. Such a method of interpretation would apparently have been necessary in the case before them.

But whatever my own view may be, we are pressed by the fact that contradictory views have been expressed on the point by two Benches of this Court in *Natesa Chetti v. Vengu Nachiar*(3), and *Chelamanna v. Rama Rao*(4). Moreover in *Sellappa Goundan v. Gurumurti*(5), decided after the latter case another Bench has expressly confirmed the view taken in *Natesa Chetti v. Vengu Nachiar*(3), after considering both cases. It is clear therefore that there is a difference which can only be decided by a Full Bench. I have not overlooked the fact that both the cases deal with compromises filed in pending suits: and have considered whether the present case might be distinguished on that ground, and effect given to the view, which I hold to be correct. The same principle might however govern both classes of cases: and the difference of opinion is on a point of great importance and based on the interpretation of judgments of the Privy Council. I therefore think the best course is to refer the following question to a Full Bench:—

Is a compromise affecting immovable property of the value of over Rs. 100 embodied in a petition under Order XXI, rule 2, which has been recorded by the Court, exempt from registration?

COUTTS TROTTER, J.—I concur in the proposed reference. My Lord has so fully discussed the case law on the subject that it would be useless for me to go over the same ground again. A perusal of the cases shows a distinct line of cleavage of opinion. One view is that a compromise incorporated in a decree is exempted from registration only because and in so far as its terms become part of the decree: from which it would follow

(1) (1898) I.L.R., 20 All., 171 (P.C.). (2) (1899) I.L.R., 22 Mad., 508 (P.C.).
(3) (1910) I.L.R., 33 Mad., 102. (4) (1913) I.L.R., 36 Mad., 46.
(5) (1914) 27 M.L.J., 396.

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that any terms of a compromise which travelled outside of the issues in the suit would require registration, if they purported to deal with immoveable property over Rs. 100 in value. They could not properly be embodied in the decree, and even if they were, the result would be the same; for, *quoad* those terms, the decree would be travelling outside the ambit of its jurisdiction. In favour of this strict construction is the decision of the Privy Council in *Pranal Anni v. Lakshmi Anni*(1), and the later cases in Allahabad, and the settled current of recent decisions in Calcutta.

The other view is that expressed in *Natesa Chetti v. Vengu Nachiar*(2), and the earlier Allahabad cases: the underlying principle of which no doubt is that publicity—the object which registration aims at—is sufficiently attained by the production and recording of documents in Court. The origin of the doctrine appears to be an expression used in the judgment delivered by Lord WATSON in *Bindesri Naik v. Ganga Saran Sahu*(3) where he says that the provisions of section 17 of the Registration Act “do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court. Now, I do not think that that reference to the pleadings is necessarily inconsistent with the stricter view. For if the terms of a compromise are only binding when they become part of the judgment, and the judgment itself is only binding in so far as it relates to matters over which the Court had jurisdiction in the suit, it would clearly be necessary to refer to the pleadings to ascertain, if the question arose whether the Court in fact had jurisdiction or not. My own opinion is that the sentence has been put to a use in *Natesa Chetti v. Vengu Nachiar*(2), which it was not designed to indicate: and that the decision in that case is contrary to the principles laid down in *Pranal Anni v. Lakshmi Anni*(1). But what is really important is that the matter should be definitely settled one way or the other for this Court, so that practitioners can give their clients clear advice: and this can only be done by a Full Bench in a duly authoritative manner.

(1) (1899) I.L.R., 22 Mad., 508 (P.C.). (2) (1910) I.L.R., 33 Mad., 102.
(3) (1898) I.L.R., 20 All., 171 (P.C.).

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ON THIS REFERENCE

C. Madhavan Nayar for the appellants.—I contend that Exhibit D is invalid for want of registration. It is not a compromise recorded under the provisions of Order XXI, rule 2. The learned Judge did not bring his mind to bear on the contents of the petition. The order 'Recorded' does not include the terms of the compromise. The learned Judge merely recorded the fact of the adjustment. The adjustment cannot vary the decree Order XXIII, rule 3, applies only to suits and does not apply to execution proceedings.

Pranal Anni v. Lakshmi Anni(1), *Raminni Varodia Naidu v. Raminni Thippiah Naidu*(2), *Patha Muthammal v. Esup Rowther*(3) and *Chelamanna v. Rama Rao*(4), referred to.

K. P. M. Menon, for the respondent, was not called upon.

OPINION.

Where, as in the present case, after decree a petition has been presented under Order XXI, rule 2, to the Court whose duty it is to execute the decree, certifying, as required by the Rule, that the decree has been adjusted, and praying that the petition, setting out the terms on which the decree has been adjusted, should be recorded, and the order 'recorded' has been passed upon it, the order must be read as referring to the petition which it would have set out in full if it had been formally drawn up. It is in effect an order that the petition should be recorded as certifying the adjustment of the decree on the terms stated in the petition in compliance with the requirements of the Rule. In these circumstances the petition is exempted from registration by virtue of the exception in sub-section (2) of section 17 of the Indian Registration Act in favour of 'any decree or order of a Court,' and the question referred to us must be answered in the affirmative. The recent decision of the Privy Council in *Hemanta Kumara Debi v. Midnapur Zamindari Company*(5), has settled the differences of opinion which are referred to in the order of reference as to the interpretation of Lord MACNAUGHTEN's judgment in *Pranal Anni v. Lakshmi Anni*(1).

(1) (1899) I.L.R., 22 Mad., 58 (P.C.), at 513.
(2) (1918) 3 L.W., 379 at 381. (3) (1906) I.L.R. 29, Mad., 365.
(4) (1913) I.L.R., 36 Mad., 48 at 51.
(5) (1919) L.R., 46 I.A., 240.

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Their Lordships point out that the word "decree" in section 17 of the Registration Act "must be read in connexion with the purpose of the statute, which is to provide a method of public registration of documents, and there is therefore no reason why a limit should be imposed on the meaning of the word so as to confine it to the operative portion only of the decree." The same reasoning of course applies to the other word "order" with which we are now concerned. Their Lordships proceed to distinguish their earlier decision in *Kader Moideen v. Napean*(1), on the ground that in that case the order on the compromise petition had not in fact narrated or referred to the *razinama* in so far as it mentioned lands which were not the subject of the suit, whereas in the case before them the decree recited the petition for compromise and set out its terms in full. That decree, they held, made no difference between one part of the compromise and another but incorporated the whole; or in other words, was a decree which, though affecting the lands in suit as a decree, incorporated the whole agreement which led to the suit being compromised. Registration of the agreement was therefore unnecessary, as the decree was sufficient evidence of its terms. This decision entirely covers the present case and we must answer the question in the affirmative and overrule the decision on this question *Chelamanna v. Rama Rao*(2) and *Rajah Venkatappa Nayanam Varu v. Rajah Thimma Nayanam Varu*(3), which followed it.

M.H.H.

(1) (1894) L.R., 21 I.A., 96.

(2) (1918) I.L.R., 36 Mad., 46.

(3) (1914) 27 M.L.J., 656.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

VEYINDRAMUTHU PILLAI, APPELLANT IN ALL THE APPEALS
(RESPONDENT),

v.

MAYA NADAN (PETITIONER), RESPONDENT IN APPEAL AGAINST
ORDER NOS. 188 AND 260 OF 1918 AND

SUBBIYA NADAN (PETITIONER), RESPONDENT IN CRIMINAL NO. 315
AND CIVIL REVISION PETITION NO. 1227 OF 1918.*

Civil Procedure Code (Act V of 1908), Order XXI, rule 103 and Order XXXIV, rule 1—Transfer of Property Act (IV of 1882), ss. 52 and 91, Clause (f)—Lis Pendens—Sale in execution of a money decree pending a suit on mortgage of the property sold—Possession obtained by purchaser—Sale in execution of mortgage decree—Right of the latter purchaser to oust the former from possession—Order as to possession—Appeal—Suit.

Where lands were attached in execution of a money decree, and afterwards a suit for sale on a mortgage of the same lands was filed, but the attaching creditor was not made a party thereto, the purchaser of the lands in execution of the money decree is not entitled to retain possession of them as against a subsequent purchaser in execution of the mortgage decree.

Where claim proceedings under Order XXI, Civil Procedure Code, fall also under section 47 of the Code, Order XXI, rule 103, does not prevent an appeal against an order therein, as it falls under section 47 of the Code.

APPEALS against and Petitions to revise the orders of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Rāmnād at Madura, in Execution Application No. 374 of 1918, in Execution Application No. 322 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura), in Execution Application No. 86 of 1918, in Execution Petition No. 1 of 1918, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura) and in Miscellaneous Petition No. 165 of 1918, in Execution Application No. 157 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Rāmnād at Madura), respectively.

* Appeal Against Orders Nos. 188, 260 and 315 of 1918 and Civil Revision Petitions Nos. 515, 694 and 1227 of 1918.

The material facts and contentions appear in the Order of Reference and the opinion of the Full Bench reported in I.L.R., 43 Madras, 107 (F.B.).

T. R. Venkatarama Sastryar for the appellant.

S. T. Srinivasagopala Achariyar for the respondent.

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OLDFIELD, J.—The opinion of the Full Bench has established that section 47, Civil Procedure Code, is applicable to these proceedings. It is, however, objected further that they are covered also by Order XXI, rule 103, and that in accordance with it in the absence of a suit the order of the lower Court is conclusive. It is to be observed that the reference to 'any party' in the rule is to any party to the petition, not to the decree under execution. This is clear in view of the form of the provision in the previous code and the division of the former section 335 into two parts, of which the present rule represents the second. The expression 'any party' being interpreted in the manner suggested, there is no reason for holding, as has been held in connexion with the similar claim petition procedure, that the rule excludes the application of section 47 to cases such as the present between parties or their representative.

To turn next to the merits, the material facts are that the appellant is or represents the purchaser at a Court sale held in execution of a money decree. After the attachment, but before the sale, a suit was instituted on a mortgage of the properties sold and was pending at the date of the appellant's purchase. Later a decree for sale was passed and the respondent bought, when the sale took place. On his claiming delivery he found the appellants already in possession and the decisions under appeal depend on the lower Court's conclusion that, as they were there in virtue of a purchase *pendente lite*, the respondent was entitled to oust them, their right, if any, to redeem the mortgage decree and obtain possession being enforceable if at all by means of a separate suit, which they were at liberty to bring.

Argument has been based to a great extent on the fact that the attaching creditor, with reference to section 91 of the Transfer of Property Act should have been made a party to the mortgage suit and that as he was not, the appellants purchasing at the sale held under his attachment, are in some manner

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entitled to treat the proceedings in the mortgage suit as not binding on them. But neither section 91 nor Order XXXIV, rule 1, which is also relied on, confers on an attaching creditor any interest in the equity of redemption in the mortgage property; they are merely statutory provisions for his right to redeem and to be impleaded in proceedings on the mortgage. Independently of these provisions and as an attaching creditor, he obtained no interest in the property and nothing to which any equity in his favour founded on the infringement of those provisions could be annexed or which could pass from him to the purchaser at the sale held at his instance or which he could, after he had purchased himself (as he has done here) rely on as improving his title. This was the view taken in *Shananda Chandra Pal v. Sri Nath Ray Choudury*(1) and I concur with the learned Judges responsible for that decision in dissenting from *Ghulam Husain v. Dina Nath*(2) to this extent and for the reasons they give. Reliance also has been placed on *Venkata-Seetharamayya v. Venkataramayya*(3) in which *Ghulam Husain v. Dina Nath*(2) was followed, and on the references in it to the interest of the attaching creditor.

But whilst it may be doubted whether those references were an accurate description of the attaching creditor's position, it is material that the question before the Court was whether he was entitled to bring the property to sale, not whether the purchaser at such a sale was entitled to retain possession.

The right of the attaching creditor to bring the property to sale, notwithstanding the pendency of mortgage proceedings, may in fact be conceded without effect on the argument, on which the decision under appeal is founded. That argument is based on section 52 of the Transfer of Property Act; and what it does affect is not the attaching creditor's right to a sale, but the extent of the interest which such a sale would pass. For section 52 does not invalidate a sale held *pendente lite*, but only subjects the property in the purchaser's hands to the decree in which the pending litigation may end, as though no transfer has taken place. That is, it makes it liable for the mortgage amount

(1) (1912) 17 C.W.N., 87.

(2) (1901) I.L.R., 23 All., 467.

(3) (1914) I.L.R., 37 Mad., 418.

and imposes on the purchaser the same obligation to pay that amount in order to protect it, as would have been imposed by the decree, if no transfer had taken place. In the present case the mortgagor has made no such payment, but has allowed the property to be sold and, as he would not have been entitled to retain possession against the mortgage-decree purchaser, the appellant cannot do so either.

This entails acceptance of the lower Court's conclusion; and in accepting it I endorse its refusal to express an opinion as to the appellant's right to redeem by taking separate proceedings. This result entails dismissal of all the appeals. The appellant will pay the respondent's costs in each.

The connected Civil Revision Petitions are dismissed but without costs.

SESHAGIRI AYYAR, J.—I agree. Notwithstanding the conclusion of the Full Bench that the question should be dealt with under section 47 of the Civil Procedure Code, Mr. Srinivasagopala Achariyar contended that no appeal lay because of Order XXI, rule 103. There has been a change in the language between the old and the new codes in this matter and a first reading of rule 103 suggests that unless the resistance is by the judgment-debtor the only remedy of the resisting party is by way of suit. But this Court has always held, with reference to the provisions relating to claims, that if the claimant comes under section 47, the fact that a remedy by suit is given to him *qua* his rights as a claimant would not take away his right under section 47. The definition section includes in the definition of decree "the determination of any question within section 47". Therefore in my opinion, an appeal lies. I respectfully dissent from *Zipru v. Hari Supdushet*(1).

The main question is whether an auction purchaser under a money decree who has obtained possession can compel a mortgagee or a purchaser under the mortgage decree to leave his possession undisturbed provided he is willing to redeem the mortgage. The only decision in which there are observations in point on this subject is *Ghulam Husain v. Dina Nath*(2). That has been dissented from in *Shananda Chandra Pal v. Sri*

(1) (1918) I.L.R., 42 Bom., 10.

(2) (1901) I.L.R., 23 All., 467.

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Nath Ray Choudury(1). In these circumstances, it is desirable to examine the basis of the contention put forward on behalf of the auction purchaser. Under section 91 of the Transfer of Property Act, an attaching decree holder has got the right to bring a suit to redeem the mortgage. Does this give him an interest in the property? The question is now settled that an attachment confers no interest in the property attached. Reading section 91 (f) with this well-recognized rule, the proper construction to be put on the section is that by virtue of his right to bring the equity of redemption to sale, he is given the privilege of instituting a suit for redemption and no more. I do not think that any interest in property, as in the case of a puisne mortgagee can be ascribed to the attaching decree holder. Mr. Venkatarama Sastriyar referred to the language of Order XXXIV, rule 1 and asked us to hold that section 91, clause (f) of the Transfer of Property Act was intended by the legislature to give an interest in the property to the attaching creditor. Rule 1 of Order XXXIV refers to the substantive right mentioned in section 91 of the Transfer of Property Act and cannot and does not enlarge that right. In my opinion, the right which the attaching creditor possesses of suing to redeem is not an interest in property. The learned vakil for the appellant contended that this conclusion would militate against *Venkata Seetharamayya v. Venkataramayya*(2). As I understand that judgment what the learned judges had to decide was whether a mortgagee purchaser who failed to implead an attaching creditor can sue for a declaration that the latter is not entitled to pursue his further remedies under the attachment. They held that as he was a necessary party and was not made a defendant, his rights were not affected. What those rights may result in need not be considered now and was not considered then. The decision rests upon the broad proposition recognized by section 85 of the Transfer of Property Act and re-enacted in Order XXXIV, rule 1, that a person who ought to have been sued is not affected by any decree that may be passed behind his back. He can regard the result of the suit as infructuous so far as his rights are concerned and proceed to enforce them, notwithstanding the decree in the suit. The principle is that a person who ought to

(1) (1912) 17 C.W.N., 871.

(2) (1914) I.L.R., 37 Mad., 418.

have been brought before the Court and was not, should be placed in *status quo ante*. That, I understand, is the principle which underlies *Mulla Vittil Seethi v. Achuthan Nair*(1). That was a case of a puisne mortgage in possession; it was held that the sale obtained in a suit brought by the first mortgagee without impleading the puisne mortgagee did not affect the latter's possession. The decision in *Lakshpat Rai v. Fakhr-ud-din*(2) may also be cited as showing that a money decree purchaser cannot claim to retain possession merely because he purchased the property first.

The learned vakil contended that the true principle applicable to such cases is to hold that the first purchaser is entitled to retain possession against subsequent purchasers. This principle, is no doubt well-established as regards competing purchasers under money decrees. It has also been accepted as regards contending mortgage decree purchasers. Is the extension of this doctrine justifiable when the competition is between a purchaser under the money decree and a purchaser under a mortgage decree? Having regard to the fact that no interest is transmitted by the money decree holder to his auction purchaser, I do not think such an extension is warranted. Let us see what the result of upholding such a contention would be. The attaching decree holder who had the right to sue to redeem would have his rights enlarged on account of the failure to include him as a party defendant. On what principle is this addition to his rights to be justified? Mr. Venkatarama Sastriyar suggested that as, if the money decree holder had put up the equity of redemption to sale, the purchaser standing in the shoes of the mortgagor can compel the mortgagee to grant him time to redeem, the fact that he purchased during the pendency of the mortgage suit should not affect this right. This argument necessitates the examination of the theory that the attaching creditor is not affected by *lis pendens*. It was contended on the authority of *Krishnaya v. Mallaya*(3) that a person who ought to have been impleaded is not affected by the doctrine of *lis pendens*. That was a case of the application of the doctrine to co-defendants. The learned Chief Justice applied the analogy

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(1) (1911) 21 M.L.J., 218 (F.B.). (2) (1917) I.L.R., 39 All., 538.
(3) (1918) I.L.R., 41 Mad., 458.

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AYYAR, J.

of *res judicata* to that case. I do not think it was intended to lay down that all the rights and infirmities applying to *res judicata* were attracted by *lis pendens*. No doubt section 52 of the Transfer of Property Act is not in terms applicable to Court sales. The reason being that where a competent Court having jurisdiction to do so sells property, that sale is not vitiated by the fact that another Court had *scisin* of a suit relating to the same property. But the principle underlying the section is applicable to a person who with knowledge that a suit is pending relating to the property deliberately ignores such a suit and purchases the property. True knowledge is not a factor which affects the applicability of *lis pendens*. But in estimating the value of the rights acquired by such a purchaser is it inequitable to say

"you knew that a suit was pending and if you purchased with knowledge of such a pending litigation you cannot claim to supercede the right of the mortgagee in that suit."

I am inclined to the view that the principle of first purchase is not applicable under these circumstances; and where it conflicts with the reason underlying Order XXXIV, rule 1, namely, that a failure to implead places the respective claimants only in *status quo ante*, I am prepared to give precedence to the latter right. The decision in *Chinnu Pillai v. Venkatasamy Cheltiar*(1) turned upon the interest in property possessed by a puisne mortgagee and therefore is not inconsistent with the view I have taken.

For these reasons, I agree with the conclusion of my learned brother that the Civil Miscellaneous Appeals should be dismissed with costs and also with the order as to Civil Revision Petitions.

K.R.

(1) (1917) I.L.R., 40 Mad., 77.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

KANDREGULA ANANTHA RAO PANTHULU (PLAINTIFF),
APPELLANT,

1919,
December.

v.

KUNDIKONDA SURAYYA AND KUNDIKONDA
PRAKASAM (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Indian Contract Act (IX of 1872) ss. 64 and 65—Written Contract—Material alteration by one party, effect of—Breach of contract—Damages—Repayment of advance.

If a written contract is materially altered by one party without the knowledge and consent of the other, the former is not entitled to damages for breach of contract, but is entitled to a repayment of the advance made by him.

SECOND APPEAL against the decree of A. VENKATARAMAYYA PANTULU Garu, the Additional Temporary Subordinate Judge of Rajahmundry, in Appeal No. 27, of 1918, preferred against the decree of K. NARASIMHAM Garu, the Additional District Munsif of Rajahmundry, in Original Suit No. 477 of 1916.

Plaintiff and defendants Nos. 1 and 2 entered into an agreement for the delivery by the latter of 50,000 coconuts. The terms of the contract were embodied in a document (Exhibit A); and according to plaintiff, one of the terms was, that if delivery was not made within a certain date, the plaintiff was entitled to claim profit at the rate of Rs. 15 per thousand coconuts. Plaintiff alleged that there was a breach of contract by non-delivery on the stipulated date, and claimed damages at the above rate as well as the return of an advance of Rs. 1,200 paid to defendant on the same date and evidenced by a receipt (Exhibit A1) written on the same sheet of paper as Exhibit A. Defendant, inter alia, contended that the agreement was that on default the defendant was to pay Rs. 5 per thousand coconuts, that the figure 15 was an unauthorized alteration by plaintiff, and that as it was a material alteration the plaintiff was not entitled to base his claim on that document.

The District Munsif found that the document, had been altered as alleged by the defendant, and that as the alteration

* Second Appeal No. 210 of 1919

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was of a material character it vitiated the agreement, and held that plaintiff could not claim damages for defendant's default. He, however, held that the payment of Rs. 1,200, as an advance, was evidenced by a separate document, though it was part of the same transaction, and decreed the repayment of that amount. On appeal, the Subordinate Judge concurred with the District Munsif that the alteration was material and that no damages could be allowed. With regard to the repayment of the advance of Rs. 1,200 he observed :

"The contract Exhibit A and the receipt Exhibit A1 were written on the same sheet of paper and the contract also refers in specific terms to the receipt to be executed on the other side of the document. The receipt seems to have been separately written up just for the purpose of securing formal attestation to the transaction, represented by the contract and the receipt. The suit itself has been brought on the basis of the contract, the execution of the receipt being only incidentally referred to as evidencing the payment of the advance. And the cause of action for the suit itself is mentioned in the plaint as the due date for the delivery of the cocoons mentioned in the contract. Under such circumstances I do not think the learned District Munsif was right in separating the plaintiff's claim for the advance of Rs. 1,200 as standing on a different footing from his claim for damages and awarding a decree to him for that amount as distinguished from the rest of the claim."

He, therefore, reversed the decree and dismissed the plaintiff's suit. Plaintiff thereupon preferred this Second Appeal.

P. Narayanamurti for the appellant.

V. Ramdoss for first respondent.

C. Rama Rao for second respondent.

SPENCER, J.

SPENCER, J.—I cannot agree with the learned Subordinate Judge in his view that the plaintiff is debarred from recovering the advance made by him for the mere reason that Exhibit A (the contract deed) and Exhibit A1 in which the receipt of the advance was acknowledged, were written on the same piece of paper and that a material alteration of one would affect the other with the taint of fraud.

In my opinion the defendant is bound to refund any advantage taken by him whether the contract is void, or

voidable and rescinded. In one case section 65 of the Contract Act applies, in the other section 64.

There is no question now of performing the contract. First defendant does not want to perform it and he may be treated as having rescinded it, as he set up in his written statement another arrangement by which the original contract had been superseded. In fact the first defendant in his written statement, paragraph 10, did not deny his liability to refund the advance of Rs. 1,200 but he alleged that satisfaction had been given as regards Rs. 500 and that only Rs. 700 remained to be paid.

As for the claim for damages for non-performance of the contract on the point of law, which is whether a plaintiff who has made a material alteration in an instrument containing a contract can recover any amount under it, I think we should follow *Chitturi Suriah v. Boddu Ramayya*(1), *Gour Chandra Das v. Prasanna Kumar Chandra*(2), and the case of *Powell v. Divett*(3).

In fact Mr. Narayanamurti conceded after some argument that as the terms of the contract were embodied in Exhibit A he was not entitled to recover damages independently of this document.

The only question then left was as to the appellant's (plaintiff's) right to recover the advance of Rs. 1,200, and this must be found for the appellant on the strength of first defendant's admission and the reasons given above.

The result will be that the appeal will be allowed with proportionate costs in this and the lower Appellate Court on this part of the plaintiff's claim and the decree of the District Munsif will be restored against first respondent and the Second Appeal dismissed with costs against second respondent, who, it is conceded, has been unnecessarily made a party to this appeal.

KRISHNAN, J.—I accept the finding of the lower Courts that the written contract, Exhibit A, has been materially altered by the plaintiff without the knowledge and consent of the first defendant, the other party to it. On that finding we must hold that plaintiff is not entitled to enforce that contract, see *Powell v. Divett*(3), and that his suit so far as it is for damages was

(1) (1915) M.W.N., 150.

(2) (1906) I.L.R., 33 Calo., 812.

(3) (1812) 104, E.R., 755.

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rightly dismissed, as it would be enforcing the contract to give him such damages.

It is, however, argued that plaintiff is nevertheless entitled to the repayment of the Rs. 1,200 paid by him as an advance to the first defendant and the claim is made under section 64 or 65 of the Contract Act. The view of the lower Appellate Court that Exhibit A1, the receipt given for the money, is also rendered invalid by the alteration in Exhibit A does not seem to me to be supportable. It is only a receipt for the money paid. If the repayment of that money is claimed by way of enforcement of the contract, no doubt plaintiff will be met by the objection based on its material alteration. But it is not so claimed. The lower Courts have found that the first defendant did not perform the contract but on the other hand he committed breach of it. Though plaintiff cannot take advantage of the breach to claim damages, he is not precluded from relying upon it and treating the contract as having become void under section 65 and requiring the defendant to repay the money advanced to him. Illustration (c) of section 65 seems to indicate that the section is meant to apply also to cases where one party breaks a contract and the other party in consequence of it rescinds it. The material alteration, though it prevents plaintiff from enforcing the contract, does not seem to prevent him from rescinding it. No authority has been cited to show that it does. On the other hand the ruling in *Chitturi Suriah v. Boddu Ramayya*(1), would seem to support the view that the money advanced could be claimed back. Plaintiff would therefore be entitled to be paid back the Rs. 1,200 that he paid.

The Second Appeal so far as it is against the second respondent is not pressed. I would therefore allow the Second Appeal against the first respondent and, reversing the decree of the Subordinate Judge, restore that of the District Munsif. Plaintiff will pay and receive proportionate costs so far as the first respondent is concerned in this and the lower Appellate Court.

The Second Appeal is dismissed with costs against the second respondent.

K.R.

(1) (1915) M.W.N., 160.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

AMBALAVANA PANDARA SANNADHIGAL (FOURTH
RESPONDENT, FIFTH RESPONDENT), DEFENDANTS,

1919,
December,
11 and 12.

v.

THE ADVOCATE-GENERAL OF MADRAS AND THREE OTHERS
(PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Sec. 92, and O. I, r. 10 (2)—Suit by plaintiffs after obtaining consent of Advocate-General—Application by Advocate-General to be added as co-plaintiff—Power of Court to add parties.

In a suit under section 92, Civil Procedure Code, instituted by persons who had obtained the requisite consent of the Advocate-General, the Court can, on the application of the Advocate-General, add him as a co-plaintiff.

PETITIONS under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act, praying the High Court to revise the Order of V. R. KUPPUSWAMI AYYAR, Subordinate Judge of Kumbakonam, in I.A. Nos. 486 and 487 of 1919, in Original Suits Nos. 8 and 71 of 1918, respectively.

The material facts and contentions appear from the judgment.

The Hon'ble T. Ranga Achariyar for the petitioner.

K. V. Krishnaswami Ayyar and A. C. Shanmukha Nayanar for the respondents.

The JUDGMENT of the Court was delivered by

SPENCER, J.—The learned Subordinate Judge has directed the addition of the Advocate-General as a plaintiff in two suits, under section 92 of the Civil Procedure Code, which relate to the administration of a mutt and a temple, and the question we have to decide is whether we should in the exercise of our powers of revision interfere with that order.

It is argued that, if it be shown, as the defendant proposes to do, that the other plaintiffs are not persons having an interest in the trust, the suit will be liable to be dismissed, and that the addition of the Advocate-General is not necessary for the complete disposal of the suit as originally instituted.

* Civil Revision Petition Nos. 692 and 693 of 1919.

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SPENCER, J.

Order I, rule 10 (2), Civil Procedure Code, provides for the addition of parties whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon all the questions involved in the suit. We are not disposed to place a narrow construction on these words. *Darves Haji Mahamad v. Jainudin*(1) certainly supports Mr. Ranga Achariyar's arguments, for the petitioner, that a suit which is bad at its institution cannot be bettered by the addition of another plaintiff. But the view taken in Bombay has not been followed in this Court: see *Ramnyyengar v. Krishnayyengar*(2) *Murugesu Mudaliar v. Dr. Sir S. Subramania Aiyar*(3) and *Dr. Sir S. Subramania Aiyar v. Murugesu Mudaliar*(4).

We think that both the original plaintiffs and the Advocate-General represented the public interests when they sued for the protection of a trust under section 92 of the Civil Procedure Code, and in such a case the most important questions to be settled in the suit are those which relate to the administration of the trust, and the Court has power under Order I, rule 10, to add parties for the effectual adjudication of those questions: see *Parameswaran Munsee v. Narayanan Nambodri*(5). We cannot read into the rule the words 'as between the parties to the suit' after the words 'questions involved in the suit,' as to do so would be to defeat the object of this salutary provision of law for the final settlement of disputes, seeing that in almost every case similar objection might be taken to the exercise of this power.

Another argument based on the wording of section 92 of the Civil Procedure Code, is that a suit brought by the Advocate-General, in conjunction with two other worshippers to whom he has given his consent in writing to sue, would be not maintainable. It is argued that the exercise of the right of action by one party exhausts the right of the other.

As we understand the section, the Advocate-General has the power to sue, and the other parties have the same right, and they may exercise that right separately or in conjunction with each other.

The right of each to sue in his own name is not exclusive of the right of the other. Cases in which there is a competition

(1) (1911) 1 L.R., 31 Bom., 803. (2) (1847) 1 L.R., 10 Mad., 185.
(3) Appeals Nos. 810 and 373 of 1918. (4) Appeal No. 9 of 1919 (unreported).
(5) (1917) 1 L.R., 40 Mad., 110.

between two or more plaintiffs will be governed by Order I, rule 1, Civil Procedure Code, subject to rules 2 and 11 of the same order. As the other plaintiffs have agreed in the lower Court to the Advocate-General having the conduct of these suits, the defendant will not be embarrassed nor will the trial be delayed by the procedure which the lower Court has adopted.

The revision petitions therefore fail and are dismissed with costs. (1 set for each petition.)

K.R.

AMBALAVANA
PANDARA
SANNADHIGAL
v.
THE
ADVOCATE-
GENERAL
OF MADRAS.
SPENCER, J.

APPELLATE CRIMINAL.

Before Mr. Justice Abdul Rahim and Mr. Justice Spencer.

SUNDARASAN, PETITIONER (ACCUSED),

v.

KING-EMPEROR, RESPONDENT.*

1919,
July 16 and
December 19.

Criminal Procedure Code, section 190 (c)—District Magistrate receiving information of offence, as President of District Board—Right to take cognizance under section 190 (c).

The fact that a District Magistrate, who happens to be also the President of a District Board, receives in the latter capacity information as to the commission of an offence by a servant of the Board, does not debar him from taking cognizance of the offence under section 190 (c) of the Criminal Procedure Code.

Thakur Pershad Singh v. The Emperor, (1906) 10 C.W.N., 775, dissented from.

CRIMINAL REVISION PETITION filed under sections 435 and 439 of the Criminal Procedure Code and section 107 of the Government of India Act, 1915, to revise the Order of P. MACQUEEN, District Magistrate of Coimbatore, dated 16th July 1919, taking cognizance of the offence of forgery alleged to have been committed by the accused.

The accused in this case was a clerk employed under the District Board of Coimbatore. A cheque for about Rs. 90 was issued by the Engineer of the District Board in favour of a contractor for work done. On a complaint by the contractor to the Engineer that he had not received payment for the work,

* Criminal Revision Case No. 540 of 1919 (Criminal Revision Petition No. 459 of 1919).

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EMPEROR. the Engineer instituted an inquiry, and found that the cheque was cashed by the accused at the Taluk Treasury on an endorsement in accused's favour, purporting to have been made by the contractor. The contractor having denied the endorsement, the Engineer reported the matter to the President of the District Board. The President happened to be the District Magistrate. He took cognizance of the offence under section 190 (c), Criminal Procedure Code, and forwarded it to the Deputy Superintendent of Police for investigation and report. The police thereupon filed a complaint before him as District Magistrate, and he transferred the case to the file of the Taluk Magistrate, Avanashi.

S. Subrahmanya Ayyar for petitioner.

Public Prosecutor for the Crown.

ABDUR
RAHIM, J.

ABDUR RAHIM, J.—The District Magistrate of Coimbatore, who is also the President of the District Board, had information that a certain cheque had been forged and he has taken cognizance of the offence against the accused under section 190 (c), Criminal Procedure Code. It is argued that he had no such power. But I must admit it is difficult to find any basis for such an argument in face of the language of section 190 (c), which is to the effect that the District Magistrate may take cognizance of any offence 'upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.' There can be no doubt, upon the order recorded by the Magistrate, that he suspected that the accused had committed an offence of forgery and he has set out the facts which led him to that suspicion. Reliance has been placed in support of the petition upon several decisions of the Calcutta High Court, one of which is *Thakur Pershad Singh v. The Emperor*(1). There it is laid down, following two older decisions of the same Court [*In the matter of Surendranath Roy*(2) and *In the matter of Mohesh Chunder Banerjee*(3)], that a Magistrate taking cognizance of an offence is bound to disclose the information, private or otherwise, upon which he issues a warrant for the arrest of the accused. So far as that goes the information is set out in the order of the Magistrate in

(1) (1900) 10 C.W.N., 775.

(2) (1870) 5 Bea. L.R., 274.

(3) (1870) 13 W.R. Cr. Rulings (1).

this case. But it is further observed,

"there is nothing on the record to show that the information, whatever it may have been, which he received was not lodged to him as Collector; and if that were so, it was not open to him as Magistrate to act on that information and proceed to issue warrants against the petitioners. Practically by such action he is making himself a Judge in his own case, for the case seems to be that he with the other co-proprietors granted a lease on certain terms to Chamroo Saboo and that Chamroo has tampered with that lease."

It is urged that here the information which Mr. MacQUEEN had derived from his position as the President of the District Board and that therefore he could not use that information in order to act under section 190 (c). With all respect to the learned Judges who decided *Thakur Pershad Singh v. The Emperor*(1), it is difficult to see wherefrom they obtained the limitation which they imposed upon section 190 (c), and I find that in a later ruling of the same Court, *Lakhi Narayan Ghose v. Emperor*(2), one of the learned Judges, Mr. Justice CAENDUFF, J., doubted the correctness of that ruling. It seems to me that when a District Magistrate is given such a wide power as to take cognizance of an offence on suspicion, it would be disregarding the express language of the legislature to lay down that he cannot act if his suspicion or knowledge is based on facts which came within his cognizance in another capacity. It may be that in some cases the exercise of such a power by Magistrates may cause considerable hardship and such a power may be liable to be harshly exercised. But we have nothing to do with that. Where certain powers are conferred on the Magistrates by the legislature it is no business of the Court to lay down limitations which are unwarranted by the language of the Code.

The petition therefore must be rejected, but the accused will remain on the same bail pending trial.

SPENCER, J.—I concur. I only wish to add that I agree with the opinion of Mr. Justice CAENDUFF in *Lakhi Narayan Ghose v. Emperor*(2) that the decision in *Thakur Pershad Singh v. The Emperor*(1) goes beyond the provisions of the Code and is not a decision which can be followed without question.

(1) (1900) 10 C.W.N., 775.

(2) (1910) I.L.R., 37 Cal., 221.

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SPENCER, J.

Another case, *Jhuna Lal Sahu v. The King-Emperor*(1), was quoted to us. But, as I understand that case, there was a complaint in writing, of which the Magistrate might have taken cognizance under section 190, sub-section (1) (a), and the learned Judges were of opinion that, having such a complaint before him, the Magistrate was not justified in taking cognizance of the same under section 190, sub-section (1) (c), as if it was a matter that had come to his knowledge from a source other than a complaint of facts constituting an offence, as 'complaint' is defined in the Code.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

YELLA KRISHNAMMA (PLAINTIFF), APPELLANT,

v.

KOTTIPALLI MALI (DEFENDANT), RESPONDENT.*

Sale of land—Non-payment of price—Right of vendor to sue for possession—Decree for possession, whether can direct payment of price or be conditional on payment—Transfer of Property Act (IV of 1882), ss. 54 and 55.

A vendee who has not paid the purchase money for the lands bought by him, is entitled to a decree against the vendor for possession of such lands. The Court cannot make the decree conditional on payment of the purchase money, nor can it decree payment of the price to defendant in the vendee's suit.

SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, Temporary Subordinate Judge of Cocanada, in Appeal Suit No. 120 of 1918, preferred against the decree of K. PURUSHOTTAM PANTULU GABU, District Munsif of Amalapuram, in Original Suit No. 948 of 1916.

The plaintiff sued to recover possession of the suit lands sold to him by the defendant under a registered sale-deed executed by the latter on 16th January 1913. The sale-deed recited that the vendor had already received the purchase money. The

(1) (1917) 2 Patna L.J., 657.
* Second Appeal No. 499 of 1919.

plaintiff sued to recover possession from the vendor, and alleged in the plaint that he had paid the full amount of the purchase money. The lower Courts found that no portion of the purchase money was paid by the vendor; the District Munsif passed a decree, directing delivery of possession on the plaintiff paying the full amount of the price to the defendant within one month, and in case of default that the suit should stand dismissed. On appeal by the plaintiff, the lower Appellate Court modified the decree by omitting the direction for dismissal of the suit, and by substituting in its place a direction that 'the plaintiff will be entitled to recover possession of the property on his paying to defendant or into Court the amount of the purchase money.' The plaintiff preferred this Second Appeal, and contended that the lower Courts were wrong in passing a decree for possession, conditional on his paying the purchase amount.

K. Ramamurti for the appellant.

A. Satyanarayana for the respondent.

COUTTS TROTTER, J.—The short point in this Second Appeal is whether a plaintiff who has not paid the purchase money of a property which has been conveyed to him can maintain a suit for possession without paying for it, or submitting to a decree for payment, or a condition attached to the decree as to the purchase money which he had agreed to pay. No doubt it seems very reasonable that a man who comes to enforce his right against the property should be expected to do what is just and pay the price. But we think that there is no doubt whatever that the law in this country, following the English law, is otherwise. Two benches of this Court, in *Subrahmaniam Ayyar v. Pooran*(1) and in *Rama Aiyar v. Vanamamalai Aiyar*(2), have held that in such cases as the present the vendee can be compelled to pay the purchase money in extinction of the lien of the vendor before he gets a decree for possession. That must proceed on two assumptions. The first is, that the vendor is entitled to a possessory lien in respect of his unpaid vendor's lien, and the other is that you can give relief against the consequences laid down in the Transfer of Property Act as following from a transfer by sale-deed and conveyance. With regard to the first of these propositions, we

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TROTTER, J.

(1) (1904) I.L.R., 27 Mad., 28

(2) (1915) 27 I.C., 336.

KRISHNAMMA v. MALI. COURTTS. TRUTTER, J. think that it is an oversight of the learned Judges to have treated an unpaid vendor's lien, which only creates a charge on the property sold, as a possessory right exercisable in the face of the claim of the vendee to possession. With regard to the second, the matter was very carefully considered by two learned Judges of this Court, the late Chief Justice and the present Chief Justice, in *Velayutha Chetty v. Govindaswamy Naicken*(1), where they pointed out that the broad proposition involved is this: Can Courts give equitable relief to mitigate or suspend the consequences laid down by a statute; and they came to the conclusion that the proposition that the plain words of the statute could be whittled away by the application of the so-called equitable doctrines, was an absolutely untenable one and they expressed their dissent from the contrary decision in *Bajinath Singh v. Paltu*(2). The same principle was really involved in the decision of the Full Bench of this Court in *Kandasami Pillai v. Ramasami Mannadi*(3). That was a case where it was part of the terms of a lease deed or demise that the lessee should discharge a prior hypothecation on the land. It was found that this was not in the nature of a condition precedent, but was merely a concurrent covenant with the other obligations of the parties to the document, and it was held by the Full Bench that the creation of a present demise involved the right to immediate possession by the person to whom the demise was made, unless it could be shown that any of the stipulations imposed upon him for performance were in the nature of conditions precedent.

The learned Judge in this case refers to the case of *Nilmadhab Parhi v. Haraprosad Parhi*(4), besides the decisions in Madras which we feel constrained to hold are no longer good law in view of the Full Bench ruling and of the ruling in *Velayutha Chetty v. Govindaswamy Naicken*(1). We think that the learned Judge clearly misconstrued the effect of the decision, because the ground upon which the judgment really proceeds is that there was evidence of an intention that a registered document was not to take effect *ipso facto* at once on execution and was not intended to be performed till something else had been done. Now if there

(1) (1911) I.L.R., 34 Mad., 543.

(3) (1919) 36 M.L.J., 313.

(2) (1908) I.L.R., 30 All., 123.

(4) (1913) 17 C.W.N., 1131.

KRISHNAMMA v. MALI. COURTTS. TRUTTER, J. had been any evidence in this case that it was the intention of the parties that this sale-deed, which is absolutely unqualified on the face of it, should only come into effect when in fact the consideration had been paid, no doubt any Court would have the right to give effect to such a contract and to hold that there was such an intention. The section of the Transfer of Property Act which enumerates the respective duties of vendor and vendee is expressly qualified by the words "in the absence of a contract to the contrary". The Calcutta case held, on the particular facts, that there was a contract to the contrary and that therefore clearly the consequences of the statute did not necessarily ensue.

The appeal must be allowed with costs.

AYLING, J.—I agree.

K.B. AYLING, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

CHERIA KUNHAMMAD AND KALLIYANI (DEFENDANTS

Nos. 3 AND 4), APPELLANTS,

v.

KUNHUNNI ALIAS KIZHAKKAYIL NAIR AND ANOTHER

(PLAINTIFFS AND FIFTH DEFENDANTS), RESPONDENTS.*

Malabar Law—Karnavan—Lease four years before expiry of a prior lease—No necessity or justification for such lease—Expiry of prior lease when grantor was karnavan, effect of, on subsequent lease—Lease, whether valid or binding on succeeding karnavan.

Where a karnavan granted a lease to take effect on the expiry of a prior lease whose term was to expire four years later, and it was found that there was no necessity or justification for granting the subsequent lease four years prior to the expiry of the term of the prior lease,

Held, that the subsequent lease was not valid or binding on the succeeding karnavan, even though the prior lease expired when the grantor continued to be the karnavan.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 554 of 1913, preferred against the decree of T. N. RAMASWAMI AYYAR, District Munsif of Payyoli, in Original Suit No. 432 of 1911.

* Second Appeal No. 1357 of 1918.

1920,
January, 21.

KUNHAMMAD
v.
KUNHUNNI.

Suit is by the present karnavan of a Malabar edam to recover lands belonging to the edam which were leased out by the previous karnavan (the fifth defendant) in favour of the first defendant. The property had been previously leased to the first defendant in 1891 under a lease for a term of twelve years. Four years before the expiry of that lease, namely, in 1899, the fifth defendant granted the present lease in favour of the first defendant. The interest of the first defendant in the lease was purchased in Court auction by the second defendant who transferred his interest to the third and fourth defendants. There was also a kanom in 1903 and a puramkadam in 1905 executed in favour of the third and fourth defendants by the fifth defendant. The fifth defendant ceased to be karnavan in 1907, as he then became a sthani, and the plaintiff became the karnavan of the edam from that time. The plaintiff instituted the present suit to recover the plaint properties on the basis of the prior lease of 1891 having expired, and the subsequent lease, kanom and puramkadam, not being valid and binding on the plaintiff's edam. The lower Courts held that the kanom and puramkadam were not binding on the plaintiffs' edam, and also held that the lease of 1899, granted by the fifth defendant four years prior to the expiry of the prior lease of 1891, was not for any necessity of the edam, and decreed possession of the lands in favour of the plaintiff, although the prior lease had expired in 1903 at a time when the fifth defendant was still the karnavan of the edam. The third and fourth defendants preferred this Second Appeal.

K. P. M. Menon for the appellants.

C. Madhavan Nayar for the respondents.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—Defendants Nos. 3 and 4 are the appellants. The plaintiff is the karnavan of an edam and he sued to recover the edam property which had been leased to the first defendant in 1899, to take effect on the expiry of a prior lease granted in 1891, and which would expire in the ordinary course in 1913. It was found by the lower Appellate Court that there was no necessity or justification for granting that lease in 1899, four years before the term of the prior lease expired. The question is whether in law the plaintiff who has succeeded to the karnavastanam in 1907 is entitled to treat the lease granted without

justification or necessity by the prior karnavan, fifth defendant, as not binding on the tarwad. In *Cheria Cherikandan v. Krishnan Nambiar*(1), SUNDARA AYYAR, J., and myself held that where a lease had been granted for five years and a melcharth was granted after three years from the beginning of the first lease and two years before the expiry of that lease term to another tenant, such a second lease was not binding on the succeeding karnavan. In that case, no doubt the second lease was granted to a man other than the person who was holding under the first lease. Mr. Menon argued that in that case we were probably led to the conclusion adverse to the second lease by a desire to put an end to the undesirable practice of karnavans granting kanoms and leases to third persons over the heads of the lessees and kanomdars in possession. But there is nothing in the judgment to indicate that the fact that the second lease was given to a person other than the original lessee influenced our opinion. I think that SUNDARA AYYAR, J., (who pronounced the judgment which I adopted) has given two reasons why such an exercise of power in anticipation by the karnavan is not binding on the tarwad. He first says:

"it is not alleged that there was any necessity for doing so or that the tarwad derived any benefit from the transaction."

So, if such an allegation is not made and proved, it is implied in the above observation that that would be a sufficient ground for holding that the transaction would not be binding on the tarwad. Then, that ground is sought by us to be fortified by the further consideration that the karnavan who gave the second lease may be succeeded by a different karnavan even during the continuance of the term of the first lease and that

"it is impossible to countenance the proposition that the karnavan for the time being can tie down the discretion of those that are to succeed him in the management by granting leases of family lands, when there is absolutely no reason for doing so, and the lands are being held by tenants on leases which are still in force."

The judgment was pronounced on 19th July 1912. Taking advantage of this second reason mentioned in the judgment, about the danger to the rights of the succeeding karnavans, an argument was elaborately advanced in the case reported in the

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ATTAR, J.

next page, i.e., *Moidin Kutti v. Kunhi Koyan*(1), that if the karnavan who anticipated the expiry of the first lease happened to be alive and still holding his position as karnavan when the term expired, the melkanom or melcharth already granted need not be supported by necessity or justification to be binding on the tarwad. AYLING and HANNAY, JJ., in a short judgment decided on this contention as follows :

"It is found that there was no family necessity to justify the melcharth Exhibit B; and we must hold that the transaction is not binding on the successor of the karnavan who executed it whether the latter did or did not survive the expiry of the prior kanom. The appeal is dismissed with costs."

Mr. Menon however relied upon a yet later decision of PHILLIPS and KRISHNAN, JJ., in *Thekkel Thamarayi v. Kizhukkotti Aliammu*(2). In this case the decision in *Cheria Cherikandan v. Krishnan Nambiar*(3), is referred to and it was interpreted as implying that if the grantor lived after the term of the prior kanom expired and was thus in a position to then grant the melcharth (and provided that the grant was not of such a nature as to improperly prejudice the successor) it is valid. Somehow, reference is not made to the decision of AYLING and HANNAY, JJ., in *Moidin Kutti v. Kunhi Koyan*(1). A karnavan's ordinary legal right is that of management over the tarwad affairs and properties and, in my opinion, it is difficult to hold that four years before a lease expired, it is the proper thing or an ordinary incident of management to grant a second lease to begin on the expiry of the former lease. That was the principle on which *Cheria Cherikandan v. Krishnan Nambiar*(3), was based. It is only where proper necessity or justification can be urged to invoke what can be called the extraordinary powers of dealing with the property (which is being held by tenants under a lease which has not expired) that such an action can be held valid against the tarwad. It is also significant that this contention that necessity need not be shown where the karnavan continues in power at the expiry of the first lease seems not to have been argued before the lower Appellate Court but was raised for the first time in the Second Appeal memorandum. As

(1) (1914) 27 M.L.J., 691.

(2) Second Appeal No. 774 of 1917 (unreported).

(3) (1914) 27 M.L.J., 690.

the lower Courts have found that there was no necessity or justification for the attempt to deal with the property before the expiry of the former term, I would uphold the lower Appellate Court's judgment, expressing my respectful dissent from the decision in *Thekkel Thamarayi v. Kizhukkotti Aliammu*(1), and I would dismiss the Second Appeal with costs, the contention relating to the two other documents Exhibits I and IX not being sustainable on the facts found

SPENCER, J.—As regards *Thekkel Thamarayi v. Kizhukkotti Aliammu*(1) which has been quoted to us in support of the premature grant of a melcharth, if the time for the renewal of lease or kanom is anticipated by a karnavan in such a way as to have the effect of fettering his successor's management of the estate, though a renewed lease or kanom may be bad on account of such anticipation of the karnavan's powers, it does not to my mind follow that in cases where there is no successor and the same karnavan continues in office till after the expiry of the term the instrument is necessarily a good one. SUNDARA ATTAR, J., in *Cheria Cherikandan v. Krishnan Nambiar*(2), observed that there was no justification for the granting of a melcharth two years in advance of the expiration of the prior lease. In that case, it was not alleged that there was any necessity for it or that the tarwad derived any benefit from the transaction. *A fortiori* in the present case, where no explanation has been offered for anticipating the time of the renewal of the lease by four years, it is difficult to see how the fifth defendant's conduct can be justified. I agree that the Second Appeal should be dismissed with costs.

K.R.

(1) Second Appeal No. 774 of 1917 (unreported). (2) (1914) 27 M.L.J., 690.

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v.
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—
SADASIWA
ATTAR, J.

SPENCER, J.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Phillips.

1920,
January 21.

JEKKAM REDDI, SESHADRI REDDI AND TWO OTHERS
(DEFENDANTS), APPELLANTS,

v.

SIR S. SUBRAMANIA AIYAR, K.O.I.K., AND THREE OTHERS
(PLAINTIFFS NOS. 1 AND 3 TO 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Sec. 92—Suit by two persons, one of whom had no interest under the section—Leave under the section obtained subsequently by two others having such interest—Latter joined as additional plaintiffs—Suit, whether maintainable.

Where a suit was instituted under section 92, Civil Procedure Code, by two plaintiffs, one of whom had no interest such as that required by that section, and two other persons having the requisite interest subsequently obtained leave under the section and were joined as additional plaintiffs in the suit.

Held, that the suit was maintainable under section 92 of the Code, and ought to be tried on the merits.

Ramayyengar v. Krishnayyengar, (1887) I.L.R., 10 Mad., 185, applied.

APPEAL against the decree of K. SUNDARAM CHETTIYAR, the Temporary Subordinate Judge of Nellore, in Original Suit No. 61 of 1917 (Original Suit No. 47 of 1917 on the file of the District Court of Nellore).

The present suit (Original Suit No. 47 of 1917) was instituted under section 92, Civil Procedure Code, in the District Court of Nellore, on 27th July 1917, for removal of the defendants from trusteeship and the framing of a scheme in respect of a temple in the village of Vodur in Gudur taluk in Nellore district. The suit was originally instituted by two plaintiffs, one of whom, (the first plaintiff, Sir S. Subramania Aiyar, who was the President of the Dharma Rakshana Sabha) was a person permanently residing in Mylapore, Madras, and had not visited the temple. The defendant, *inter alia*, objected in his written statement, dated 5th November 1917, to the maintainability of the suit on the ground that one of the two plaintiffs (*viz.*, the above-said first plaintiff) had not the interest required by section 92, to obtain leave and institute the suit. Thereupon, two other persons applied to the Collector of Nellore for leave to institute this very suit and the Collector granted sanction.

* Appeal No. 182 of 1919.

The suit was transferred to the file of the Sub-Court of Nellore and was therein numbered as Original Suit No. 61 of 1917. The two persons who had subsequently obtained leave applied to the Sub-Court to be joined as additional plaintiffs in the suit. The Court passed an order joining them as additional plaintiffs in the suit. The Court framed issues as to the competency of the first plaintiff to obtain leave and to institute the suit, as also additional issues whether the sanction obtained by plaintiffs Nos. 3 and 4 subsequent to the institution of the suit, would make the suit a validly instituted suit, and also whether the sanction granted to those plaintiffs was proper. The lower Court held that the suit was not properly instituted and could not be validated by the subsequent sanction obtained by the additional plaintiffs and accordingly dismissed the suit without costs. The defendants preferred this appeal against the decree disallowing their costs; the plaintiffs preferred a memorandum of objections, and contended that the suit was maintainable and ought to have been decided on the merits.

T. V. Venkatarama Ayyar and K. N. Kumaraswami Ayyar for appellants.

P. R. Gandpati Ayyar for respondents.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.—One of the plaintiffs in this suit which was instituted under section 92, Civil Procedure Code, was found to have no interest such as that required by this section. Thereupon, two other men who had the requisite interest applied to the Collector and obtained sanction to institute this very suit. They were then added as third and fourth plaintiffs. Objection was, however, taken by the defendants, to the effect that the suit was bad as laid and must be dismissed and that the requirements of section 92 were not satisfied by adding the third and fourth plaintiffs in the same suit. The learned Subordinate Judge heard the objection, discussed it and came to the conclusion that the suit was not properly instituted and dismissed it. There is a ruling of this Court in *Ramayyengar v. Krishnayyengar*(1), which would cover the present case, but it was argued that in the old Code no such clause as that in sub-paragraph (2) of

(1) (1887) I.L.R., 10 Mad., 185.

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Ayyar,
PHILLIPS, J.

section 92 occurred in section 539 and that the latter paragraph makes a difference. We find, however, that *Ramayyengar v. Krishnayyengar*(1), has been followed in some very recent cases of this Court decided under the new Code. One of them is a decision of OLDFIELD and BAKEWELL, JJ., in Appeals Nos. 310 and 373 of 1918 and the other is the judgment of SPENCER and KRISHNAN, JJ., in *Ambalavana Pandara Sannadhigal v. The Advocate-General of Madras*(2). On the other hand, there is a ruling of the Bombay High Court in *Darves Haji Mahamad v. Jainudin*(3), contrary to the view taken in these cases. And the Allahabad High Court seems to have taken the same view of the law as the Bombay High Court. But the matter being purely one of procedure we think we ought to follow the rulings of this Court. The judgment of the Subordinate Judge is set aside and the case will be remanded to him for disposal on the merits, the memorandum of objections being allowed.

K. B.

APPELLATE CIVIL

1920,
February 12.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

KALATHY AMMALU AMMA AND THREE OTHERS, LEGAL REPRESENTATIVES OF THE DECEASED APPELLANT (SECOND DEFENDANT),

v.

KOLLANGARTH RAMAN NAIR AND NINE OTHERS (PLAINTIFFS NOS. 1 TO 4, DEFENDANTS NOS. 10 TO 14 AND LEGAL REPRESENTATIVES OF THE DECEASED FIFTEENTH DEFENDANT), RESPONDENTS.*

Malabar Compensation for Tenants' Improvements Act (I of 1890), Sec. 19—Compensation for tenants' improvements—Contracts made after Act, more favourable to tenant than the Act—Contract, or Act enforceable—Value whether at the time of eviction, a date of contract, payable.

Section 19 of the Malabar Compensation for Tenants' Improvements Act, does not prevent the tenant from claiming compensation under a contract made after passing of the Act, if it is more favourable to him than the Act.

The value of improvements payable to a tenant is their value at the time of eviction.

Kerala Varma Valia Rajah v. Ramunni, (1893) 3 M.L.J., 51 (F.B.), followed.

(1) (1887) I.L.R., 10 Mad., 185.

(2) (1920) I.L.R., 43 Mad., 707.

(3) (1906) I.L.R., 30 Bom., 803.

* Second Appeal No. 101 of 1919.

SECOND appeal against the decree of V. S. NARAYANA AYYAR, Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 63 of 1918, preferred against the decree of T. KRISHNAN NAYAR, District Munsif of Nadapuram, in Original Suit No. 474 of 1915.

AMMALU
AMMA
v.
RAMAN NAIR.

The plaintiffs sued to recover the plaint properties from the defendants on the strength of a marupat executed by one Kunhali to one Krishna Variar, who was then the pattamali of the plaint devaswam. The only contention in Second Appeal was as to the amount of compensation payable to the defendants. The marupat (Exhibit A) was executed on 5th November 1886, after the Malabar Compensation for Tenants Improvements Act was passed, and was in these terms:

"Marupat executed by Kunhali to Krishna Variar, etc.:—The following properties have been demised as kanam and kuzhikanam and a sum of rupees twenty received in cash for the necessities of the devaswam. The sum of money is charged as kanam on the said parambas and a demise granted for 24 years. Therefore, if I reclaim and improve these parambas and make kuzhikanams (trees) therein, I shall receive the value thereof at double the local rate and also vettukanam equal to that kuzhikanam amount, and if I make houses and wells, the value estimated therefor on inspection, along with the said kanam amount . . .

5th November 1886

(Signed) Kunhali."

The lower appellate Court allowed compensation for improvements at the rate current at the date of Exhibit A, according to the Malabar Compensation for Tenants' Improvements Act and not according to the terms of the contract, Exhibit A. The second defendant preferred this Second Appeal.

K. P. M. Menon for the appellant.

K. P. Padmanabha Pillai for first to fourth respondents.

P. V. Parameswara Ayyar for sixth to ninth respondents.

The JUDGMENT of the Court was delivered by

SADASIVA AYYAR, J.—The questions for consideration are:

SADASIVA
Ayyar, J.

(1) Whether second defendant is entitled to contract himself out of the Malabar Tenants Improvements Act where the terms of the contract are more favourable to him than the provisions of the Act relating to improvements.

(2) Whether the calculation of the value of improvements according to Desa Maryada (usage of the land) mentioned in

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RAMAN NAIR.
SADASIVA
AYYAR, J.

the contract should be made at the rate prevailing on the date of Exhibit A or at the time of ejection.

(3) What is the amount claimable for improvements according to the contract? Is it (a) twice the value of kuzhikanam improvement *plus* twice that amount again for vettukanam or (b) twice the kuzhikanam amount *plus* twice the vettukanam amount or (c) twice the value of kuzhikanam *plus* the value of the kuzhikanam for vettukanam (that is thrice on the whole).

We think that section 19 of the Act does not prevent the tenant from claiming under a contract made even after the passing of the Act, if it is more favourable to him than the Act. The general words in the short judgment in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1) that "section 19 precludes parties from contracting themselves out of the Act by any contract made after 1st January 1886" do not, when taken with the facts of that case, and having regard to the language of section 19, prevent the tenant from claiming according to the contract if it is more favourable. The section says only that "nothing in any contract made after the first day of January 1886, shall take away or limit the right of a tenant to make improvements and to claim compensation" according to the Act, and not that nothing in any contract made after the first day of January 1886, shall oblige the landlord to pay more compensation than is claimable under the Act, nor does it say conversely that nothing in such a contract shall entitle the tenant to claim more compensation than is claimable under the Act.

On the second question, we are bound to follow the decision of the Full Bench in *Kerala Varmah Valia Rajah v. Ramunni*(2), and hold that the value at the time of eviction has to be considered.

On the third question, we think that twice the ordinary value for kuzhikanam and the same amount as the ordinary value of the kuzhikanam for vettukanam, total, thrice the amount of kuzhikanam is claimable for both kuzhikanam and vettukanam taken together. In the result, the compensation payable to second defendant for kuzhikanam and vettukanam is

(1) (1909) I.L.R., 32 Mad., 1 (F.B.). (2) (1908) 3 M.L.J., 51.

not Rs. 1,663-15-7 but thrice Rs. 1,271-5-9 *plus* thrice Rs. 294-8-6. (This will not affect the amount given separately for chamayams.)

The lower Courts' decrees will be modified accordingly. Time for redemption extended till six months from this date. The appellant will get half his costs from plaintiffs here and in the lower appellate court. The appeal so far as it is directed against respondents Nos. 6 to 9 is dismissed with costs.

K.B.

AMMALU
AMMA
v.
RAMAN NAIR.
SADASIVA
AYYAR, J.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

ARUMUGAM PILLAI, APPELLANT (PETITIONER)

v.

KRISHNASAMI NAIDU AND FIVE OTHERS RESPONDENTS
(RESPONDENTS)*

1920,
March 16.

Execution—Pre-decree arrangement that decree should be inexecutable in part, whether recognisable in execution proceedings.

An arrangement made prior to decree in a suit that the decree that might be passed should be inexecutable in part is one that cannot be enforced in execution; hence a sale held in execution of such a decree in spite of the arrangement is good.

Chidambaram Chettiar v. Krishna Vathiyar, (1917), I.L.R., 40 Mad., 233 (F.B.), distinguished.

APPEAL against the Order of F. A. COLERIDGE, in Appeal No. 106 of 1917, on the file of the District Court of Madura preferred against the Order, of M. R. SANKARA AYYAR, District Munsif of Dindigul, in Execution Application No. 801 of 1916, in Execution Petition No. 860 of 1915, in Original Suit No. 255 of 1912.

This appeal arose under the following circumstances:—One Palaniyappa Chetti, who is the second respondent herein, and who held the first and third mortgages on a certain property, filed Original Suit No. 255 of 1912 for the recovery of the mortgage amount due on his first mortgage against the mortgagors and the third defendant, who was the second mortgagee of the same properties. The third defendant is the third respondent in this

* Appeal against Appellate Order No. 31 of 1918 and Civil Revision Petition No. 629 of 1918.

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v.
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NAIDU.

appeal. In execution of the decree obtained by Palaniyappa Chetti the properties were brought to sale and purchased by one Krishnasami Naidu, the first respondent in this appeal. The appellant in this appeal had purchased the very properties in execution of another decree but subject to the decree in the abovementioned Original Suit No. 255 of 1912. He filed a petition which has resulted in this appeal under section 47, and under rule 90 of Order XXI, Civil Procedure Code, stating that the sale held in execution was null and void for the reasons (1) that there was an agreement made prior to the decree between the plaintiff and the third defendant, that the third defendant should pay Rs. 300 towards any decree that might be passed in the suit and that the plaintiff should not execute the decree thereafter to the prejudice of the third defendant but should use it only to get what money he could from other defendants, (2) that a person who had ceased to be the authorized agent of the plaintiff got the final decree passed, without notice to the interested parties and conducted the sale proceedings from beginning to end. The plea of the purchaser was that the agreement, if any, was unenforceable in execution proceedings, that he was not aware of any such arrangement and that he was utterly ignorant of any fraud in the obtaining of the decree or in the conduct of the sale. Both the lower Courts held that the purchaser was not aware of any fraud and that the agreement could not be recognized in execution and accordingly dismissed the petition. Thereupon the petitioner preferred this appeal to the High Court. He also preferred a Civil Revision Petition (No. 629 of 1918) to the High Court against the order of the District Court.

K. S. Jayarama Ayyar and S. Panchapagesa Sastriyar for appellant.

K. S. Ganapati Ayyar for respondent.

OLDFIELD, J.—On the question whether effect has been wrongly refused to the arrangement made before decree, I observe that *Chidambaram Chettiar v. Krishna Vathiyar*(1), dealt with an arrangement to postpone execution, not with one, such as is pleaded here, for the decree being treated as in part inexecutable. An arrangement of the latter description has

(1) (1917) I.L.R., 40 Mad., 233 (F.B.).

received effect in this Court, so far as appears from the authorized Reports only in one case, *Rama Ayyan, v. Sreenivasa Pattar*(1), the decision of a single Judge; and I do not think that *Ohidambaram Chettiar v. Krishna Vathiyar*(2), obliges us to extend the principle to the extent required by appellants' contention.

The other objection to the sale is that it was obtained and carried through by a person having no authority from the decree-holder in the matter. This objection is pressed here in the shape of a contention that the whole proceedings from and including the final decree were taken without notice going to appellant or the judgment-debtor and that they therefore were vitiated by fraud and cannot be sustained. But on the assumption, which at present rests on mere assertion that the purchaser was a party to that fraud, there is still the fact that the absence of notice to appellant or the debtor was never distinctly alleged or, so far as appears, relied on in the lower Courts or in the grounds of appeal here. In fact, so far as we have been able to test this case, by reference to the final decree, we observe that the mention in it of the judgment-debtor as absent is ground for a presumption that he had had notice and disregarded it; and then his remedy was by proceedings to have that decree set aside. This objection also to the Lower Appellate Court's decision is therefore unsustainable.

The appeal against Appellate order is dismissed with costs. The Civil Revision Petition is dismissed; no order as to costs.

SESHAGIRI AYYAR, J.—I agree in the main with the observations of my learned brother in the judgment just now delivered. In *Ohidambaram Chettiar v. Krishna Vathiyar*(2), I rested my conclusion on the theory of *stare decisis*. It is argued before us by MR. JAYARAMA AYYAR that it follows from my judgment in that case that all the cases referred to therein as supporting the theory of *stare decisis* must be taken to have been accepted by me as correct. I do not think this suggestion is well founded. The course of decisions was referred to for the general proposition that pre-decree arrangements are within the language of section 47. I did not intend to accept as correct every one of the decisions I quoted for that purpose.

(1) (1896) I.L.R., 19 Mad., 230. (2) (1917) I.L.R., 40 Mad., 233 (F.B.).

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—
OLDFIELD, J.

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—
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AYYAR, J.

On the other hand I want to make it clear that *Chidambaram Chettiar v. Krishna Vathiyar*(1), should not, in my opinion, be applied to what are termed cognate cases. Further, I am clear that an attack against the decree as having been obtained by fraud by one of the parties thereto is not within the principle of *Chidambaram Chettiar v. Krishna Vathiyar*(1).

I agree therefore with my learned brother that this appeal should be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Krishnan.

NANA TAWKER (FIRST PLAINTIFF), APPELLANT,

v.

BHAWANI BOYEE AND ANOTHER (SECOND DEFENDANT AND SECOND PLAINTIFF), RESPONDENTS.*

Will—Fixed deposit—Direction to pay to another after death of depositor, whether a will.

A person depositing money with a fund filled in a form provided by the fund, whereby he nominated another as the person entitled to receive the money after his death.

Held that this amounted to a will, and if made in the town of Madras, the nominee could not recover the deposit unless the nomination was duly executed and attested as a will and probate thereof obtained.

Per KRISHNAN, J.—The direction created neither a charge nor a trust in favour of the nominee or a contract on which he could sue.

Towers v. Hagan, (1889) 23 L.R., Ir., 53 and *In re Williams*, [1917] 1 Ch., 1, followed; *Florina Marties v. Pinto*, (1917) 33 M.L.J., 476, distinguished.

APPEAL against the decree of C. R. THIRUVENKATA ACHARIYAR, Judge of the City Civil Court, in Original Suit No. 306 of 1918.

The facts are stated in the Judgment of KRISHNAN, J.

T. R. Venkatarama Sastri, K. Sundara Rao, Ponnuswami Ayyar and Narayanaswami Ayyar for appellant.

A. Krishnaswami Ayyar, A. Nanabhai Devay, A. V. Seshayya and M. Patanjali Sastri for respondents.

(1) (1917) I.L.R., 40 Mad., 233 (F.B.).
* City Civil Court Appeal No. 17 of 1919.

WALLIS, C.J.—The deceased T. Naganatha Tawker on 14th May 1913 applied by letter, Exhibit II, to the nidhi which is the first defendant in the case and requested them to receive payment of Rs. 200 for twelve months on fixed deposit. The application, which was made in a printed form provided by the nidhi, contained certain particulars to be filled in by the depositor including the following:—"Name of the person entitled to receive the deposit paid by me after me—relationship—profession or occupation." Against this he entered the names of the present plaintiffs. "T. Nana Tawker, elder brother's son, T. Kripasanker Tawker, grandson." He then received from the nidhi the fixed deposit receipt in the usual form, Exhibit I, which provided that interest would cease at the end of the twelve months, when the receipt should be sent for renewal or payment, bearing a one anna stamp.

Article 36 of the Articles of Association of the nidhi, which was registered under the Indian Companies Act, may be translated as follows:—

"If any accident should happen to one of the signatories in order to transfer the shares, etc., to which he is entitled, he must write giving specific details as to the person to be entitled to receive the money after his death or his heirs may receive it. Should any one desire to alter the names of the said persons it can be done on payment of a fee of annas two."

It is stated by the learned Judge that the depositor was a member or subscriber of the nidhi, and this has not been questioned before us. Consequently the Articles of Association were binding as between him and the Company. It was also admitted, as stated by the learned Judge, that the nomination in Exhibit II must be taken to have been made pursuant to Article 36.

On these facts, the learned Judge has held that the right to receive the deposit is in the second defendant the heir of the deceased and not in the plaintiffs the nominees under Exhibit II.

Mr. T. R. Venkatarama Sastriyar, in support of the appellant's claim, relied on *Ashby v. Costin*(1), *In re Davies*, *Davies v. Davies*(2), *Bennett v. Slater*(3) and *Florina Marties v. Pinto*(4).

(1) (1888) 21 Q.B.D., 401.
(3) [1899] 1 Q.B., 45.

(2) [1892] 3 Ch., 83.
(4) (1917) 33 M.L.J., 476.

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Bennet v. Slater(1) was a decision on the construction of section 15 of the Friendly Societies Act, 1875, and is of no assistance. In *Ashby v. Costin*(2) the action was in respect of the insurance money which had been paid to the defendant by an unregistered Friendly Society to which the deceased belonged. The rules empowered the society to distribute the insurance money among the relatives specified, in such proportions as they should think fit, unless the deceased had otherwise bequeathed it and if the deceased left no such surviving relatives and had not made a will they were only liable for his funeral expenses. CAVE, J., held that on the death of the subscriber the society by the terms of the contract were entitled to deal with the money in the manner provided in the rules. *Florina Marties v. Pinto*(3) was a similar case. In *In re Davies, Davies v. Davies*(4), again, the case related to the insurance money payable under a policy entered into with an unregistered Friendly Society. Under the rules the insurance money was payable to the nominee of the policy holder and in default of nomination to his assignee, and in default of assignment to his widow, and, if he left no widow, to his children living at his death in equal shares. This again was treated by NORTH, J., as a contract with the society that the insurance money should be applied on the member's death in this way, and as having authorized them to divide it among his daughters in the event which happened. Both these cases proceeded on the footing that under the contract the insurance money was not the absolute property of the subscriber, NORTH, J., observing in the latter case that he had a contingent interest which would have become absolute on the happening of a certain event which however did not happen. It is, in my opinion, unnecessary to consider these decisions in the present case because here the fixed deposit all along formed part of the subscriber's estate and was repayable to him at the end of each period of twelve months unless renewed. The case is just the same as if the Bank of Madras, or any other Bank which takes fixed deposits, were to require the applicant, as in this case, to fill in a form containing the name of the person to whom it was to be paid after the

(1) [1899] 1 Q.B., 45.
(3) [1917] 33 M.L.J., 476.

(2) (1888) 21 Q.B.D., 401.
(4) [1892] 3 Ch., 63.

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depositor's death. In such a case it might be said to be a term of the contract entered into between the parties, that if the fixed deposit became payable after the depositor's death, it should not go under the ordinary law of succession to his legal representative, and as regards the beneficial surplus, to the next of kin or the beneficiaries under his will, but to some one else. The law, however, is, that in the absence of a will the next of kin are entitled to succeed, and if any one desires that any portion of his estate should go to any one else, his only course is to make a will in the prescribed form. The nomination in the present case cannot be enforced as a will, as it is not attested by two witnesses and probate has not been obtained as required by the Hindu Wills Act, in the case of wills executed in a Presidency Town. Therefore, no effect can be given to it. This view is in accordance with a decision of the Irish courts: *Towers v. Hogan*(1). A nomination of this kind in the language of Lord COZENS-HARDY in *In re Williams, Williams v. Ball*(2), "seems to be, if anything, in the nature of a testamentary instrument," and must therefore, fail for want of due execution. There can be little doubt that there, as in the present case, the object was to avoid the trouble and expense of taking out probate or letters of administration, but the method adopted is one which the law cannot recognize. The appeal fails and is dismissed with costs.

KRISHNAN, J.—This is an appeal from the decree of the City Civil Court in Original Suit No. 306 of 1918 dismissing the plaintiff's suit. The facts of the case are undisputed. The first defendant is a nidhi or fund carrying on business in Madras, and is registered under the Indian Companies' Act. One Naganatha Tawker, a share-holder in it, deposited a sum of Rs. 200 in May 1918 as a fixed deposit for a year under receipt, Exhibit I. That receipt is in the following terms:

"Received from T. Naganatha Tawker Rs. 200 only as a deposit repayable twelve months after date with interest at the rate of 7½ per cent per annum. N.B.—Interest will cease at the expiration of the above period of twelve months when this receipt must be sent in for payment or renewal endorsed by the depositor."

(1) (1889) 23 L.R., Ir., 53.

(2) [1917] 1 Ch., 1.

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It also adds "no transferable." This is the usual form of fixed deposit receipt that banks and funds issue. When making this deposit Naganatha Tawker put in an application to the fund for the purpose on a printed form as prescribed by the rules of the fund:—It is filed as Exhibit II. One column in it was headed 'name of the person entitled to receive the deposit paid by me, after me, his relationship and profession or occupation.' Under that heading Naganatha Tawker had filled up the names of the two plaintiffs.

Naganatha Tawker died sometime in 1915, without renewing the deposit or withdrawing the money. In this suit plaintiffs claim the money as the nominees in Exhibit II, against Naganatha Tawker's heir-at-law, his daughter, the second defendant. The learned City Civil Judge held that the nomination gave the plaintiffs no right to recover the money and dismissed their suit and hence the appeal.

It is clear on the facts, and it is not denied, that the right to the deposit money continued to be in the depositor till his death, and that he was entitled to deal with it, or to withdraw it, as he pleased. No consent of the fund was necessary to enable him to exercise full dominion over the amount after the period of the fixed deposit was over. It was also open to him, under Rule 36 of the Articles of Association of the fund, to change his nominees as he pleased on paying merely a registering fee of two annas to the fund, though he did not do so in the present case. In these circumstances, it was conceded by Mr. Venkatarama Sastriyar, for the appellants, that he could not support his clients' claim on the basis of an assignment or of a trust. The retention of dominion over the money by Naganatha Tawker is altogether inconsistent with either position. See *Warriner v. Rogers*(1) as to trusts. The arrangement, as one intended to take effect after the death of Mr. Tawker, is clearly in the nature of a testamentary disposition, and could have been well supported as a will if the formalities required by law for a will had been complied with. As Exhibit II was executed in Madras the Hindu Wills Act will apply to it, and if it is to be treated as a will, it should have been attested by two witnesses at least, but unfortunately for the plaintiffs it is only attested by one. It

(1) (1873) L.R., 18 Eq., 340.

therefore fails as a will, and even as a valid will there is the further difficulty in their way that no probate or letters of administration has been obtained to enable them to maintain a suit on it.

Mr. Venkatarama Sastriyar, therefore, conceded that he could not support his clients' case on the basis of a will either; but, as I understood him, he contended that it was a part of the contract of deposit between Naganatha Tawker and the fund that the latter should repay the money to the plaintiffs in the event of the former's death without having withdrawn it or changed the names of his nominees, and as that event has happened the plaintiff as such nominees became entitled to the money as against the heir-at-law of Naganatha Tawker. For this argument, he has first to establish that the fund had undertaken to pay the nominees as alleged, or in other words the payment to the nominees was a part of the contract between Naganatha Tawker and the fund. I am not satisfied that this has been proved. The receipt, Exhibit I, which contains the terms under which the deposit was made makes no reference to payment to nominees. In fact it expressly provides for the depositor to endorse and return it for payment or renewal and excludes by the words "not transferable" any assignees claiming the money. We have not been referred to any rule in the Articles of Association of the fund requiring the deposit to be repaid to the nominees on the depositor's death. Rule 36 merely deals with the change of names of the nominees or heirs, and rule 37 has reference only to share monies and not to any deposit. Therefore, no term can be imported into the contract of deposit, as implied by the rules, to repay to the nominees. No doubt the deposit was made in pursuance of the application, Exhibit II, but there is nothing in Exhibit II to show that the fund was bound to pay or undertook to pay the nominees or that the statement in it was anything more than a mere representation by Naganatha Tawker to the fund as to who he wished to be treated as the heir to this money on his death, which the fund may or may not act upon as they choose. Even if it is treated as a direction or mandate to the fund to pay to the nominees, it will still fall short of a contract; and the fact that it was open to Naganatha Tawker to change his nominees at any time as he pleased, without the concurrence of

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the fund and to withdraw the money if he chose, is rather in favour of the contention that there was in reality no contract as to payment to the nominees. If the contract is not proved, the first plaintiff's argument based on the existence of such a contract must fail. Treated as a mandate it was of no effect as it became revoked by Naganatha Tawker's death. See *In re Williams, Williams v. Ball*(1).

But even if we take it that the nomination of the plaintiffs was sufficient in law to make the payment to them of the deposit money on Tawker's death a part of the contract between him and the fund, I think we should still hold that the plaintiffs who were no parties to that contract obtained thereby no right to the money. To hold otherwise will be, it seems to me, to allow a testamentary disposition of property to be made in the form of a contract and thereby enable parties to evade the formalities of the Hindu Wills Act and the necessity to take out probate or letters of administration to the estate of the deceased and lead practically to a repeal of that Act; for the agreement to pay to the nominees did not admittedly come into operation till Tawker's death. A somewhat similar attempt was made in *Towers v. Hogan*(2), where a person invested monies in a fund, and wrote a letter to another asking him to distribute it to certain persons in a certain manner after his death; this was done statedly for the purpose of saving the trouble and expense of taking out administration. The learned Judges in the first Irish Court held, that the letter had no legal effect to pass the property to those persons and they observe that to hold otherwise will lead to the Statute of Wills being practically repealed. In *In re Williams, Williams v. Ball*(1), already cited, where a policy-holder made an endorsement on the policy authorizing his housekeeper to draw the insurance money in case he predeceased her, the Court of appeal held that she had no right to the money. Lord COZENS HARDY, M.R., says in his judgment:

"It seems to me to be extremely difficult to say that this document, which did not confer on the assignee any power or right during the assignor's lifetime, was an assignment of the policy or anything else than an attempt to give her an interest at his death

(1) [1917] 1 Ch., 1.

(2) (1889) 23 L.R., Ir. 53.

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in the event of his predeceasing her. If that be so, the assignee's claim cannot be supported on any ground, the testamentary disposition failing as not being properly carried out. In the case of *Cleaver v. Mutual Reserve Fund Life Association*(1), it was held that on a policy taken out by the husband for the benefit of his wife, and so stated in the policy itself, the wife obtained no interest in it apart from the Married Woman's Property Act; that case was no doubt complicated by the wife having murdered the husband but that did not affect this part of the case".

Lord ESHER, M.R., says on page 158:

"I think that, apart from the statute no interest would have passed to the wife by reason merely of being named in the policy."

Lord Justice FRY observes on page 157:

"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 (the husband) that the defendants would, in the event which has occurred, pay Florence Maybrick (the wife) £2,000 assured; it would be broken by non-payment to her; but the cause of action resulting from such breach would vest in the executors of the assured and not in the payee. She was, independently of the statute, a stranger to the contract."

This case was cited at length and followed in *Oriental Government Security Life Assurance, Limited v. Vanteddu Ammiraju* (2), in which it was held by this Court that where the assured does not in his lifetime create any trust in respect of the insurance money under a policy for the benefit of the wife and children they got no interest, and that the money forms part of the assured's estate and is recoverable by his legal representatives. This case was no doubt overruled by the Full Bench in *Balamba v. Krishnayya*(3), but only on the question whether section 6 of the Married Woman's Property Act, III of 1874, applied to a Hindu's wife and children or not, the Full Bench holding that it did. This question, however, does not arise for our consideration in this case. But on the point before us, speaking of *Balamba v. Krishnayya*(3), WHITE, C.J., says on page 508:

"If the view taken by the learned Judges as to Married Woman's Property Act was right, I should agree with their

(1) [1892] 1 Q.B., 147.

(2) (1912) I.L.R., 35 Mad., 162.

(3) (1914) I.L.R., 37 Mad., 483 (F.B.)

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conclusion that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured, notwithstanding that under the contract the money was payable to the beneficiaries in default of trustees."

A similar view was taken in Bombay in *Shankar Vishvanath v. Umabai*(1). It was held, in that case, that though the policy was a contract expressed to be for the benefit of the wife, nevertheless, she got no interest in the insurance money thereby as she was a stranger to the contract.

Mr. Venkatarama Sastriyar has however drawn our attention to the ruling in *Florina Marties v. Pinto*(2), and the cases cited in it in favour of his argument. But, on examining that case it will be found that the decision was based on the ground that there was an agreement for consideration paid between the policy-holder and the nominee that the bonus should belong to the latter. This agreement is referred to a second time by the learned Judge in distinguishing the case before him from the insurance policy cases above mentioned which were cited to him. He says:

"In a case like this where the nominee by agreement with the nominator was entitled to the money, there can be no question that as between the estate of the nominator and the nominee the latter is entitled to it."

That is a position that does not exist in the present case; in fact the nominees here did not know of their nomination by Tawker till sometime after the latter's death. The decision is therefore clearly distinguishable from the present case. But Mr. Venkatarama Sastriyar has relied on the dictum of the learned Judge where he says, referring to the English cases, which I shall presently consider:

"In all these cases the principle adopted was that if under the contract between the member and the society, the society undertakes to pay a particular person, that person, is entitled to the money, though the member may have the power to select any person he chooses and though the nomination may be ambulatory in character so as to enable the member at his entire discretion to change the nomination or even to make the fund his own by merely observing the formalities prescribed by the rules."

(1) (1918) I.L.R., 37 Bom., 471.

(2) (1917) 83 M.L.J., 476.

With all respect to the learned Judge it seems to me that this dictum is not borne out by the cases cited and is inconsistent with the view expressed in the cases I have referred to above, and I am unable to follow it. Turning now to the cases cited, it will be seen that in *Ashby v. Costin*(1), CAVE, J., based his judgment on the fact that money in question was not the money of the deceased at any time though payable out of a fund to which he and others contributed. He might have made it part of his assets by will but he did not do so. The learned Judge points out that the society had full discretion in the circumstances that happened to determine which of the relatives of the deceased should get the allowance and in what proportion. It was in these circumstances that the administrator's suit against the sister who had been selected by the fund for payment was dismissed, as manifestly he would have no rights in the money paid to her. That case is entirely distinguishable from the case before us, inasmuch as here the money belonged to Tawker and continued to be his till his death, and there was no payment by the fund to any one. The next two cases of *In re Davies*, *Davies v. Davies*(2), and *Bennet v. Slater*(3), were, as observed by the learned Judge himself, cases of societies registered under the Friendly Societies Act. The latter case proceeded purely on a construction of section 15 of the Act of 1875, and there is no general principle stated in it which is applicable here. In the former case, the facts were that the testator Mr. Davies did not deal with the policy money in his will. But under the rules of the society which were incorporated in the policy, and formed part of the contract, the money was payable to the plaintiffs, his daughters, and not to the defendant, his son's widow. NORTH, J., says, meeting an argument that the contract with the fund was against public policy as withdrawing the money from his creditors, that it was perfectly legal and that:

"as against persons who claim under the will, the contract must be effectual."

This has to be read with the context and it must be remembered the case was one to which the Friendly Societies Act

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(1) (1888) 21 Q.B.D., 401.

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(3) [1899] 1 Q.B., 45.

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applied. There is no decision in it, that apart from the Act the daughters were exclusively entitled to the money, and there was no question of any nominee taking. I do not think therefore that these cases in any way support the dictum in *Florina Marties v. Pinto*(1), or are authorities against the view I am inclined to take.

Our attention was also drawn to several cases dealing with the general question whether a person who is a stranger to a contract can enforce it at all, and if so in what circumstances. That is a question on which judicial opinion has differed: see *Itti Panku Menon v. Dharman Achan*(2). The general rule is, that a stranger to a contract cannot take any rights under it, and cannot enforce it. The exceptions are stated by TYABJI, J., in *Iswaram Pillai v. Sonnivareu Taragan*(3), where the authorities are considered and the question is discussed at length. I do not therefore propose to consider the authorities cited in detail. None of the exceptions stated seems to me to apply to the present case. There is no charge or trust created here, and the only possible suggestion that can be made is that the contract was for the benefit of the plaintiffs. That however is not so, as the deposit was not made for their benefit but for the depositor himself, as he retained the right to draw out the money. As pointed out by TYABJI, J., following the opinion of BOWEN, L.J., in *Gandy v. Gandy*(4) it is only

"If the true intent and effect of a contract is to give to third parties a beneficial right under it, that is to say, to give them a right to have the covenants in the contract performed and this can only happen, as pointed out by SIR GEORGE JESSEL in *In re Empress Engineering Company*(5), 'when the parties have no power of coming to a new agreement the next day, releasing the old one' then the stranger may be allowed in a Court of Equity to enforce his rights under the contract; but that the whole application of this doctrine depends in its being made out that upon the true construction of the contract such a beneficial right is given."

Lord Justice COTTON says in the same case:

"If the contract, although in form it is with A is intended to secure a benefit to B so that B is entitled to say he has a

(1) (1917) 83, M.L.J., 476.

(3) (1915) I.L.R., 38 M.L.J., 753.

(2) (1918) I.L.R., 41 Mad., 488.

(4) (1885) 30 Ch. D., 57.

(5) (1881) 16 Ch. D., 125 at 130.

beneficial right as *cestu que* trust under that contract then B would in a Court of Equity be allowed to insist upon and enforce the contract."

Accepting the exceptions thus engrafted on this general rule they do not cover the present case.

I therefore consider for the reasons above stated, that by their nomination plaintiffs obtained no interest in the deposit money, and that their suit was rightly dismissed, and I agree therefore that the appeal fails and must be dismissed with costs.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
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THE OFFICIAL ASSIGNEE OF MADRAS (PLAINTIFF),
APPELLANT,

v.

C. SAMBANDA MUDALIAR (CLAIMANT), RESPONDENT.*

1920,
March 16, 17,
18 and 26.

Presidency Towns Insolvency Act (III of 1909), sec. 55—Provincial Insolvency Act (III of 1907), sec. 36—Mortgage within two years of insolvency of mortgagor—Good faith and consideration for mortgage—Onus of proof on mortgages—Mortgages admitted to proof by Official Assignee—Application by Official Assignee to expunge proof of mortgage—Onus of proof.

Under section 55 of the Presidency Towns Insolvency Act, as under section 36 of the Provincial Insolvency Act, a mortgagee setting up a mortgage executed within two years of the insolvency of the mortgagor, has the onus cast on him to show that the transaction was one executed in good faith and for consideration.

The fact that the Official Assignee is moving to expunge a proof which he has admitted under section 26 of the former Act, does not shift the burden of proof from the mortgagee to the Official Assignee.

Official Assignee v. Annaguranammal, (1913) 20 I.O., 901, followed.

An admission of proof by the Official Assignee is in no sense an adjudication and it is open to him as well as to other creditors to have an adjudication by the Court on notice, and in such adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise.

APPEAL against the judgment and order of the Hon'ble Mr. Justice COUTTS TROTTER, dated 19th March 1919, in the exercise

* Original Side Appeal No. 34 of 1919.

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of the Insolvency Jurisdiction of the High Court in Insolvency Petition No. 153 of 1916.

The material facts are stated in the judgment of KRISHNAN, J.
D. Chamier for the appellants.
C. Madhavan Nayar for the respondents.

WALLIS, C.J. WALLIS, C.J.—This is an appeal from the judgment of Mr. Justice COULTS TROTTER dismissing an application of the Official Assignee to expunge the proof of one Sambanda Mudaliar as a secured creditor on a mortgage alleged to have been executed in June 1916.

This case has brought to the notice of the Court, not for the first time, the existence in this city of dangerous gangs who take advantage of the fact that the Indian Majority Act enables young men to dispose of their property before they have sufficient sense to manage it, and get them to execute conveyances for little or no consideration and thus strip them of their possessions. I am not unaware of the considerations which actuated the legislature in fixing the age of eighteen as the age of majority, but I hope that this matter may receive reconsideration in the near future with the object of stopping scandals such as have come to light in this Court, in this case and in other recent cases.

In this case the insolvent, who came of age in 1916, by August of that year had been stripped of all his property and found himself in the Insolvency Court where his brother has preceded him, and in this case also we have had before us the case of another young man named Kuppaswami, who in a brief career which came to an untimely end made away with the estate which his father had acquired in the well-known firm of Messrs. Thompson & Co., in this city. The learned Judge, in another suit has already set aside two mortgages which were obtained by another gang from this insolvent, and that decision has been confirmed on appeal; and the reason why a different fate attended the present application appears to be that, as stated by the learned Judge in his judgment, the proceedings before him were conducted upon the footing that the onus was admittedly on the Official Assignee. I do not know how that view came to be taken. In law a mortgagee setting up a mortgage executed within two years of the insolvency has the onus cast on him under section 55, of this Act and section 86 of the Provincial

Insolvency Act to show that the transaction was one executed in good faith and for consideration. That has been repeatedly held as regards section 36 and it has also been held as regards section 55, the language of which is identical, by Sir ARNOLD WHITE, C.J., in *Official Assignee of Madras v. Annapuranammal*(1), and in another Calcutta case.

In this case the burden is, if anything, stronger, because we have a mortgage at the usurious rate of 24 per cent, by a young man who has just come of age, and who was squandering his property in dissolute courses. I do not know if it was supposed that the fact that the Official Assignee was moving to expunge a proof which he had admitted under section 26 of the second schedule to the Act altered the onus of proof; but I think it is clear that it has no such effect. An admission of proof by the Official Assignee is in no sense an adjudication, and it is open to him, if he thinks that the proof was improperly admitted, to have an adjudication by Court on notice. It is also open to other creditors, if they are not satisfied with the admission, similarly to obtain an adjudication and in that adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise. Possibly the fact that the insolvent in his examination Exhibit K1, in April 1917 told the Official Assignee "I got the money Rs. 4,000 and odd. It was all in rupees and notes. I have spent it for drinking and women" may have influenced the view that the onus was on the Official Assignee. The difficulties of these cases are illustrated by the fact that the insolvent made that statement to the Official Assignee, under what inducement we know not, because his explanation that he was drunk when he made it is absurd. However, it is nobody's case now that on the execution of this mortgage the insolvent was paid Rs. 4,000 in rupees and notes and that circumstance cannot affect the burden. I attach considerable importance to this question of burden of proof, because from the learned Judge's judgment I think that, if the burden that was placed on the Official Assignee had not been placed on him, he would have arrived at exactly the same conclusion at which we have arrived.

[His Lordship dealt with the evidence as to bona fides and consideration and then proceeded as follows:]

(1) (1913) 20 I.C., 901.

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On the whole I have no hesitation in coming to the conclusion that the mortgagee has failed to discharge the onus that was on him of showing that the transaction was entered into in good faith and for consideration. All that is shown is that a payment of Rs. 340 was admittedly made about the time of the execution of that mortgage. But the statute says that a mortgage of this kind if executed without consideration is void. Even as to this Rs. 340, as was held by the late Chief Justice in another case, the proper course is to set aside the whole mortgage and allow the mortgagee to prove as an unsecured creditor for Rs. 340.

The appeal is allowed, except as to Rs. 340 with costs both here and below on the Original Side scale. Certify for two counsel.

KRISHNAN, J.

KRISHNAN, J.—This is an appeal from the order of Courts Trotter, J., dismissing a petition of the Official Assignee, in the matter of the insolvency of a young man named Devarajulu, praying for the annulment of a mortgage executed by him to one Sambanda Mudaliar under section 55 of the Presidency Towns Insolvency Act. That section provides that a transfer of property made by a person who is adjudged an insolvent within two years from the date of the transfer shall be void against the Official Assignee, and may be annulled by the Court unless the transfer was made before and in consideration of Marriage or was made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. It has been held with reference to section 36 of the Provincial Insolvency Act, which is worded exactly similarly as section 55, that if the transfer is shown to be within two years of the insolvency, the burden is on the transferee to prove that he comes within the exception by showing good faith and valuable consideration. See *Nilmoni Choudhuri v. Beshanta Kumar Banerji*(1). This view was approved of in *Anantarama Aiyar v. Yussuffji Omer Sahib*(2), and in *Official Assignee of Madras v. Annapuranammal*(3). WHITE, C.J., assumed that the onus was on the transferee in a case under section 55 itself, though he did not expressly decide it. The manner in which the section is worded making an exception in

(1) (1914) 19 C.W.N., 865.

(2) (1916) 31 M.L.J., 133.

(3) (1913) 20 I.C., 901.

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favour of bona fide encumbrances for valuable consideration, clearly throws the onus on the person who alleges that he is within the exception. No case has been cited to us to the contrary, but it was urged that in the present case the onus was on, or had been shifted on to the Official Assignee as at an earlier stage of these insolvency proceedings he had accepted the proof of the mortgagee and admitted his claim. I do not think this contention is tenable. The Official Assignee's action was based on what he was then led to believe were the real facts of the case by the mortgagee, but now he states that he has been shown reason to think that he was wrong in his view, and he has applied to the Court to annul the mortgage under section 55. The way in which the Court has to deal with the matter when it comes before it, depends entirely on the wording of the section, and is not affected by anything the Official Assignee might have done previously. What the Official Assignee did here was merely to come to a conclusion on the evidence placed before him by the mortgagee, and that cannot be treated as an admission against him, or against the body of creditors whom he represents. It follows that the onus is still on Sambanda Mudaliar and has not been shifted.

There is a further reason why in the present case the onus should be placed on him to prove consideration for his document. The mortgagor is a young man who had come into property on his father's death and who had just attained his majority. It is clear from his schedule that he was borrowing recklessly. With reference to another mortgage executed by this very youth about the time that the mortgage in question here was executed, we recently held, following *Moti Gulabchand v. Muhomed Mehdi Tharia Topan*(1), that the burden was shifted on to the mortgagee to prove consideration. See *Shivagami Ammal v. N. Devarajulu Naidu* and *Narayanaswami Mudaliar v. N. Devarajulu Naidu*(2). The petition is the same in this case and therefore the onus is, in my opinion, on Sambanda Mudaliar, for both the above reasons, to prove the good faith and consideration for his mortgage before we can uphold it.

[His Lordship then dealt with the evidence and proceeded as follows:]

(1) (1896) I.L.B., 20 Bom., 367.

(2) O.S.A. Nos. 26 and 48 of 1919 (unreported).

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Finding then that the mortgagee has failed to prove that his mortgage was made in good faith and for proper consideration it must be annulled under section 55 of the Act. But as it is admitted that the mortgagee paid Rs. 340 to Devarajulu, he must be allowed to claim Rs. 340 from the insolvent's estate.

The proper order in such a case seems to be as held by WHITE, C.J., in *Official Assignee of Madras v. Annapurnammal*(1), to set aside the mortgage in toto and treat the mortgagee as an unsecured creditor for the amount advanced by him.

I would therefore allow the appeal and annul the mortgage (Exhibit H) and direct Sambanda Mudaliar's name to be retained in the schedule as an unsecured creditor for Rs. 340. He must pay the Official Assignee's costs in this appeal and in the first Court. We certify for two counsel in the lower Court, costs on original side scale.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer,

SUBBIAH THEVAN, ACCUSED,

v.

THE ASSISTANT SESSIONS JUDGE OF TINNEVELLY,
REFERRING OFFICER.*

Criminal Procedure Code (Act V of 1898), ss. 303 and 307—Verdict of jury—Reasons for their verdict—Power of Sessions Judge to question jury as to their reasons for their verdict—Question, if permissible, for determining whether Reference to High Court necessary.

A Sessions Judge is not entitled under section 303 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict, even if he intended to make a reference to the High Court under section 307 of the Code.

Reference No. 80 of 1919, dissented from; *Emperor v. Siranadu*, (1907) I.L.R., 80 Mad., 469, and *Public Prosecutor v. Abdul Hameed*, (1913) I.L.R., 36 Mad., 589, followed.

Though a Sessions Judge is neither bound nor entitled to put such questions to the jury, still his having done so for the purpose of determining whether he should make a reference is not improper or a sufficient ground for not accepting the reference.

(1) (1913) 20 I.C., 901.
* Reference No. 7 of 1920.

REFERENCE under section 307 of the Code of Criminal Procedure (Act V of 1898), by C. S. MAHADEVA AYYAR, the Assistant Sessions Judge of the Tinnevely division, in Sessions Case No. 10 of 1920 (of his Calendar for 1920).

The material facts appear from the judgment.

V. L. Ethiraj for Public Prosecutor on behalf of the Crown.

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SADASIVA AYYAR, J.—This is a reference by the Assistant Sessions Judge of Tinnevely, the jury having returned a verdict of 'not guilty' against the accused by a majority. The charge was that at about 10 p.m. the accused committed theft of two cloths from the yard in the dwelling house of prosecution witness No. 1. No doubt the time is not very accurately spoken to by the witnesses, but there can be no question that it was after sunset and between (about) 8 and (about) 10 p.m. The accused examined no witnesses, and beyond wild insinuations made by him in cross examination, there is nothing to show that any of the prosecution witnesses was actuated by feelings of enmity towards the accused in giving evidence against him. As soon as the theft was discovered, the accused was pursued, and he was caught red-handed with the stolen cloths in his possession. On the whole, I think that the jury's verdict is perverse.

One matter relating to the procedure of the Assistant Sessions Judge has to be considered. After the jury had pronounced their verdict that the accused was not guilty, he asked them to state briefly the reasons for their opinion. It has been held in *Emperor v. Siranadu*(1) and in *Public Prosecutor v. Abdul Hameed*(2) that the Sessions Judge has no power, under section 303 or section 307, Criminal Procedure Code, to question the jury as to the reasons for their verdict, unless he considers that there has been an accident or mistake or there is some ambiguity or doubt as to the nature and meaning of the verdict which has to be cleared. The Assistant Sessions Judge in this case however relies in justification of the course he took, on the decision of a Bench of this Court which dealt with Reference Case No. 30 of 1919, even though the verdict in this case cannot be said to be ambiguous. The decision relied on by him does seem

(1) (1907) I.L.R., 80 Mad., 469.

(2) (1913) I.L.R., 3 Mad., 585.

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to lay down that the Court, if it intended to make a reference to the High Court, should have asked the jury for their reasons for not believing the evidence of the witnesses for the prosecution, and the learned judges refer to section 305 of the Criminal Procedure Code. With great respect, I do not think that section 308 gives any power to the Sessions Court to call upon the jury to give their reasons for their verdict, unless the Court is unable to ascertain what the verdict of the jury really is; (section 307 is the section which deals with cases where the Sessions Judge disagrees with the verdict).

However, *Emperor v. Siranadu*(1) and *Public Prosecutor v. Abdul Hameed*(2) do not in my opinion lay down that for the purpose of coming to a conclusion satisfactorily to his own mind whether the case is a fit one for reference to the High Court, the Sessions Judge may not put questions to the jury and even to the individual members of the jury to ascertain the reasons for their verdict. It may be that after hearing these reasons he might change the view which he might have arrived at as to the necessity of a reference to the High Court or he might be confirmed in his opinion as to such necessity. He may not be entitled under those particular sections to put those questions, and the jury may not be bound to answer such questions, but I do not find anything to render it improper, for the particular purpose mentioned by me, for the Judge to put such questions. While I therefore differ from the ruling in Reference Case No. 80 of 1919, that under section 303 (1) the Sessions Judge should have asked the jury for their reasons for their not believing the evidence of the witnesses where he considers the verdict perverse, I do not think that his having asked such questions in this case is improper, or is a sufficient ground for not accepting the reference.

In the result, I convict the accused under section 380, Indian Penal Code, and sentence him to four years' rigorous imprisonment.

SPENCER, J.

SPENCER, J.—I agree in thinking that the accused is guilty and that he should be sentenced to four years' rigorous imprisonment.

(1) (1907) I.L.R., 30 Mad., 409.
(2) (1913) I.L.R., 36 Mad., 585, at 589 and 590.

As regards the questions that the Assistant Sessions Judge thought fit to put to the jury, I consider that section 303, Criminal Procedure Code, does not authorize him to question the jury as to the grounds for their opinion, although it would be convenient and even desirable when such references are made that the Court that makes the reference as well as the Court that disposes of it should know what is in the mind of the jury. *Emperor v. Siranadu*(1) and *Public Prosecutor v. Abdul Hameed*(2) have laid down that such questions should not be asked. I think that all Courts should follow those decisions, and I am of opinion that so long as the present wording of the Criminal Procedure Code is retained, a Sessions Judge is neither authorized to ask questions nor is the jury bound to answer questions, as to the reasons for their verdict, and that they can only be asked questions to make it clear what their verdict is when it is ambiguous.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Moore.

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APPELLANT,

v.

S. R. M. M. R. M. RAMASWAMY CHETTY (GARNISHEE),
RESPONDENT.*

1920,
April, 12
and 14.

Presidency Towns Insolvency Act (III of 1900), sec. 115—Immunity of Official Assignee from stamp duty, whether applicable to his attorney—Nattukottai Chettis, whether bankers—Loans advanced on or without deposit of goods—Entry in same account—Banker's lien on goods for general balance of accounts—Indian Contract Act (IX of 1872), sec. 171.

An attorney representing the Official Assignee, is entitled to the same privileges as to stamp duty as the latter has under section 115 of the Presidency Towns Insolvency Act. Consequently, the attorney need not pay stamp duty for a copy of the order passed by a Judge of the High Court in the exercise of its insolvency jurisdiction.

(1) (1907) I.L.R., 30 Mad., 409.
(2) (1913) I.L.R., 36 Mad., 585, at 589 and 590.
* Original Side Appeal No. 68 of 1919.

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It is perfectly general knowledge, and it has been recognized in judicial decisions, that Nattukottai Chettis are the Indian bankers of this part of the country.

Vellayappa Chettiar v. Unnamalai Achi, (1917) 6 L.W., 687 and *Annamalai Chetti v. Annamalai Chetti*, (1919) 10 L.W., 67, referred to.

The garnishee, a Nattukottai Chetti, had, in addition to money-lending business, customers who deposited money with him, kept pass books and went with them and drew money, and he paid interest on the deposits and bought and sold hundies and lent money on securities. *Held*, the garnishee was a banker. It appeared that diamonds were deposited by a customer with the garnishee from time to time and advances made thereon and the diamonds were redeemed from time to time but also that loans were made by him without deposit of diamonds and entered in the same account.

Held, on the insolvency of the customer that under section 171, Indian Contract Act, the garnishee was entitled as a banker to retain the deposits as security for his general balance of account with the insolvent, and that no contract to the contrary had been proved in the case.

APPEAL against the judgment and order of the Hon'ble Mr. Justice COURTS TROTTER, dated the 2nd day of September 1919, passed in the exercise of the High Court's insolvency jurisdiction in Insolvency Petition No. 115 of 1917.

The material facts appear in the judgment pronounced by COURTS TROTTER, J., which is as follows :—

In this case the insolvent, one Muthiah Chetti, was a dealer in diamonds. Towards the end of his career he became extremely embarrassed, financially, and from time to time raised sums of money from several Nattukottai Chetti merchants, by pledging parcels of diamonds with them against advances. The present garnishee is one of the Nattukottai Chetti merchants with whom he had a large number of dealings, and at the time when the crash came and Muthiah Chetti was adjudicated insolvent, there were eight outstanding loans covered by deposits of diamonds and promissory notes. It was arranged between the Official Assignee and the garnishee that the diamonds should be sold and an account kept of what each lot realized. The result is that on five of these transactions there has been a surplus and on three there has been a deficiency. The Official Assignee's contention is that the garnishee is bound to hand over each surplus in full and retain only his right to prove in the insolvency for the deficiencies. The garnishee pleads the right to set off the deficiencies against the surpluses and hand over to the Official Assignee only the balance so resulting on the whole account.

The garnishee's case is put in two ways, and though it would be sufficient for me to decide for him on either point to establish

his right, I think as both are points of importance and as this case is not likely to end in this Court, I ought to express my opinion on both. The first point taken before me by the garnishee is that the transactions which he had with the insolvent were transactions of a banker with his customer and that accordingly he is entitled to the general lien of a banker over his customer's securities which is conferred by the law merchant and embodied in section 171 of the Indian Contract Act. The first step the garnishee has to accomplish is therefore to show that he is a banker within the meaning of the Contract Act. It is not very easy to give a definition of 'banker.' Dr. Heber Hart in his Law of Banking says: "A banker is one who in the ordinary course of his business honours cheques drawn upon him by persons from, and for whom, he receives moneys on current account." That no doubt emphasises the aspect of a banker's business which is most familiar in modern commercial conditions. But, there were bankers before cheques, and one has to get further below the surface of things and seek for something more fundamental. Dr. Thomas Hodgkin, who is not only a great historian but a very eminent banker, says somewhere in his "Italy and Her Invaders," speaking of the bankers and money lenders of the later Roman Empire: "The essential difference between a banker and a money lender is that a money lender lends his own money and a banker lends other peoples". That seems to me to express with great insight the distinguishing feature of a banker's business, and every one knows that a Nattukottai Chetti, while he may have a lot of his own money invested in his business, habitually lends other people's money along with it. Dr. Heber Hart says: "A banker is also a lender of money. The profitable conduct of the business of banking necessarily involves the lending or advancing of money by way of allowing over-drafts on current account, making loans in the form of advances, or discounting bills". I may add that in *Kunhan Mayan v. The Bank of Madras* (1), a loan of money on a pledge of jewels was recognized as a legitimate banking operation to which the general lien of bankers attached. It seems to me to make no difference to the essence of the matter that the loan in the case of the Bank of Madras would take the form of opening a credit in the dealer's favour on which he could draw by cheque, whereas in the case of a Nattukottai Chetti it would take the form of an advance of hard cash. The fact that the transaction is more primitive, or more direct, does not seem to me to affect its real character. One has to have regard to the customs and state of advancement of the

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(1) (1898) I.L.R., 19 Mad., 234.

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people on whose affairs one has to adjudicate and there are hundreds of rich merchants in Madras carrying out every week of their lives commercial transactions on a large scale with a complicated system of mercantile credit who have never drawn or had drawn in their favour a single cheque during their whole career. Further, in *Vellayappa Chettiar v. Unnamalai Achi*(1), this Court has expressly recognized that a Nattukottai Chetti of the ordinary type does exercise the functions of a banker. I am therefore of opinion that the relations of the garnishee to Muthiah Chetti in this case may properly be regarded as those of banker and customer.

That being so, by virtue of the Contract Act a general lien will enure to the banker "in the absence of a contract to the contrary." Such a contract of course need not be and could hardly ever be explicit. But the terms of the contract or the nature of the transaction, in any particular case, may be such as impliedly to negative the right to a general lien on the customer's security. The line is often very hard to draw. There has been a long series of decisions of English Courts, and I propose to examine the most important of those which seem to me to bear upon the present question. On such a subject one hardly expects to derive very much assistance from the decisions of Indian Courts, which are occupied in determining very different matters. In *Jones v. Peppercorne*(2), the plaintiffs deposited some bonds with their bankers, Strahan, Paul and Bates. The latter employed the defendants Messrs. Peppercorne of the Stock Exchange as their brokers, and in order to raise money from their brokers they deposited with them their clients' (the plaintiffs') security. That was of course a fraud by the bankers upon the plaintiffs. Nothing turns upon that, and the case was dealt with in argument on the footing that the bonds for the purpose of determining the question of law might be regarded as the property of Strahan, Paul and Bates. There were two specific transactions, one a deposit of 108 bonds as security for a specific loan of £5,000 and the other a deposit of 80 bonds as security for another advance of £23,000. Eventually Strahan, Paul and Bates, were adjudicated bankrupt, and the brokers while admitting that the sale of the bonds had realized a surplus after repayment of the specific loans of £5,000 and £23,000, claimed to retain that against the general balance of account arising out of other transactions between them and Strahan, Paul and Bates in respect of which money was due to them. The Court upheld the general lien of the brokers, which for present purposes may be considered as identical with that of bankers, on the ground that the

(1) (1917) 6 L.W., 687.

(2) (1858) 70 E.R., 490.

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general lien was not excluded by the mere fact of there being a special contract whereby the security was on the face of it deposited as security for a specific loan. *PAGE WOOD, V.C.*, relied for that doctrine upon the case of *Brandao v. Barnett*(1). As that case was decided adversely to the claim for a general lien, I turn to it to examine the reason for which the House of Lords so decided, and I think that the reason is to be found in its very special circumstances. In that case the customer deposited with his bankers tin boxes, of which he kept the keys, containing exchequer bills, the sole duty of the bankers being to receive interest on those bills and when directed by the customer to take the bills from his hands, get them exchanged for new bills, and return these to the customer. The House of Lords held, that on the bills locked up in the box, the bankers had no lien to secure the general account of the customer. The *ratio decidendi* appears to me to be not a limitation of the general lien of the bank to securities of the customer pledged for a special primary purpose. On the facts of the case the securities were never pledged with the bankers at all, but were merely physically placed in the bank, possession being retained in the hands of the customer, and the banker's relation to him being limited to a purpose so narrow as to preclude the idea that the bankers could do anything but return them to the customer when he asked for them. The case is really analogous to the common practice of packing up silver and other valuables in boxes and putting them in banks, when a customer closes up his house for a time. They are deposited with the bank for safe custody only, and such a purpose by necessary implication precludes the idea of a general lien. *Re European Bank, Agra Bank claim*(2), appears to me merely to re-affirm the principle that the fact that securities are primarily deposited against one account does not prevent a lien attaching to them in respect of a separate account of the same customer. The next case that I need refer to is *Re Bowes*(3), the case mainly relied upon by Mr. Devadoss. In that case Bowes deposited with his bankers a policy on his life by way of equitable mortgage to secure the repayment of moneys, not exceeding in the whole at any one time the sum of £4,000. When the time for adjustment came, Bowes' overdraft on his bankers exceeded £5,000. *NORTH, J.*, held that the terms of the deposit necessarily implied that the policy was to be a security for £4,000 and no more, and that it followed that if the debt exceeded £4,000 the security could not be applied to cover

(1) (1846) 12 Cl. & Fin. 787., 8 E.R., 1622.

(2) (1872) 8 Ch. App., 41.

(3) (1886) 33 Ch. D., 586.

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it. I respectfully agree with that decision, because I think that in that case the bankers were rightly treated as having said, "If we lend you £4,000, this policy is available to us as our security. If we lend you more, it is not". I may refer to two other cases which seem to me to belong to the same class as *Brandao v. Barnett*(1), and when closely scrutinized to contain no new doctrine as to the nature or extent of the banker's lien but merely to decide on the particular facts that there had been no pledge of the suggested securities at all. The first is *Wylde v. Radford*(2). In that case there was a deposit of title-deeds which covered the title to two properties, and accompanying the deposit was a memorandum which expressly stated that the deposit was meant to effect a pledge of one only of the properties to which the deeds related. The Court held, and it is difficult to see how it could hold otherwise, that there had been no pledge whatever of the second property, and that no lien attached to it or to the part of the title-deeds relating to it. Similarly in *Wolstenholme v. Sheffield Union Banking Co.*,(3), a partnership had an account with the bank and one of the partners had a separate private account of his own with the same bank. At a time when both accounts were overdrawn, the partner asked for a specific advance of £500 to be secured by a deposit of title-deeds of a property belonging to him. He wanted the money really for the purposes of the firm, and I gather from the report that a portion of the advance was in fact put to the credit of the firm's account and not of the private account of the partner. The partner subsequently became bankrupt and a sale of the property realized a surplus after satisfying the partner's debt on his private account with the bank, which surplus the bank claimed by virtue of their general lien to apply to the extinguishment of the debt of the partnership to them. The Court of Appeal held that the loan was a loan to the partner on the property secured, and that it was immaterial that the money was by his direction handed over in part at least to the use of the partnership. As Lord ESHER says, the claim of the bank was in fact to retain the property of one man to pay the debts of another. That seems to me to be tantamount to saying merely that the Court treated the deposit as never having been pledged either towards the general partnership account or towards any particular transaction of the partnership, and obviously if there was no pledge to secure any partnership debt, no question of the general lien could arise at all.

(1) (1846) 12 Cl. & Fin., 787; 8 E.R., 1622.

(3) (1886) 54 L.T., 746.

(2) (1863) 33 L.J. (Ch.), 51.

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I must now apply the principle derived from these cases to the present circumstances. The principle appears to me to be that the presumption is in favour of a general lien and that presumption is not ousted by the mere fact that the pledge of the security was originally made against a specific advance, but will only be ousted if the terms of the pledge, or the manner in which it has been dealt with by the parties, raises the inference that they must have intended to exclude the operation of the general lien. For that purpose I have to look at the accounts in this case, it not being suggested that there is anything in the nature of an explicit negation of the lien. When sums of money were paid in by Muttiah Chetti, as they were from time to time, they were usually credited to one of the specific loans, and I infer that the diamonds deposited against that specific loan were released. On the other hand I find that there were a number of loans where there was no specific promissory note recorded as being given or any pledge of diamonds. I take at random the entries of the 26th Margali (9th January 1916) and 7th Ani (20th June 1916), where two sums of money seem to have been lent without any specific deposit of diamonds and without giving a promissory note to distinguish the advances from a general extension of the credit of the account. I cannot suppose that these advances which appear in the current account in the ordinary way were contemplated for a moment by the parties as having been made without any security and without the garnishee having the right of relying on the diamonds already in his hand as covering them also. The fact that when moneys sufficient to repay a specific advance were put in the hands of the garnishee he from time to time appears to have released the diamonds deposited to secure that particular advance seems to me to be by no means conclusive. The question is not whether the banker in fact released a particular pledge on re-payment of the particular debt which he was at liberty to do if he liked, but whether he was bound to do so. In my opinion he was not and he could at any time, if there was a general balance against Muttiah Chetti, have refused to release any given parcel of diamonds on tender of the specific sum for which they were originally pledged. This appears to me to be the effect of *Re London and Globe Financial Corporation*(1). In that case, if I may respectfully say so, I think that BUCKLEY, J., puts his finger on the point really decided in *Brandao v. Barnett*(2) and *Wylde v. Radford*(3), namely, that in those

(1) [1902] 2 Ch., 416.

(2) (1846) 12 Cl. & Fin. 787; 8 E.R., 1622.

(3) (1863) 33 L.J. (Ch.), 51.

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cases the person who claimed the lien never held the property over which he claimed to exercise the lien in his own right but as a mere agent or bailee for the customer. I am therefore of opinion that in this case the right of general lien is established and that on that account the Official Assignee's claim fails.

The other contention on behalf of the garnishee was that he was entitled to a set-off under section 47 of the Presidency Towns Insolvency Act which runs as follows :

"Where there have been mutual dealings between an insolvent and a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more, shall be claimed or paid on either side respectively."

Section 38 of the English Bankruptcy Act contains the words, 'mutual credit, mutual debts, or other mutual dealings,' as had the earlier English Statutes. Except as a saving of words, I do not think this makes any difference, because as I read the decisions on the subject, the governing words are, 'the sum due from the one party shall be set off against any sum due from the other party which occur both in the English and Indian Acts. What the section requires, broadly, is that there should be a debt on both sides, and the voluminous case law on the subject which I shall briefly examine is really directed to ascertain what can be said to be legally a debt on one side or the other.

The starting point is the leading case of *Ross v. Hart*(1). In that case the bankrupt had deposited cloths with the defendant, a fuller, to be dressed, he then owing money to the defendant, for work done on other cloths in previous transactions. The assignee demanded delivery of the cloths tendering the amount due for dressing them. The defendant claimed to set off the amount owing to him on previous transactions. The Court held that this claim could not be maintained, as there was no debt due from the fuller to the bankrupt but only an obligation to return the goods when the work ordered to be done upon them was executed and the Court laid it down that mutual credits are such credits only as must in their nature terminate in debts. Later cases have interpreted this established rule as meaning not credits which must *ex necessitate rei* terminate in debts, but credits which have a natural tendency to terminate in debts, not in claims differing in their nature from a debt. Thus in

(1) (1818) 8 Taunt., 499.

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Ross v. Hart(1) itself, the credit of the cloths which the fuller may be supposed to have made to the account of the bankrupt would not naturally terminate in a debt but in an obligation to return the cloths. Most of the cases when examined resolve themselves into a consideration of the question whether the facts of each case constituted a credit which had a natural tendency to resolve itself into a debt. Considerable difficulty has arisen in cases relating to the discounting of bills. But with those I am not directly concerned. I confess to very great difficulty in understanding the decision in *Young v. Bank of Bengal*(2), nor are my difficulties entirely resolved by the explanation of that decision given by Baron PARKE, who was a party to it, in *Alsagar v. Currie*(3). If it were necessary for me to express an opinion on this subject, I should prefer the opinion of WALLIS, J., in *In the matter of Canthom*(4) to that of TREVELYAN, J., in *A. B. Miller v. The National Bank of India*(5). See also the observations of BOVILL, C.J., in *Naoroji v. Chartered Bank of India*(6). In *Eberle's Hotels and Restaurant Co. v. Jonas*(7), the plaintiff company before it was wound up had deposited some cigars with the defendants to secure a debt. After the winding up the liquidator claimed a return of the cigars on payment of the debt which they were deposited to secure. The defendants refused to give them up unless the liquidator paid another debt due from the company to them which they claimed to set off under the Bankruptcy Act. The Court held that they were not entitled to do so as the right of the plaintiffs did not create a pecuniary liability in the defendants but only an obligation to return the cigars, and that this was not affected by the fact that a judgment in trover in their favour would take the ordinary form of ordering the return of the goods or their value. In *Palmer v. Day & Sons*(8), the debtor owed fees to a firm of auctioneers and subsequently he handed over some pictures to them with instructions to sell them subject to his approval of prices. The Court held that the deposit of the pictures with a mandate to sell constituted the giving of credit to the auctioneers. It is clear that the Court based its judgment on the positive mandate to sell which if executed must result in a money debt due from the auctioneers to the owner of the pictures. Lord RUSSELL, C.J., points out in his judgment the reasons underlying the decisions and says that unless the dealings are such

(1) (1818) 8 Taunt., 499.

(3) (1844) 12 M. & W., 751.

(5) (1892) 1 L.R., 19 Cal., 148.

(7) (1887) 18 Q.B.D., 459.

(2) (1836) 1 M.I.A., 87.

(4) (1910) 1 L.R., 33 Mad., 53.

(6) (1868) L.R., 3 C.P., 444.

(8) [1895] 2 Q.B., 618.

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as will end on each side in a money claim the claims are incommensurable and that there cannot be an account as between goods and money and no balance can be struck. Lord Russell also suggests in that judgment that the debt must be one that arises out of contract, a dictum which was followed by VAUGHAN WILLIAMS, J., in *Re Mid-Kent Fruit Factory*(1). The next case that I will refer to is *Re Daintrey, Ex parte Mant*(2). The facts of that case are rather complicated but it is necessary to state them at some length before the decision can be understood. The parties were both solicitors and Daintrey owed Mant £86. Subsequently Daintrey sold his practice to Mant on the terms that he should be remunerated out of the profits of the business. After Mant and Mant (that was the title of the firm) had carried on the practice they had acquired from him for three years, they owed him under their agreement a sum of £300 which the trustee in Daintrey's bankruptcy claimed. Mant and Mant asserted the right to set off against this the sum of £86 that Daintrey owed them previously. Their claim was upheld. The point of that decision I take to be that you ought to look at the date of the receiving order to see whether at that date the relations between the parties were such as must naturally eventuate in mutual money debts. There need not be money actually owing at that date, provided the contractual obligations are already in existence which must in the natural course of things eventuate in subsequent money debts. Whether or no those relations have taken their natural course and resulted in a money debt is to be ascertained when the claim on the one side or the other is presented, as is pointed out very clearly by BIGHAM, J., at page 568. This case is relied upon by Mr. Grant as negating the suggestion that the relation which exists between parties at the time of adjudication must involve a debt due at that date, though its amount may be uncertain. Solicitors' businesses are not always profitable and it is quite possible that Daintrey's business in Mant and Mant's hands might have yielded not profit but loss, in which case no moneys would have become due to Daintrey. Yet the Court of Appeal treated the contract as one that in the natural course of events must terminate in a debt from Mant and Mant to Daintrey. Lord (Trustee of) *v. Great Eastern Railway*(3) is a further affirmation of the principle that you cannot set off goods against money. In *re Taylor, Ex parte Norvell*(4) is an interesting if rather complicated case which gave rise to a conflict of judicial opinion.

(1) [1898] 1 Ch., 567.

(3) [1908] 2 K.B., 54.

(2) [1900] 1 Q.B., 516.

(4) [1910] 1 K.B., 562.

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In that case Taylor owed Norvell £257 for work done and Norvell had entered into a binding contract with Taylor, of which specific performance had been decreed in his favour, for the purchase of the property of Taylor, and he claimed that in paying Taylor's trustee in bankruptcy for the price of the property he was entitled to deduct £257 which Taylor previously owed him. The decision of the majority of the Court of appeal really amounts to this: that a decree for specific performance imposes upon the purchaser an obligation of the nature of a money debt and does not merely invest him with a right to the conveyance of the land. *Provincial Bill Posting Company v. Low Moor Iron Company*(1) does not appear to me to be a decision on the section at all. *Shivi Gowda v. Fernandes*(2) is not a decision on the insolvency statute and in any case only appears to me to re-affirm the principle that money and goods are incommensurable.

Applying the principles derivable from these authorities to the present case, what is the result? The argument of Mr. Grant is, as I understand it, something like this. These diamonds were deposited subject to the provision of law that on default they could be sold. A creditor must be assumed to contemplate that the security will be worth more than the debt for which it is deposited and it must therefore have been in the contemplation of the parties that the natural result of the transactions would be that there would be a money surplus in the hands of the pledgee which would be a debt owing from him to the pledgor. It is no answer to say that you have to assume the contingency of default, because that would exclude the case of banks which have discounted bills, even accommodation bills where the liability of the drawer or holder is only contingent upon the non-payment of the acceptor, and there is ample authority for holding that a bank which has discounted a bill is a creditor of the person for whom it has discounted it. I feel and admit the difficulty of accounting logically for the decisions relating to the discounting of bills, and as I have said before I cannot quite see how they are reconcilable with *Young v. Bank of Bengal*(3), or perhaps I should rather say how *Young v. Bank of Bengal*(3), can be logically brought into line with the other authorities. But I think I can rest my decision on this matter on a narrower ground. To my mind, at the material date, that is, the date of adjudication when the diamonds were still in the hands of the pledgees unsold, the cross obligation was incommensurable with the money debt on the part of the pledgor. The primary duty that lay upon the

(1) [1909] 2 K.B., 344.

(2) (1911) I.L.R., 34 Mad., 518.

(3) (1836) 1 M.I.A., 87.

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pledgees though no doubt it was contingent was not to pay a sum of money but to return the diamonds, and that obligation could only be turned into a money debt by the fulfilment of a series of contingencies, namely, that the debtor should make default, that the pledgee should exercise his right of sale, and that the sale should result in a surplus. I think that these contingencies are too numerous to enable me to say that at the date of adjudication there was anything due from the pledgee which could be said to be such as would naturally result in an obligation to pay money.

In the result, as the garnishee succeeds on the first point though I have held that he fails on the second, there must be judgment in his favour with costs on the original side scale.

Against this judgment in favour of the Garnishee, the Official Assignee of Madras preferred this appeal.

The Hon'ble *M. D. Devadoss* for the appellant.

A. Krishnaswami Ayyar and *M. Subbaraya Ayyar* for the respondent.

The JUDGMENT of the Court was delivered by

WALLIS, C.J. — This is an appeal by the Official Assignee from the order of Courts Trotter, J., on a garnishee summons. The first objection taken is that the appeal is filed out of time. The Official Assignee was represented by an attorney who claimed the same privileges as to stamp duty as the Official Assignee has by virtue of section 115 of the Presidency Towns Insolvency Act. This was apparently disputed in the Insolvency office and a claim was made upon the Official Assignee's attorney for stamp duty for a copy of the order appealed against, and the attorney ultimately paid it to save time. But the question before us is whether the attorney as representing the Official Assignee has any stamp duty to pay. If not, the appeal is in time. As pointed out by Mr. A. Krishnaswami Ayyar, the wording of section 115 is taken from the English Insolvency Act, and it was no doubt framed with reference to English practice. But at the same time it has to be applied to the practice obtaining in this Court. Now section 115 says

"No stamp duty or fee shall be chargeable for any application made by the Official Assignee to the Court under this Act, or for the drawing and issuing of any order made by the Court on such application."

The application for a copy appears to be either an application made to the Court, or an application for the issue of an order

made by the Court on his application, because the only method of issuing orders which is known to us here is the issue of a copy. Therefore we are of opinion that the appeal is within time.

The question in the appeal is whether the garnishee was entitled to a banker's lien in respect of advances made by him on various packets of diamonds deposited with him. The first question is whether he was a banker. Mr. A. Krishnaswami Ayyar has called our attention to an Irish case, *In Re Shield's Estate*(1), in which the question was whether the party there was a banker. In this case, we have evidence given that this garnishee who is a Nattukottai Chetti does banking business and money lending business, that he has customers who deposit money with him and who keep pass books and come with these pass books and draw money, that he pays interest on their deposits, and that he buys and sells hundis and lends money on securities. There is abundant evidence that in this particular case the garnishee did carry on banking business, and further than that it is perfectly general knowledge, and we have recognized it in *Vellayappa Chettiar v. Unnamalai Achi*(2) and *Annamalai Chetti v. Annamalai Chetty*(3) that these Nattukottai Chettis are really the Indian bankers of this part of the country. There is therefore no reason why the garnishee in this case should not be entitled to a banker's lien. Under section 171 of the Indian Contract Act, bankers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; and we agree with the learned Judge that the Official Assignee in this case has failed to show any contract to the contrary. What he has shown is that various advances were made from time to time on the security of deposits of diamonds, and that the diamonds so deposited were redeemed from time to time. But it also appears that loans were made without any deposit of diamonds at all which are included in the same account. The garnishee's affidavit also shows that all the diamonds were the subject of a sort of second pledge to another creditor. There is no reason for differing from the learned Judge in his conclusion that a contract to the contrary has not been proved.

In the result the appeal fails and is dismissed with costs.

Short and Bewes, Solicitors for the appellant.

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(1) (1901) 1 Ir. R., 172.

(2) (1917) 6 L.W., 687.

(3) (1919) 10 L.W., 67.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Walter, C.J., Mr. Justice Oldfield,
Mr. Justice Sadasiva Ayyar, Mr. Justice Spencer and
Mr. Justice Seshagiri Ayyar.

N. N. L. RAMASWAMI CHETTIAR (SECOND DEFENDANT),
APPELLANT,

v.

MALLAPPA REDDIAR (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), sec. 53—Fraudulent alienation to defeat and delay creditors—Attachment of alienated property—O. XXI, r. 68, suit under—Plea of attaching creditor as to fraudulent nature of alienation, validity of.

In a suit by an alienee, whose claim to property attached under a decree has been rejected, to set aside the order and establish his title, it is open to the attaching creditor to plead in defence that the transfer was in fraud of creditors.

Subramania Ayyar v. Muthia Chettiar (1918), 1 L.R., 41 Mad., 612 (F.B.) and *Palaniandi Chetty v. Appavu Chettiar* (1916) 30 M.L.J., 565 overruled.

SECOND APPEAL against the decree of K. S. KODANDARAMA AYYAR, Subordinate Judge of Tuticorin, in Appeal Suit, No. 71 of 1918, preferred against the decree of R. VEMBU AYYAR, District Munsif of Tuticorin.

This appeal first came on for hearing before SADASIVA AYYAR and SPENCER, JJ., who made the following

ORDER OF REFERENCE TO THE FULL BENCH.

SPENCER, J.—The plaintiff claims the suit properties by virtue of a gift in his favour, dated 19th November 1914. The second defendant is a creditor of the donor, the first defendant, who obtained a decree and attached the properties in execution. The plaintiff made a claim under Order XXI, rule 58, Civil Procedure Code. It was dismissed and this suit is brought to set aside the summary order and to obtain a declaration that the property is not liable to be attached.

The trial of the plaintiff's suit raised the question of law whether it is open to an attaching decree-holder to plead in defence against the alienee's suit that the alienation is a

fraudulent one, intended to defeat or delay the alienor's creditors. This question was answered in the negative in *Subramania Ayyar v. Muthia Chettiar*(1), which is a Full Bench decision. We have decided to refer the same question of law once more to a Full Bench. It need hardly be said that we should not have ventured to take this extreme course, if we were not fully convinced that the law as laid down by that Full Bench seriously requires reconsideration.

In order to justify this reference it is necessary that I should as briefly as possible enumerate the reasons which have impelled us to make it:—

1. There appears to be an increasing sense of hesitation in the minds of both the Bench and the Bar in regarding *Subramania Ayyar v. Muthia Chettiar*(1), as representing sound law;

2. Other High Courts have put a different construction on section 53 of the Transfer of Property Act;

3. In a case that has since come before the Privy Council a plea of this description was allowed to be raised in defence of the suit;

4. There are no words in section 53 which make it imperative that a person defrauded, defeated or delayed should put forward his claim to have the transfer avoided in a regular suit and not otherwise; and

5. There are independent reasons for doubting the correctness of the conclusion of the learned Judges who decided *Palaniandi Chetty v. Appavu Chettiar*(2), upon which the Full Bench Case in *Subramania Ayyar v. Muthia Chettiar*(1), was based.

I will now proceed to amplify the above reasons. On the first point I will merely refer to the opinions expressed by ABDUR RAHIM, J. in *Cheruthazhath Abdulla Haji v. Cheriyaandi Ibrayan Kutti*(3), by KRISHNAN, J. in *Pokker v. Chandrankandi Kunhamad*(4), and by SADASIVA AYYAR and NAPIER, JJ., in their reference to the Full Bench on the former occasion in *Subramania Ayyar v. Muthia Chettiar*(1). I will only add that I share in the doubts expressed by the abovenamed learned Judges.

(1) (1918) 1 L.R., 41 Mad., 612 (F.B.).

(2) (1916) 30 M.L.J., 565.

(3) (1919) 50 I.C., 959.

(4) (1919) 36 M.L.J., 231.

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Next, *Abdul Kadir v. Ali Mia*(1) is a direct decision to the contrary on the point that a creditor who has obtained a decree and taken out execution is competent to raise a plea under section 58 of the Transfer of Property Act that the alienation made by his debtor is voidable and should be avoided, and the learned Judges quote the English case of *Clough v. London and North Western Railway Co.*(2), and two other decisions of the same Court in support of this proposition. *Clough v. London and North Western Railway Co.*(2), is an authority for allowing a voidable transaction to be avoided on the ground of fraud by any unequivocal act including a statement in a plea by defendants in an action. This Calcutta case was considered by the Full Bench in *Subramania Ayyar v. Muthia Chettiar*(3), and dissented from without full discussion of the reasons which influenced the learned Judges of the Calcutta High Court in coming to their conclusion. In *Baroda Prosad Banerjee v. Gajendra Nath Banerjee*(4), it was held that when a transaction is voidable, it is open to the injured party to declare his will to rescind the transaction by way of defence to an action brought to enforce the transaction against him. In *Bhikabhai Muljibhai v. Panachand*(5), the defendant was allowed to set up the defence that a mortgage transaction was intended to defeat and delay creditors upon a suit brought by the mortgagor for a declaration that the defendant was not entitled to attach the properties.

Again in *Seth Ghunsham Das v. Uma Pershad*(6), the Privy Council confirmed the decree of the Judicial Commissioner of the Central Provinces in a suit in which certain creditors who had attached before judgment their debtor's property raised in defence a plea that the plaintiff's mortgage was executed collusively as a device to defeat creditors. If there had been such an easy way of obtaining a reversal of the Judicial Commissioner's decision as that of objecting to the plea being raised as a defence to the suit, it is likely that that ground would have been argued before the Judicial Committee.

(1) (1912) 15 C.L.J., 649.

(3) (1918) I.L.R., 41 Mad., 612 (F.B.).

(5) (1919) I.L.R., 43 Bom., 707.

(2) (1871) L.R., 7 Exch., 26.

(4) (1909) 9 C.L.J., 383 at page 393.

(6) (1919) 38 M.L.J., 483 (P.C.).

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In *Lakshmi Doss v. Roop Laul*(1), a case of a voidable deed, the defendant was allowed by a Full Bench of this Court to set up as defence that the deed was invalid even at a time when a suit to declare its invalidity would have been time-barred. And in *Thathu Naick v. Kondu Reddi*(2), two Judges out of three composing the Full Bench held that it was open to the defendants to have a sale set aside by way of answer to the plaintiff's claim on the strength of the sale to recover possession of the mortgaged property which he had bought in auction in execution of his mortgage decree.

As to the two reported cases, about the correctness of which we feel a doubt, I may say at once that I do not wish to attempt to challenge the other principle established by *Palaniandi Chetty v. Appavu Chettiar*(3), viz., that if a regular suit is brought by a creditor to declare a conveyance made by his debtor to be invalid, the decree obtained by him would enure for the benefit of all other creditors, and it follows from this that such suits should ordinarily be brought in a representative character on behalf of all the creditors, in order to avoid the same question being raised again and again by different creditors of the same debtor, although I prefer the opinion of KRISHNAN, J., in *Pokker v. Chandrankandi Kunhamad*(4) that it should be a matter within the discretion of the Court to direct at the instance of the defendant that a suit by a single creditor should be amended so as to make it a suit on behalf of all creditors, and not that all suits should be dismissed if not brought in a representative character. It seems to me that even if this principle of representation be accepted in its fullest significance, it does not follow as a necessary corollary, that a creditor, who is not already bound by a decision of the same question in a prior suit, should be debarred from setting up the invalidity of the transfer when he is made a defendant in a suit brought by the alienee just because he is a defendant.

In *Palaniandi Chetty v. Appavu Chettiar*(3) one of the learned Judges, COURTS TROTTER, J., did not go beyond what was decided in *Ishvar Timappa v. Devar Venkappa*(5), which

(1) (1907) I.L.R., 30 Mad., 169.

(3) (1916) 30 M.L.J., 565.

(2) (1909) I.L.R., 32 Mad., 242.

(4) (1919) 36 M.L.J., 281.

(5) (1908) I.L.R., 27 Bom., 146.

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is an authority for the proposition that if a creditor sues he should do so in a representative capacity. The other learned Judge, SESHAGIRI AYYAR, J., reluctantly allowed the validity of the objection that an assignment by a debtor is good and valid until it is set aside in a proper proceeding. He quoted *Vyse v. Brown*(1) and *Glegg v. Bromley*(2) as authorities for this, but he did not define a proper proceeding as confined in meaning to a regular suit, nor did he lay down that the person desiring to avoid the assignment must occupy the role of plaintiff in such a suit. The above two cases are not, as I understand them, authorities for such a proposition. He relied further on a case decided by a Full Bench, *Phul Kumari v. Ghanshyam Misra*(3), which decided a question of Court fees and incidentally seems to have decided that the effect of a successful suit under section 288, Civil Procedure Code (now Order XXI, rule 68), to set aside a summary order passed on a claim-petition was to place the parties in the same position as they had occupied before such order was made. The learned Judge did not notice that if the theory advanced in *Palaniandi Chetty v. Appavu Chettiar*(4) was accepted, a counter-petitioner who succeeded in defeating the claim would be in a worse position than if he failed, because he would have no right to appeal in the form of a suit under Order XXI, rule 68, against an order passed in his favour, and if the claimant appealed in that form he could not set up in defence a plea based on section 58, Transfer of Property Act. In *Muthukumara Chetty v. Anthony Udayar*(5), my learned brother pointed out that a party who was entitled to avoid a transaction might do so by other means than by getting a decree of Court. For instance, he might do so by an unequivocal act of repudiating the transaction—see page 877. The Full Bench in *Subramania Ayyar v. Muthia Chettiar*(6) did not result in any reasons being added to strengthen the view taken by the two learned Judges who decided *Palaniandi Chetty v. Appavu Chettiar*(4). As this is a point of law which is constantly recurring, I think it advisable that another Full

(1) (1884) 18 Q.B.D., 199.

(3) (1908) I.L.R., 35 Cal., 202 (P.C.).

(5) (1915) I.L.R., 38 Mad., 867.

(6) (1918) I.L.R., 41 Mad., 612 (F.B.).

(2) [1912] 3 K.B., 474.

(4) (1916) 30 M.L.J., 565.

Bench should finally pronounce on the point whether we should follow the view taken in *Palaniandi Chetty v. Appavu Chettiar*(1), and in *Subramania Ayyar v. Muthia Chettiar*(2).

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SADASIVA AYYAR, J. —I agree with the proposal of my learned brother to refer the question again to a Full Bench. I may be permitted to add a word of explanation. During the course of the arguments, I expressed rather strongly my reluctance to again refer the question to a Full Bench as I was a party with NAFIER, J., to the reference on which *Subramania Ayyar v. Muthia Chettiar*(2) was decided and I had, since the date of the Full Bench decision, loyally followed it surrendering, as I was bound to do, my view on the question. But as my learned brother thought that even the English procedure and practice on which the decision in *Palaniandi Chetty v. Appavu Chettiar*(1) was based, seemed not to support the view taken in that case (I am myself very diffident to express any opinion on what the practice and procedure of English Courts is, or has been, on any matter) and as in a later Privy Council decision no objection to the plea of voidability on the ground of fraud raised by the defendants (creditors) seems to have been taken by the fraudulent alienee, based on the ground that the creditors were not legally entitled to put forward such a plea in defence and could only have the alienation set aside in a suit brought by them as plaintiffs, I got over my reluctance to join in this reference. According to *Pokker v. Chandrankandi Kunhamad*(3), read with *Subramania Ayyar v. Muthia Chettiar*(2), the decree-holder who was able at once to defeat the claim-petition of a fraudulent alienee gets a mere barren victory which could be at once turned into a defeat, if the alienee brings his suit to set aside the order on the claim petition on the ground that the alienation has not been set aside in a regular suit and so the merits of the alienation should not be gone into; while if the decree-holder was unsuccessful in the claim proceedings he has the statutory right under Order XXI, rule 68 [admitted by Sir W. B. AYLING, J., and KRISHNAN, J., in his favour in *Pokker v. Chandrankandi Kunhamad*(3)] to bring his suit against the claim order and could have the merits of the fraudulent

(1) (1916) 30 M.L.J., 565.

(2) (1918) I.L.R., 41 Mad., 612 (F.B.).

(3) (1919) 36 M.L.J., 281.

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alienation gone into and decided in that suit. This anomaly is also a ground for reconsideration of *Subramania Ayyar v. Muthia Chettiar*(1). No doubt, on questions of procedure it is undesirable to unsettle precedents, but as no titles to property are likely to be disturbed and as the result of overruling *Subramania Ayyar v. Muthia Chettiar*(1) would only be to defeat what is almost wholly a technical plea, to simplify procedure, to shorten litigation, and to favour creditors sought to be defrauded (honest creditors and decree-holders being favourites of the law), I do not think that the objection is a serious one.

ON THIS REFERENCE

K. Bashyam Ayyangar, with *V. K. Srinivasa Ayyangar*, for the appellant.—I submit that *Subramania Ayyar v. Muthia Chettiar*(1) is wrong. It does not decide anything more than was decided by *Palaniandi Chetty v. Appavu Chettiar*(2). There is no warrant for the proposition that a voidable transaction can be avoided only by way of suit. A person who is entitled to avoid a transaction may do so by means other than obtaining a decree of Court. He may avoid a transaction by an unequivocal act. See *Pollak on Contracts*, pages 618-619, *Clough v. London and North Western Railway Co.*(3), *Bijoy Gopal Mukerji v. Krishna Mahishi Dabi*(4), *Muthukumara Chetty v. Anthony Udayar*(5) and *Reese River Silver Mining Co. v. Smith*(6). This principle has been embodied in section 86 of the Trusts Act. Further, there is nothing in section 58, Transfer of Property Act, to warrant avoidance by a regular suit and in no other way. In the Guardian and Wards Act, and Probate and Administration Act, we find analogous provisions, and Courts have allowed the whole question to be gone into in defence; see *Sinaya Pillai v. Munisami Ayyar*(7) and *The Eastern Mortgage and Agency Co., Ltd. v. Rebati Kumar Roy*(8).

Order VIII, rule 2, declares that a defendant must raise specifically the question whether a transaction is void or voidable in point of law. *Lakshmi Doss v. Roop Lawl*(9) goes further and decides that a defendant is entitled to set up in

- (1) (1918) I.L.R., 41 Mad., 612 (F.B.). (2) (1916) 30 M.L.J., 585.
(3) (1871) L.R., 7 Exch., 26. (4) (1907) I.L.R., 34 Cal., 329 (P.C.).
(5) (1915) I.L.R., 38 Mad., 867. (6) (1889) L.R., 4 H.L., 64 at p. 73.
(7) (1899) I.L.R., 22 Mad., 289. (8) (1906) 3 C.L.J., 260.
(9) (1907) I.L.R., 30 Mad., 169.

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defence the invalidity of a deed although his right to have it avoided by a suit has become time-barred.

Practice in the Indian Courts has been to consider the question in defence and in execution: *Chidambaram Chettiar v. Sami Ayyar*(1), *Subramania Pillai v. Dakshnamurthi Mudaliar*(2) and *Rajani Kumar Dass v. Gaur Kishore Shaha*(3). See also *Seth Ghunsham Dass v. Uma Pershad*(4), recently decided by the Privy Council. The English practice is the same. In England a transaction in fraud of creditors has been allowed to be impeached in garnishee proceedings: *Edmunds v. Edmunds*(5).

[WALLIS, C.J.—If the transaction is good as between the parties how are you entitled to attach the property so long as the alienation stands good? Under section 60, Civil Procedure Code, you are only entitled to attach property belonging to the judgment-debtor.]

My submission is that the moment the creditor, ignoring the alienation, proceeds against the property alienated there is avoidance and it becomes the judgment-debtor's assets for satisfying his creditors. See *In re Mouat*(6). Here there has been such an avoidance: either by the creditor putting in a claim petition for the attachment of the property fraudulently alienated, or by his insisting upon the Court going into the merits of the transaction on the hearing of the claim petition of the alienee. See *Burjorji Dorabji Patel v. Dhunbai*(7). Even assuming that the scope of the claim inquiry is limited to the determination of the question of possession there is an order, rightly or wrongly passed, in my favour in the claim petition. Under Order XXI, rule 63, the alienee has to bring a suit to establish his right to the property and in such a suit I am entitled to question the merits of the transaction under which he claims the property. See also Order VIII, rule 2, *Thathu Naick v. Kondu Reddi*(8) and *Baroda Prosad Banerjee v. Gajendra Nath Banerjee*(9).

A. Krishnaswami Ayyar with *E. S. Chidambaram Pillai* and *P. N. Marthandam Pillai* for the respondent.—The Full Bench

- (1) (1907) I.L.R., 30 Mad., 6. (2) (1912) 15 I.O., 193.
(3) (1908) I.L.R., 35 Cal., 1051. (4) (1919) 36 M.L.J., 483 (P.C.).
(5) [1904] P., 362. (6) [1899] 1 Ch., 831.
(7) (1892) I.L.R., 16 Bom., 1 at p. 21. (8) (1909) I.L.R., 32 Mad., 242.
(9) (1909) 9 C.L.J., 383.

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is right. It supports *Palaniandi Chetty v. Apparau Chettiar*(1), which follows *Ishvar Timappa v. Devar Venkappa*(2). *Ramu Aiyar v. Palaniappa Chetty*(3), relates only to a question of title to the property. *Glegg v. Bromley*(4), *Heawood v. Bone*(5), referred to.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The decision of the Full Bench in *Subramania Ayyar v. Muthu Chettiar*(6) affirmed the decision in *Palaniandi Chetty v. Apparau Chettiar*(1) that a conveyance offending against the provisions of section 53 of the Transfer of Property Act can only be avoided in a suit properly instituted for that purpose, and that consequently in a suit by an unsuccessful claimant under Order XXI, rule 63 of the Civil Procedure Code, it is not open to the attaching decree-holder to plead that the transfer by the judgment-debtor to the claimant was fraudulent. This ruling has since been questioned in two cases in this Court, *Cheruthazhath Abdulla Haji v. Cheriyaandi Ibrayan Kutti*(7) and *Pokker v. Chandrangandi Kunhamad*(8), as observed in the referring order of SPENCER, J., where many of the Indian decisions are cited. The question has now been very fully argued before a Bench of five Judges, and after carefully considering all the arguments addressed to us I have come to the conclusion that the view taken by the two learned Judges of the Calcutta High Court in *Abdul Kadir v. Ali Mia*(9) is right, and that there is nothing to prevent a creditor who has been defrauded, defeated or delayed from exercising the option given him by section 53 of the Transfer of Property Act of avoiding the conveyance otherwise than by the institution of a suit for that purpose. If the framers of the Transfer of Property Act, who were of course thoroughly familiar with the English decisions on the subject, had intended that the creditor should only exercise this option by instituting a suit, I make no doubt that, in a measure which was intended to be self-contained and to be administered in many

places where English decisions are not readily available, they would have said so expressly. As they have not done so, we are, in my opinion, bound to apply the law that voidable transactions may be avoided by any open or unequivocal declaration, of an intention to avoid them, as laid down by the House of Lords in *Oakes v. Turquand and Harding*(1), and in numerous other cases.

I prefer to rest my opinion on the language of the section which we have to administer, but at the same time, I do not think that the English decisions, when properly understood, afford any support to the contrary view. The practice of requiring a creditor suing in Chancery to set aside a deed of fraudulent transfer to sue on behalf of all the creditors was, in my opinion, only another application of the well-known maxim that he who seeks equity must do equity. As observed by Mr. Kerly in his 'History of Equity' at page 145, even after the two statutes of Elizabeth extended the powers of the Common Law Court to defeat fraudulent conveyances, recourse continued to be had to Chancery to set aside settlements in fraud of creditors: *Naylor v. Baldwin*(2). This was no doubt owing to the superior facilities then possessed by the Court of Chancery for eliciting the truth in such cases owing to its power to examine the defendant and to grant discovery, which the Common Law Courts could not do. It is unnecessary to consider whether the Court of Chancery invariably required a judgment-creditor as a condition of obtaining relief to sue on behalf of all the creditors. In so far as it did so, it was merely an application of the well-known equitable rule which was also applied in the more recent case of *Reese River Silver Mining Company v. Atwell*(3). It was there argued that there was no case in which a creditor had been allowed to bring such a suit when the debtor was still alive without first obtaining a judgment against him, but this contention was overruled, and a creditor who had not obtained judgment was allowed to sue, but, at the same time, leave was given to amend the bill (or plaint) by making it on behalf of all the creditors, a decision followed by JENKINS, C.J., in a similar case: *Ishvar Timappa v. Devar Venkappa*(4). That is not the question now

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(1) (1916) 30 M.L.J., 565.

(2) (1903) I.L.R., 27 Bom., 146.

(3) (1913) I.L.R., 35 Mad., 35 at p. 38.

(4) (1912) 3 K.B., 474.

(5) (1884) 13 Q.B.D., 179.

(6) (1918) I.L.R., 41 Mad., 612 (F.B.).

(7) (1919) 50 I.C., 959.

(8) (1919) 36 M.L.J., 231.

(9) (1912) 15 C.L.J., 649.

(1) (1867) L.R., 2 H.L., 825.

(2) (1639-40) 1 Chan. Rep. 132; 21 E.R. 528.

(3) (1869) L.R., 7 Eq., 347.

(4) (1903) I.L.R., 27 Bom., 140.

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before us, as the suit with which we are concerned is the statutory suit under Order XXI, rule 68.

This and the other Chancery cases cited in *Palaniandi Chetty v. Appavu Chettiar*(1), in my opinion throw no light on the question whether under the statutes of Elizabeth it is not open to a creditor to avoid a fraudulent conveyance without suit or action, if he can do so effectively and is prepared to face the risk of having to pay damages should the conveyance ultimately be found not to have been fraudulent. That he can do so appears from two decisions cited by STERLING, J., in *In re Mouat*(2), where the creditor's rights at law and in equity are distinguished. In the very early case of *Bethell v. Stanhope*(3), where the testator shortly before his death had made a fraudulent gift of his goods to his daughter but had remained in possession of them, it was held that they were assets in the hands of his administrator; and that when the donee afterwards took them it was a trespass against the administrator; and in *Shears v. Rogers*(4), LITTLEDALE, J., observed:

"Creditors had a right to the property which the deed purported to convey, and might enforce that right at law. The assignment was void as soon as the creditors claimed to treat it as such, though not till then."

The judgment-creditor's right to take in execution goods which have been made the subject of a conveyance offending against the statute of Elizabeth without bringing a suit to set aside the conveyance has, also been recognized in a number of cases, beginning with the early case of *Turvil v. Tipper*(5), where it was held that an alienee from the judgment-debtor under a fraudulent conveyance could not maintain an action of trespass against the bailiff of a Manor Court for seizing the goods, which were the subject of the conveyance, in execution against the judgment-debtor. Later cases went further, and held that the sheriff or bailiff was not only entitled to seize in execution goods which had been fraudulently transferred by the judgment-debtor but was bound to do so. In *Lovick v. Crowder*(6), Lord TENTERDEN said,

(1) (1916) 30 M.L.J., 565.

(3) (1601) Cro., Eliz., 810.

(5) (1627) Lat., 222.

(2) [1899] 1 Ch., 831.

(4) (1832) 8 B. & Ad., 302.

(6) (1823) 8 B. & C., 132.

"Now, if a party be in possession of the goods apparently the property of the debtor, the sheriff, who has a *fiery facias* to execute, is bound to inquire whether the party who is in possession is so *bona fide*; and if he find the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ".

The same rule was laid down by Baron PARKE in *Imray v. Magnay*(1), in which a fraudulent judgment had been suffered by the debtor:

"The judgment is by the statute (13 Eliz.) made void against creditors, but by implication it is void against a sheriff, who acts in right of a creditor; as a deed is, which is fraudulent against creditors: *Turvil v. Tipper*(2). And it is now of frequent occurrence, that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of the creditor; and the statute seems to us to put both (the judgment and the conveyance) on the same footing".

In *Remmett v. Lawrence*(3), doubts were expressed as to how far the sheriff was bound to take notice that a judgment or conveyance was fraudulent, but *Imray v. Magnay*(1), was subsequently affirmed in *Christopherson v. Burton*(4). It is unnecessary to pursue the question of the sheriff's liability. What is material is that the decisions of these eminent Judges proceeded on the view that the sheriff in execution may do what the creditor could do himself, viz., avoid the fraudulent conveyance without a suit. As regards *Vyse v. Brown*(5), all that was decided was that the defendant, who was the executor under a will by which the judgment-debtor became entitled to a legacy which he was said to have fraudulently alienated, could not be said to be a debtor to the judgment-debtor in the amount of the legacy so as to entitle a creditor of the judgment-debtor to take garnishee proceedings. In *Glegg v. Bromley*(6), it was held that the assignment there in question was not in contravention of the statute of Elizabeth, and no question as to how such settlements could be avoided appears to have arisen. These decisions appear to have no bearing on the present question.

(1) (1843) 11 M. & W., 267.

(3) (1850) 15 Q.B., 1004.

(5) (1884) 13 Q.B.D., 199.

(2) (1627) Lat., 222.

(4) (1848) 3 Exch., 160.

(6) [1912] 3 K.B., 474.

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It is the less necessary to import restrictions into section 53 of the Transfer of Property Act because the legislature in India has made what it considers sufficient provision for the rights of the other creditors in the provisions of the Code relating to the realization and distribution of assets in execution by allowing judgment-creditors who come in before the realization of the assets to share in them.

The actual question referred to us is whether it is open to an attaching decree-holder to plead in defence to a suit by the alienee whose claim has been rejected that the transfer to him was fraudulent under section 53. For the reasons already given, I am of opinion that it is open to the judgment-creditor by virtue of section 53 of the Transfer of Property Act to attach as the property of the judgment-debtor property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under Order XXI, rule 58, and still maintains his right to attach, that again is a sufficient exercise of his option to avoid and entitles him to succeed in the subsequent suit under rule 63 which has next to be considered.

When the claim is preferred, it becomes the duty of the executing Court to investigate it unless of opinion that it was designedly or unnecessarily delayed. What is to be investigated at this stage is provided by rules 60 and 61 and is, not the creditor's right to attach, but the question whether the judgment-debtor was in possession (as defined in the rule) of the attached property at the date of the attachment. If he was, the attachment is to continue and execution to proceed, subject to the result of the suit which the claimant may institute within one year to establish his right; and according to the decision of the Full Bench in *Venkataratnam v. Ranganayakamma*(1), the result is the same under the present Code when the claim is rejected on the ground that it was designedly or unnecessarily delayed. On the other hand, if the judgment-debtor is found not to have been in possession as defined in the rule, the attachment is to be raised and execution

(1) (1918) I.L.R., 41 Mad., 985 (F.B.).

against the attached property suspended until the judgment-creditor has established his right to attach in a suit under rule 63. If the provisions of rules 60 and 61 be pursued, the question whether the claim should be allowed or disallowed in the first instance will depend on whether the judgment-debtor or the transferee was in possession as defined in rule 60 at the date of the attachment. I am not satisfied that it was intended to lay down a different rule in *Ramu Aiyar v. Palaniappa Chetti*(1), but, if it was, I am unable with great respect to follow that decision.

The resulting suit under rule 63 is by the unsuccessful party to the claim petition 'to establish the right which he claims to the property in dispute.' Whether this suit be instituted by the attaching decree-holder or by the transferee claimant, it must equally be decided in favour of the former if the transfer is shown to have been fraudulent; because, in consequence of the fraudulent character of the transfer and its avoidance by the judgment-creditor, the result is that the transferee has not the right which he claims to hold the property free from attachment in execution by the judgment-creditor.

This view is entirely in accordance with the policy of these provisions of the Code as explained by the Privy Council in *Sardhari Lal v. Ambika Pershad*(2), which is to secure the speedy settlement of questions of title raised at execution sales. We have, however been referred to the later decision of the Privy Council in *Phul Kumari v. Ghanshyam Misra*(3). All that was decided in that case was that a suit by the unsuccessful party to establish his right under section 283, now Order XXI, rule 60 of the Code of Civil Procedure, was 'a suit to alter or set aside the summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court' within the meaning of article 17 of schedule II of the Court Fees Act. Their Lordships proceeded on the ground that a suit under section 283, rule 63, was not only the appropriate but the only means of setting aside the order passed on the claim petition, and held that this was sufficient to bring the suit within the terms of the article. They, no doubt,

(1) (1913) I.L.R., 35 Mad., 85.

(2) (1888) I.L.R., 15 Cal., 521 (P.O.).

(3) (1908) I.L.R., 35 Cal., 202 (P.O.).

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referred in one place to the suit under section 283 to establish the right of the unsuccessful party to the claim petition as an 'action of appeal' and to the plaint in such a suit as 'a plaint for review of a summary decision' but this language must be read with reference to the question before them. The effect of the judgment in a suit under section 283, now rule 63, as stated by the Privy Council in *Sardhari Lal v. Ambika Pershad*(1), and as appears from the provisions of the Code which I have examined, is to settle, as between the attaching decree-holder and the claimant, the question of title arising in execution, with the result that the order on the claim petition (which in the judgment of *Phul Kumari v. Ghanshyam Misra*(2), is referred to as a decree) is either set aside or confirmed. All that their Lordships decided in the latter case was that this latter result was enough to bring the suit within the operation of article 17 of schedule II of the Court Fees Act.

On the whole, I have come to the conclusion that, on the language of section 53 of the Transfer of Property Act, the question referred to us must be answered in the affirmative, and I am confirmed in this view by the conclusion to which I have come that the law is the same in England with regard to transfers offending against the statute of Elizabeth.

OLDFIELD, J. OLDFIELD, J.—The cases we have to consider are those, in which the claimant, having failed to obtain an order under Order XXI, rule 60, Code of Civil Procedure, brings the suit authorized by rule 63 'to establish the right which he claims to the property in dispute.' We are asked to decide whether the attaching creditor, defendant in such a suit, can plead that the transfer, on which the claimant relies, offends against section 53, Transfer of Property Act, or whether he must reserve that plea for separate proceedings to be instituted by him for its avoidance.

Of the arguments, by which the latter alternative is supported, that based on the alleged difficulty of combining in the decree in a suit under rule 63 a recognition of the creditor's right with the protection, to which the claimant's interest is entitled, can be dealt with shortly. For, firstly such a decree will not declare generally that the transfer is void, but only, what section 53 permits, that it is not binding as between the creditor

(1) (1888) I.L.R., 15 Calo., 521. (P.C.). (2) (1908) I.L.R., 35 Calo., 202 (P.C.).

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and the claimant; and next there will be nothing to prevent recognition of such a right as the latter may establish by showing that as regards a portion of the consideration, the transfer to him was valid. The Court can meet either contingency as it would in a suit by the creditor, the one by a direction regarding the disposal of the balance of the sale-proceeds after the creditor's decree has been discharged and the other by allowing him to proceed against the property only after he has paid any amount to which the claimant is legitimately entitled. I turn to the two more substantial contentions relied on, that, the scope of the suit under rule 63 being no greater than that of the investigation under rules 59 and 60, only the possession which would be decisive in the latter, can be considered in the former and that no plea regarding the character of the claimant's transfer as binding on the creditor can be considered, until or unless the latter has negatived that character by obtaining a decree.

The first of these contentions is involved in some confusion, because it is no doubt true that Subordinate Courts in fact are not dealing with claims only with reference to possession and are erroneously considering the character of the title, on which the claimant relies; and they are supported in doing so by the head-note to *Ramu Aiyar v. Palaniappa Ohetty*(1). If that were really the result of that decision, I should with all deference doubt its correctness. But in fact it decided only that the rejection of a claim by an order, which was based on a finding as to possession and which was not attacked within a year by a suit, was final as against the claimant's right, even as based on his title; and, if there are some observations in the judgment arising from the reference in that order to title as well as and in connexion with possession, it does not follow from them that the learned Judges meant more than that the adjudication as to the latter became final by implication also as to the former. More certainly would have been inconsistent with the marked distinction between the references to possession in rules 59, 60 and 61 in connexion with the preliminary order under the two last mentioned rules and the reference in rule 63 to the establishment in the subsequent suit of the right

(1) (1913) I.L.R., 35 Mad., 33.

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claimed by the plaintiff. But, as the investigation is restricted to the question of possession, that distinction is sufficient to negative the applicability of a similar restriction to the last stage of the proceedings; nor can any support for such application be found, as Mr. Krishnaswami Ayyar contends, in the reference by the Judicial Committee in *Phul Kumari v. Ghanshyam Misra*(1) to the suit under rule 63 (or the provision previously corresponding therewith) as simply 'a form of appeal related to a prior decree,' which constituted the cause of action. For their Lordships were not dealing in that case with any question of the substantive rights of the parties or the contentions open to either of them, but only with a question of court fees, in connexion with which the character of the relief asked for by the plaintiff would be decisive.

This failing, there remains the more substantial contention that the defendant-creditor cannot rely on any exercise of his option under section 53, Transfer of Property Act, in defence, or unless he has brought and succeeded in a suit. On this point I respectfully accept the statement of the English Law in the judgment just delivered and turn to the Indian authorities. There is no doubt that generally the exercise of the option to avoid a contract can be pleaded by the person entitled to exercise it in defence, as for instance in cases under sections 19 and 20, Indian Contract Act. Vide *Orr v. Sundara Pandia*(2), *Lakshmi Doss v. Roop Laul*(3), *Raja Rajeswara Dorai v. Arunachellan Chettiar*(4) and *Rangnath Saktharam v. Govind Narasim*(5), and it has not been shown to be material that the person concerned under section 53, Transfer of Property Act, is not the executant of the contract or that his plea involves his right to avoid it, not absolutely, but only as between him and the party to it, who has claimed. There is therefore nothing contrary to principle in the authorities relied on by SPENCER, J., in the order of reference; and *Rajani Kumar Dass v. Gaur Kishore Shaha*(6), may also be mentioned in connexion with another argument already referred to as an instance of a case in which partial effect was allowed to the

(1) (1908) I.L.R., 35 Cal., 202 (P.O.). (2) (1894) I.L.R., 17 Mad., 255.
(3) (1907) I.L.R., 30 Mad., 109. (4) (1915) I.L.R., 38 Mad., 321.
(5) (1904) I.L.R., 28 Bom., 889. (6) (1908) I.L.R., 35 Cal., 1051.

plaintiff's transfer. Most of these decisions were no doubt given, not in connexion with the claim procedure, but in ordinary suits brought on a transfer without a previous order rejecting a claim by the plaintiff. But that cannot affect their weight in the present discussion in view of the very comprehensive scope of the special remedy allowed in rule 63, and the description of its purpose by the Judicial Committee in *Sardhari Lal v. Ambika Pershad*(1), as the speedy settlement of questions of title arising at execution sales. It is, as these decisions show, essential only that the attaching creditor, pleading section 53, Transfer of Property Act, in defence, shall have exercised his option in some unequivocal way; and that he will have done, if not in all cases by his attachment, at least when he afterwards opposes the transferee's claim with full knowledge of it in the proceedings under rule 59. In these circumstances I agree with the answer proposed by the learned Chief Justice.

SADASIVA AYYAR, J.—Whenever English decisions are quoted before us, I, no doubt, receive much instruction and guidance when the decisions deal with questions of general jurisprudence, with the common law rights of the Crown and the subjects, and with the application of universal maxims of justice, equity and good conscience to a given state of facts. But when such English decisions are quoted as deal mainly with forms of action, with the practice as to the impleading of particular parties in particular actions, with procedure in execution, with the distinctions between actions at common law and at equity, I have always felt myself going beyond my depth, even when acute and able lawyers like Mr. A. Krishnaswami Ayyar handle such cases with ease and confidence, and I am free to confess that I am often inclined to exhibit signs of impatience when I so feel myself unable to appreciate the relevancy of arguments based on such cases.

In the present case, I am glad that I need feel no anxiety that my imperfect knowledge of English procedure and precedents will lead me into serious error as my Lord the Chief Justice has fully dealt with the English decisions quoted before

(1) (1888) I.L.R., 15 Cal., 521 (P.O.).

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us and has shown that they lend little or no support to the respondent's contention.

On the question of the interpretation to be placed on the language of the provisions contained in Order XXI, rules 58, 59, 60 and 63, the matter has been dealt with fully by KRISHNAN, J., in *Pokker v. Chandrankandi Kunhamad*(1), by SPENCER, J., in his referring order, and by my Lord in the judgment now pronounced by him; and I have nothing to add except to say that with the greatest respect, I dissent from the observations found in *Ramu Aiyar v. Palaniappa Chetty*(2), as regards the scope of Order XXI, rules 59 and 60. That when inquiring in summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of (what I may call) 'emergent' disputes, the Court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary inquiry the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit is not at all a strange or uncommon provision of the statute-law. (See section 9 of the Specific Relief Act, the possession chapter of the Criminal Procedure Code and the analogous provisions in the Succession Certificate Act, the Estates Land Act, etc.)

I am therefore clear that the Court is bound to order the release of an attached property if it finds possession in the claimant *on his own account*, even if there is title and disposing power remaining in the judgment-debtor. Such a release is, however, not an adjudication that the decree-holder had not got the right under section 60, Civil Procedure Code, to attach or that he could not successfully nullify the release orders in a suit brought under Order XXI, rule 63. Under section 60 of the Civil Procedure Code, the property liable to attachment need not be in the possession of the judgment-debtor, because all saleable property, movable or immovable, *belonging to* the judgment-debtor, or over which or the profits of which he has a disposing power which he may exercise for his own benefit whether the same be held in the name of the judgment-debtor or by any other person in trust for him or in his behalf, can be

(1) (1919) 36 M.L.J., 231.

(2) (1918) I.L.R., 35 Mad., 35.

attached. Order XXI, rules 59 and 60, however, seem to make it clear that even if a trespasser is in actual possession of such property (the evidence to prove and the character of such actual possession varying of course with the nature of the property attached), the Court is bound to release the property to the extent of such possession subject to the right to attach being established in a suit under Order XXI, rule 63. In such a suit, the plaintiff—decree-holder, might, of course, prove that the claimant was really not in possession notwithstanding that the Court which inquired into the claim-petition held the contrary (and therefore the summary order releasing the attachment was wrong) but he can also prove that the judgment-debtor, notwithstanding the trespass by the claimant, had not lost his rights and that the property could therefore be attached under section 60.

Mr. Krishnaswami Ayyar, as I understood him, did not dispute the proposition that a third person against whom a transaction is voidable can avoid it by an unequivocal declaration, or by unequivocal conduct disclosing that he knew of the transaction and had treated it as avoided by him: see *Bijoy Gopal Mukerji v. Krishna Mahashi Debi*(1). If when a person is bound to avoid it by bringing a suit in a Court to set it (transaction) aside (owing to a statutory law expressly or impliedly prescribing such a course as the only means of avoiding it or by his having been himself a party to the transaction sought to be avoided) and he does not do so within the time allowed by law for such a suit, he could after the expiry of such a period, plead the voidability by way of defence is a moot question on which I prefer to reserve my opinion, notwithstanding the decision in *Lakshmi Doss v. Roop Laul*(2). But no such question arises in this case.

A rather far-fetched argument was based on the decision of the Privy Council in *Phul Kumari v. Ghanshyam Misra*(3), that for purposes of the Court fees, a suit under Order XXI, rule 63, should be held to be a suit to set aside the order on the claim-petition, as it is of the nature of an appeal in the form of a suit. That argument has been adequately dealt with (if I

(1) (1907) I.L.R., 34 Cal., 329 (P.O.). (2) (1907) I.J.R., 30 Mad., 169.

(3) (1908) I.L.R., 35 Cal., 202 (P.O.).

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may be respectfully permitted to say so) by my Lord and I need say no more on that point.

Two other arguments which Mr. Krishnaswami Ayyar put forward with his usual resourcefulness might be shortly noticed. On the language of Order XXI, rule 54, which says that the attachment of immovables in execution should be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, etc., he argued that the legislature impliedly intended that no valid attachment could be made of property which had been fraudulently (but not nominally) transferred; as the prohibition by the attachment order addressed to the judgment-debtor alone who had no power to make a further transfer would be futile in such a state of facts and the form of the order prescribed for such a case would have been a prohibition to the fraudulent transferee from making any further transfer by himself. This ingenious argument is based on the assumption that the legislature, whilst enacting a general provision as to the form in which an order of attachment should be issued for the purpose of securing due publicity, intended that the general form should take into account and contain appropriate words to cover all possible contingencies and all possible complications of facts which may arise such as the case of the creditor being entitled to avoid the transfer (by the judgment-debtor) to a fraudulent transferee under section 53 of the Transfer of Property Act, and the consequent result that so far as the creditor's remedies are concerned against the transferred property, the transfer is void though the judgment-debtor would himself be unable to transfer it again whether an attachment order is or is not issued prohibiting him from doing so.

A general and single form of order for proclamation to the public was provided which would be applicable to the facts of most cases, and the legislature enacted that when an order is passed in such a form it shall constitute a valid attachment of the property in execution in all cases and under all circumstances, after the order is proclaimed in the prescribed manner.

The other argument was that the Civil Procedure Code contained no special provisions which would place a fraudulent

transferee (whose transfer was avoided by a decree-holder acting under section 53 of the Transfer of Property Act) in the position of the judgment-debtor himself so that notices of attachment, notices for settlement of sale proclamations, etc., may be issued to the fraudulent transferee instead of to the judgment-debtor, or in addition to the judgment-debtor, and so that the balance of sale-proceeds remain, after the sale of the attached property might be paid to the fraudulent transferee instead of to the judgment-debtor and so that he might get the benefit of sections 310 and 310 (A) of the Civil Procedure Code as to setting aside sales by payment within 30 days and so on. There is also no provision made for the fraudulent transferee when another decree-holder applies for rateable distribution under section 73 to intervene and prove to the Court that that particular creditor was estopped by his conduct from treating the transfer as voidable by him also and as entitling him to rateable distribution. I am wholly unable to appreciate the argument that the failure of the legislature to carefully look after the interest of the fraudulent transferee is a reason for holding that the decree-holder sought to be defrauded by him cannot avoid the fraudulent transfer except by a suit in which he is the plaintiff, or cannot bring a suit except in a representative capacity, or except in such a manner as to enable the Court to convert it into a creditor's administration suit, or cannot set up in defence to a suit by a fraudulent transferee that the decree-holder had avoided the fraudulent transfer by an unequivocal act or declaration; though the plain words of the statute law and the principles of general jurisprudence give him such rights. I must admit that I was not at all moved by the tale of the alleged hardships and inconveniences (which would result according to Mr. Krishnaswami Ayyar) to the fraudulent transferee by the absence of such express provisions in the Civil Procedure Code. On the other hand, my sympathies are with the honest creditors and decree-holders who are the favourites of the law.

It must be admitted that it was unquestionably assumed in this High Court, and in all the mufassal Courts, before *Palaniandi Chetty v. Appavu Chettiar*(1) (as pointed out in that

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decision itself) that the decree-holder when he is the defendant in a suit brought under Order XXI, rule 63, could in defence plead that he had avoided the fraudulent transfer either under section 53 of the Transfer of the Property Act or under general principles of jurisprudence embodied in the Statute of Elizabeth, and that hence, plaintiff's suit should be dismissed. Much inconvenience and hardship would result to the decree-holder if the law allowed a fraudulent transferee plaintiff to successfully raise a purely technical demurrer to such a plea of the decree-holder defendant.

The cases in which the judgment-debtor's transferee who failed in his claim petition and came in as the plaintiff in a suit under Order XXI, rule 63, may be classified as follows:—

- (a) Where the transferee is a mere nominal transferee;
- (b) Where he is a fraudulent transferee in possession;
- (c) Where he is a fraudulent transferee not in possession.

A creditor decree-holder, who is in most cases a stranger, cannot reasonably be expected to know of his own knowledge whether a transfer by his judgment-debtor is only fraudulent or is wholly nominal or partly nominal and partly fraudulent, and whether the transferee is in possession and if in possession, whether he is so for himself or for the judgment-debtor. He would therefore, usually both in the claim-petition and in the suit which afterwards arises out of the order against the claimant, be obliged to raise and be justified in raising alternatively all the pleas open to him, and the Court which decided the claim against the claimant might, in its conclusion on each of the three points, be either right or wrong. In the suit also, the Court of first instance may decide in favour of the plaintiff transferee or against him, and may decide these three points rightly or wrongly (the right decision being of course assumed to be that he was merely a fraudulent transferee and not a mere nominal transferee) and there might be appeals and second appeals before the questions are finally decided rightly. That the decree-holder who bona fide pleads that the transfer is a nominal one in the alternative and who cannot be sure whether and when the defeated claimant would bring his suit and whether there would be appeals and second appeals if the transferee fails in the first stages of the suit, that he should finally after a great delay be obliged to set aside the transfer

by obtaining a formal decree of Court in a suit of his own before he could proceed with his execution by attachment and sale of the fraudulently conveyed property, would, in my opinion, be a much more serious hardship on the decree-holder for no fault of his than the minor hardships and inconveniences to the fraudulent transferee mentioned by the respondent's learned vakil. As shown in one of the later decisions, he would be in a much worse position for his success in the summary claim proceedings than if he had lost in those proceedings.

Finally I agree both with the answer proposed by my Lord to the question referred to the Full Bench and with the propositions of law laid down in support of that answer in his judgment.

SPENCER, J.—As the judgments of my Lord and of the two other learned Judges which have just been delivered are in favour of the view that I took in my order of reference, I have nothing to add beyond expressing my concurrence with them.

SESHAGIRI AYYAR, J.—Ever since the decision in *Palaniandi Chetty v. Appavu Chettiar*(1), was pronounced, there has been a growing feeling in the profession that it should be reconsidered. Almost every one of my learned colleagues felt great disinclination to accept it as good law. It certainly has upset the practice which has hitherto obtained in such matters. I myself said in the decision that my conclusion was reluctantly come to. In the last paragraph of that judgment, I referred to the judgment of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra*(2), as compelling me to take the view I did. In these circumstances, I am not unwilling to reconsider my decision.

I still hold that the judgment of the Judicial Committee, if it is regarded as a considered pronouncement, fully justifies my view. Their Lordships say distinctly that a wrong idea about the nature of the suit under Order XXI, rule 63, is prevalent and that that idea is responsible for the view taken regarding the amount of Court fee in such suits. They then point out what in their view is the true scope of suits of this description. The majority of the Full Bench have come to the conclusion that this

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decision should be confined to matters relating to Court fees and should not be further extended. I have felt doubts whether it is permissible for us to read a judgment of the Judicial Committee in the way suggested. But there have been precedents in this Court wherein the dicta of the Judicial Committee have been restricted to the real matter in controversy in litigation. There is also the classic pronouncement of Lord HALSBURY, that a judgment of the highest tribunal is only authority for the point actually decided and that the decision should not be divorced from the facts on which it was based. For all these reasons, I do not feel it necessary to adhere to the view which I took in *Palaniandi Chetty v. Appavu Chettiar*(1). Upon one matter, I feel little doubt after hearing the full arguments addressed to us now and that is that the scope of Order XXI, rules 58 to 63, should be restricted to an enquiry into the question of possession and should not be relied on for investigating titles to property. I feel considerable doubt however upon the interpretation to be placed on the language of rule 68. Even supposing that we do not accept the letter of the ruling of the Judicial Committee in *Phul Kumari v. Ghanahyam Misra*(2), it seems to me that a suit instituted by a party against whom an adverse order has been passed in a claim proceeding should be confined to litigating the title as between himself and the successful claimant. I am not, as at present advised, prepared to hold that the limitation placed upon the summary enquiry should be wholly ignored in dealing with the suit following the enquiry. The view that the result of the summary enquiry only furnishes an opportunity for ventilating every possible right in respect of the claims of parties to the enquiry seems to go further than is warranted by the language of the rules.

Even taking this view, the question still remains whether the language of section 53 of the Transfer of Property Act should be read as contemplating suits by the person who alleges that the alienation is in fraud of his rights.

Mr. Krishnaswami Ayyar did not dispute the proposition that a party who is entitled to come to Court as a plaintiff to impeach a voidable transaction is ordinarily entitled to put it forward

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LIMITATION—Accord and satisfaction—Annulment of satisfaction on the ground of coercion, effect of—Fresh cause of action for original claim, on annulment.] A debtor who satisfied, by payment, his creditor's claim for balance of money due, sued to annul the satisfaction on the ground of coercion and obtained a decree for refund. Held, that the annulment gave the creditor a fresh cause of action upon the original claim, and time began to run from the date of annulment. <i>Mussumat Ramesh Burno Moyee v. Shoochee Mookhee Burmania</i> , (1888) 12 M.L.A., 244 and <i>Huro Pershad Roy v. Gopal Das Dutt</i> , (1888) I.L.R., 9 Cal., 255, at 259 (P.O.), followed.	PAGE
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ARTS. 44 AND 144—Alienation by mother as guardian of the sons—Decree against the sons represented by the mother as guardian ad litem—Sale in execution—Decree and sale, whether nullities—Suit by minors to recover possession—Limitation—Civil Procedure Code (V of 1908), O. XXXII, r. 4 (1).] Where a mother acting as the guardian of her minor sons mortgaged their property and a decree was passed thereon against the minors represented by the mother as guardian ad litem and properties sold in execution, and subsequently the sons sued to recover possession of the properties more than three years after the elder of them attained majority but within twelve years of the sale, alleging that their mother was not competent to represent them in the previous suit as her interest was adverse to theirs. Held, that the decree against the minors was not a nullity and had to be set aside, and that the suit was consequently barred by limitation.	
<i>Kuppuswami Ayyangar v. Kamalammal</i> ... (1920) I.L.R., 43 Mad., 842	
LIMITATION ACT (IX OF 1908), ART. 182 (2)—Appeal filed in wrong Court—Order of Court returning appeal for presentation to proper Court—"Appellate Court" meaning of—Time for executing decree.] Where a Court decides that an appeal has been wrongly presented to it and orders a return of it for presentation to the proper Court, such an order is neither 'a final order' of the Appellate Court, nor 'a withdrawal of the appeal' within article 182 (2) of the Limitation Act. 'Appellate Court' in the article means an appellate Court having jurisdiction to hear the appeal. <i>Per OLDFIELD, J.</i> (<i>Seshagiri Ayyar, J.</i> , doubting).—A mortgagor in whose favour a decree for redemption has been passed can execute the decree by sale of the mortgaged properties. <i>Govinda Taragan v. Veeran</i> (1913) I.L.R., 36 Mad., 32, followed.	
<i>Abdul Kadir v. Samipandia Tevar</i> ... (1920) I.L.R., 43 Mad., 835	
LOCAL BOARDS ACT (V OF 1884), SS. 54, 144 TO 147:—See NEGOTIABLE INSTRUMENTS ACT (V OF 1881), SS. 5 AND 6 ... 816	
LOCAL FUND CODE, RULE 549:—See NEGOTIABLE INSTRUMENTS ACT (V OF 1881), SS. 5 AND 6 ... 816	
MADRAS ESTATES LAND ACT (I OF 1908), SS. 5 AND 132—Decree for rent—Transfer of execution of decree to a Civil Court—Landholder's right of first charge on holding—Decree-holder ceasing to be landholder at the time of execution, effect of, on first charge.] A landholder's right to enforce in execution a decree for rent passed under the Madras Estates Land Act as a	

first charge upon the tenant's holding is available only if the decree is executed in a Revenue Court and not when its execution is transferred to a Civil Court. *Held further by SADASIVA AYYAR, J.*—The landholder is entitled to claim the first charge for rent only if he continues to be landlord at the time the claim for rent is sought to be enforced. *Forbes v. Maharaj Bahadur Singh*, (1914) I.L.R., 41 Calo., 926 (P.O.), followed.

Venkata Lakshamma v. Seetayya ... (1920) I.L.R., 43 Mad., 786

MORTGAGE-BOND—Transfer—Absence of notice to mortgagor—Payment to mortgagee by mortgagor, after transfer without notice thereof—Payment in full settlement of debt—Effect of payment—Receipt by mortgagee, necessity for registration—Registration Act (XVI of 1908), sec. 17 (b)—Civil Procedure Code, O. XLI, r. 33—Memorandum of objections, whether necessary—Transfer of Property Act (IV of 1882), sec. 180, principle of.] Payment by the mortgagor to the mortgagee after, but without notice of, a transfer of the mortgage, must, in the absence of collusion, be allowed to the mortgagor as against the transferee. Where such payment was accepted by the mortgagee in full settlement of the debt due, the mortgagor is entitled to get credit, as against the transferee, not only for what he actually paid but for the whole mortgage-debt. Where a receipt by the mortgagee, in terms, only discharges a mortgage-debt, it does not fall under section 17 (b) of the Registration Act, and is admissible in evidence, though it was not registered. Where, in a suit for sale instituted by the transferee of a mortgage-bond against the mortgagee and mortgagor, a decree was passed against the latter, but on appeal by him, the decree against him was reversed, the Appellate Court had power, under Order XLI, rule 33, Civil Procedure Code, to pass a decree against the mortgagee, who was a respondent in the appeal, even though the plaintiff had not filed an appeal or memorandum of objections.

Neelamani Patnaik Muswadi v. Sukaduvu Beharu ... (1920) I.L.R., 43 Mad., 803

MUTT, HEAD OF—Sanyasi—Simple money debts incurred by head for necessities of the Mutt—Suit against successor—Liability of mutt properties—Personal liability of the debtor—Lay trustee, executor or administrator, analogy of.] In a suit to recover a simple money debt, incurred by the sanyasi head of a mutt for the necessary purposes of the mutt, the properties of the mutt can be made liable, whether the suit is brought during the lifetime of the incumbent who incurred the debt or his successor. Cases of debts incurred by lay trustees of religious or charitable institutions, executors or administrators, distinguished. *Shankar Bharati Swami v. Venkapa Naik*, (1885) I.L.R., 9 Bom., 422, followed.

Lakshmindrathirtha Swamiar v. Raghavendra Rao. (1920) I.L.R., 43 Mad., 796

NEGOTIABLE INSTRUMENTS ACT (V OF 1881), ss. 5 AND 6—Cheque Bill of Exchange—Banker—Local Boards Act (V of 1884), ss. 54, 144 to 147—Government Treasury, whether a banker—Power of Local Board to make or issue negotiable instruments—Implied power—Rules and Forms under the Act—Local Fund Code, rule 549—Indorsee of an order of District Board, whether holder in due course.] A Local Board is impliedly empowered, under the Local Boards Act (V of 1884) to make, endorse or accept negotiable instruments,

as such a power can be inferred from the rules and forms made by the Governor in Council under section 144, clause (16) of the Act and contained in the Local Fund Code, which have the force of law under section 147 of the Act. A Government Treasury, in which a District Board deposits its money under section 54 of the Act and issues orders for payment out which are respected by the former, is not a 'Bank.' *Foley v. Hill*, (1848) 8 H.L. Cas., 28 at p. 43; and *Halifax Union v. Wheelwright*, (1875) L.R., 10 Exch., 183, followed. An unconditional order in writing for payment of money to, or to the order of a person, issued by a District Board on the Government Treasury, is not a cheque under section 6 but is a bill of exchange under section 5 of the Negotiable Instruments Act; and a bona fide indorsee for value of such an order is entitled to payment as a holder in due course.

Rangiswami Pillai v. Sankaralingam Ayyar ... (1920) I.L.R., 43 Mad., 818

RECEIVER, SUIT AGAINST—Sanction of Court for institution of the suit—Want of previous sanction—Effect of—Jurisdiction, whether affected—Sanction, subsequently obtained—Illegality, whether cured.] Where a suit is instituted against a Receiver appointed by a Court, without obtaining the previous sanction of that Court, the omission to obtain such sanction does not affect the jurisdiction of the Court in which the suit is laid but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation. *Banku Bahari Dey v. Harendra Nath Mukerjee*, (1910) 15 C.W.N., 54, and *Jagat Tarini Dasi v. Naba Gopal Chaki*, (1907) I.L.R., 34 Calo., 808, followed.

Ammukutty v. Manavikraman ... (1920) I.L.R., 43 Mad., 793

REGISTRATION ACT (XVI OF 1908), SEC. 17 (b):—See MORTGAGE... 803

SPECIFIC PERFORMANCE—Sale of land—Sale-deed, not registered—Vendee in default in paying purchase money—Sale-deed, whether can be regarded as an agreement to sell—Suit by vendee for specific performance, whether maintainable.] Where a sale-deed, purporting to be a conveyance of some lands, was executed and delivered to the vendee, but was not registered, and the omission was not due to act of God or fraud on the part of the executant, it is not open to the vendee to treat the unregistered document as an agreement to sell and to use for specific performance of such agreement. *Venkatasami v. Kristayya* (1893) I.L.R., 16 Mad., 341, followed. *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh* (1910) 12 C.L.J., 464, dissented from.

Thayarammal v. Lakshmiammal ... (1920) I.L.R., 43 Mad., 822

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 180:—See MORTGAGE... 803

as a defence when he is attacked. The observation in *Oakes v. Turquand and Harding*(1), that an open and unequivocal declaration of intention to avoid, will have as good an effect as an attack by way of suit is as applicable to India as to England. In that view, is there any reason for construing the words 'that every transfer of immoveable property . . . is voidable at the option of any person so defrauded, defeated or delayed' as compelling the defrauded to institute a suit? I see no sufficient reason for insisting on this view. As I said before, the only real difficulty is in interpreting the decision of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra*(2). If the result of the suit under Order XXI, rule 63, is to place the parties in *status quo ante* by removing the fetters placed on execution during the claim proceedings, then it stands to reason to hold that as on the date of the removal of the impediment, the transaction between the vendor and the vendee was valid *inter se*, there was no interest of the judgment-debtor available for attachment on that date and none came into existence by virtue of the decision in the suit; but if the other view that the suit under rule 63, although based upon the result of the claim proceedings, is an independent action which is not restricted in any way by the previous inquiry is to prevail, *Palaniandi Chetty v. Appavu Chettiar*(3) and *Subramania Ayyar v. Muthia Chettiar*(4), cannot be supported.

This is my answer to the reference.

M.H.H.

(1) (1867) L.R., 2 H.L., 325.

(2) (1908) I.L.R., 35 Calo., 203 (P.O.).

(3) (1916) 30 M.L.J., 585.

(4) (1918) I.L.R., 41 Mad., 612 (F.B.).

RAMASWAMI
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v.
MALLAPPA
REDDIAR.
—
SESHAGIRI
AYYAR, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1920,
February 2.

VENKATA LAKSHMANNA GARU (PLAINTIFF), APPELLANT,

v.

SEETAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 5 and 182—Decree for rent—Transfer of execution of decree to a Civil Court—Landholder's right of first charge on holding—Decree-holder ceasing to be landholder at the time of execution, effect of, on first charge.

A landholder's right to enforce in execution a decree for rent passed under the Madras Estates Land Act as a first charge upon the tenant's holding is available only if the decree is executed in a Revenue Court and not when its execution is transferred to a Civil Court.

Held further by SADASIVA AYYAR, J.—The landholder is entitled to claim the first charge for rent only if he continues to be landholder at the time the claim for rent is sought to be enforced. *Forbes v. Maharaj Bahadur Singh*, (1914) I.L.R., 41 Cal., 926 (P.C.), followed.

SECOND APPEAL against the decree of RAJARAM RAO, Temporary Subordinate Judge of Rajahmundry, in Appeal No. 172 of 1917, preferred against the decree of K. PURUSHOTHAM PANTULU, District Munsif of Amalapur, in Original Suit No. 256 of 1916.

The facts are given in the first three paragraphs of the Judgment of SADASIVA AYYAR, J.

K. Ramamurti, for P. Narayanamurti, for the appellant.

N. Rama Rao for the respondent.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. In paragraph 8 of the plaint it is said that plaintiff was the proprietor of the village of Guttinadevi. The contesting first defendant says, in paragraph 7 of the written statement, that the plaintiff's right as the proprietor of this village had been sold in Court auction to Nyapathi Subba Rao and therefore the plaintiff could not claim prior charge for any rent due to him, as he does in the plaint. Though the question was not made the subject of any issue, it seems not to have been denied that the property had been sold to Nyapathi Subba Rao. But there seems to have been a question before the lower Appellate Court as to

* Second Appeal No. 1854 of 1918.

whether the purchase was prior to the bringing of the summary suit No. 219 of 1913 by the plaintiff in the Revenue Court against the second defendant for rent or subsequent to that suit. Whether it was prior or subsequent to it, it has been held by the Privy Council in *Forbes v. Maharaj Bahadur Singh* (1) that if the remedy provided by law in favour of the landlord to claim prior charge for rent is sought to be enforced, he is entitled to do so only when the relationship of landlord and tenant exists at the time "the remedy provided by the law is sought to be enforced."

As this suit is based, in my opinion, solely on the alleged existence of the prior statutory charge created by section 5 of the Madras Estates Land Act in the landlord's favour, and of his right in consequence to bring the holding to sale to enforce that first charge as against all other claims, the suit has to be dismissed on the short ground that the charge (even if it existed before) ceased to exist when the plaintiff lost his estate.

As, however, other questions of law were argued at some length I shall express my opinion on those questions. Before considering those questions, some of the facts have to be stated. One Akula Ammanna was the ryot of the holding (for the rent due on which the plaintiff obtained his decree in the suit of 1913) till at least 1908. Ammanna sold it then to the second defendant by means of a registered sale-deed. The first defendant contends that that sale-deed was a nominal transaction and that Akula Ammanna continued to be the tenant of the holding even after 1908. In execution of the money decree passed against Akula Ammanna in Small Cause Suit No. 3 of 1910 the holding was attached as the property of Ammanna and was purchased by the first defendant. The first defendant obtained possession of the property through Court. Then the plaintiff had his money decree transferred to the District Munsif's Court of Cocanada from the Revenue Court and attached the holding. The first defendant, on the strength of his purchase in Court auction and possession thereunder, put in a claim petition and the claim was allowed and the attachment was raised. Hence the present suit was brought to declare the plaintiff's right to have the property sold by virtue of his alleged prior charge for the

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(1) (1914) I.L.R., 41 Cal., 926 (P.C.).

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money under the rent decree. The Lower Courts dismissed the suit on the ground that under Order XXXIV, rule 14, read with rule 15, of the Civil Procedure Code, the plaintiff can enforce his prior charge only by obtaining a decree for sale in a suit for sale brought on that charge.

The appellant's learned vakil, Mr. Ramamurti, relied upon certain observations in *Suramma v. Suryanarayana Jagapathirazu*(1) for his contention that Order XXXIV, rule 14, Civil Procedure Code, does not apply at all to the charge created by section 5 of the Estates Land Act. Section 100 of the Transfer of Property Act says :

"Where an immoveable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

I am unable to understand why the charge created by statute for rent under the Madras Estates Land Act, at least in cases where rent is payable in money, does not fall under section 100 of the Transfer of Property Act. Reliance is placed by the learned Judges, in their judgments in *Suramma v. Suryanarayana Jagapathirazu*(1), on certain decisions of the Calcutta High Court. I might at once state that those decisions were based upon the construction of the provisions of the Bengal Tenancy Act, especially section 65 of that Act. But there are several differences between the provisions of that Act and those of the Madras Estates Land Act. Section 5 of the Bengal Tenancy Act as stated by their Lordships of the Privy Council in *Forbes v. Maharaj Bahadur Singh*(2) is not a "happily worded section".

I shall deal shortly with these Calcutta decisions. In *Fotick Chunder Dey Sircar v. Foley*(3) there was no question of enforcing any prior charge. The landlord got a money decree for rent and he attached other properties of the judgment-debtor, that is, the properties other than the holding on which the rent had become due. The only question there was whether though he obtained a money decree merely he ought to be deemed as having also obtained a mortgage decree for the sale of the holding, and whether he should first bring to sale the holding and should not be

(1) (1919) I.L.R., 42 Mad., 114. (2) (1914) I.L.R., 41 Cal., 928 (P.C.).
(3) (1886) I.L.R., 15 Cal., 492.

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allowed to proceed against the other properties of his tenant in execution of the mere money decree for rent. The Court held that section 68 of Act IV of 1882 had no application and the landlord could execute his money decree by attaching and bringing to sale other properties. Having decided the direct point involved, the learned Judges proceeded thus :

"This we think is a sufficient and complete answer to Dr. Banerjee's argument. But we are not prepared to admit that the 'charge' referred to in section 65 of the Bengal Tenancy Act, 1885, is such a charge as is defined by section 100 of the Transfer of Property Act."

Where the difference lies, the learned Judges do not point out. On this vague *obiter dictum* I do not think it is possible to hold that Order XXXIV, rule 14, is not applicable where the charge for rent is sought to be enforced. The next case referred to is *Srimati Moharanee Dasya v. Harendra Lal Roy*(1). I do not find any reference made to *Fotick Chunder Dey Sircar v. Foley*(2) in the judgment in this case, but it seems to have been referred to only in the judgment of the Subordinate Judge who first decided the case. The only relevant observation in *Srimati Moharanee Dasya v. Harendra Lal Roy*(1) is that there is no strict analogy between a charge for rent and a mortgage charge, because money due for rent is both a personal debt and a first charge on the land in respect of which it is due, and the landlord can enforce his decree either by selling the land in some cases or by selling other properties. I cannot say that this case has any bearing on the question whether when a Civil Court is asked in execution to enforce the charge Order XXXIV, rule 14, is applicable. As regards *Tariniprosad Roy v. Narayan Kumari Debi*(3), this also is a decision on the point whether the landlord can pursue his personal remedy against the tenant without first having the holding sold. In the case in *Royruddi Sheik v. Kali Nath Mookerjee*(4) the question was whether when a regular mortgage deed, or a regular bond creating a charge, is taken for the arrears of rent, the charge under the Bengal Tenancy Act still existed. MOOKERJEE, J., says :

"The present suit is in no sense a suit to enforce the original rent charge. It is in substance as it is in form, a suit to enforce the

(1) (1896) 1 C.W.N., 458. (2) (1886) I.L.R., 15 Cal., 492.
(3) (1890) I.L.R., 17 Cal., 301. (4) (1906) I.L.R., 33 Cal., 985.

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rights of the plaintiff under the instalment bond by which in lieu of the original liability, a new liability was substituted. Besides, if the plaintiff had sued to enforce the rent charge, his claim would be barred by limitation."

That ground was sufficient for the disposal of the case and it was not necessary to consider at all the nature of the charge referred to in section 65 of the Bengal Tenancy Act. But as an *obiter dictum* again the learned Judge remarks that as decided in *Fortick Chunder Dey Sircar v. Foley*(1),

"The charge referred to in section 65 of the Bengal Tenancy Act is not such a charge as that defined by section 100 of the Transfer of Property Act, and does not require to be enforced in the same manner."

I shall lastly refer to *Gopinath Mahapatra v. Kashinath Beg*(2), also referred to in *Suramma v. Suryanarayana Jagapathirazu*(3). That case was decided not only under section 65 of the Bengal Tenancy Act, but also under section 167 of that Act under which the purchaser in execution of a rent decree has got the right to apply to the Collector to annul all prior encumbrances. But the question relating to the necessity of bringing a suit as prescribed under Order XXXIV, rule 14, was not decided in that case nor was it necessary to decide it.

PHILLIPS, J., however mentions in his judgment in *Suramma v. Suryanarayana Jagapathirazu*(3) two other considerations as to why section 100 of the Transfer of Property Act cannot include a charge for rent under section 5 of the Estate Act. He says:

"It may also be noted that where rent is payable in kind the charge for arrears of rent cannot come within the definition of section 100 which refers only to payment of money and it would be most anomalous that a charge created by statute should be a charge within the meaning of section 100 in some cases but not so in others."

With the greatest respect, I do not see why if a particular charge falls within the words of section 100 it should not be a charge under that section because another kind of charge created by the same statute does not fall within the section. Further, even rent payable in kind becomes really payable in money

(1) (1886) I.L.R., 15 Cal., 492.

(2) (1939) 9 C. L.J., 234.

(3) (1916) I.L.R., 42 Mad., 114.

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whenever the rent is sued for and a decree in the alternative for the value of the rent payable in kind is asked for and granted. So far, therefore, as the judgments in *Suramma v. Suryanarayana Jagapathirazu*(1) held that section 100 of Act IV of 1882 and consequently Order XXXIV, rule 14, Civil Procedure Code, would not apply to the enforcement of a charge for rent even payable in money, I respectfully differ from them. But it was argued that under section 132, read with section 125, of the Madras Estates Land Act where the property is sold for arrears of rent due on it, the purchaser takes it free of all encumbrances except those created before the Act came into force. That is, I take it, the main ground of the judgments in *Suramma v. Suryanarayana Jagapathirazu*(1) and I agree with the judgments in that respect, provided of course that the sale was one conducted by a Revenue Court in execution of its decree as expressly restricted by the provisions of section 132. But in this case the decree had been transferred to the Cocanada District Munsif's Court and that Court has under section 42, Civil Procedure Code, power to execute it only in the same manner as if it was a decree passed for money itself and it cannot exercise the powers conferred by the Revenue Court by section 132 of the Madras Estates Land Act. (In the Calcutta cases there is nothing to show that the executions and sales in execution in question were held in any other Court than a Revenue Court.) In the result the Second Appeal fails and is dismissed with costs.

SPENCER, J.—The suit land belonged to one Akula Ammanna who sold his holding by a private sale to second defendant. The first defendant purchased the property at an auction held in execution of a decree in Small Cause Suit No. 8 of 1910 obtained by a third party against Akula Ammanna.

The plaintiff brought a suit (Rent Suit No. 219 of 1913) in a Revenue Court as a landholder to recover arrears of rent from second defendant and obtained a personal decree for payment of Rs. 137-8-6 with interest. When, in execution of this decree, he attached the holding, the first defendant preferred a claim under Order XXI, rule 58, Civil Procedure Code, and it was allowed.

(1) (1918) I.L.R., 42 Mad., 114.

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SPENCER, J.

The plaintiff now sues to establish his right to recover by sale of the land the amount of rent decreed to him, relying not on the weakness of the first defendant's title as auction purchaser but on the strength of his own title based on section 5 of the Madras Estates Land Act, which provides that the rent due upon ryoti land shall be a first charge upon the holding.

The plaintiff's decree for rent was transferred to a Civil Court (viz., the Court of the District Munsif of Cocanada) for execution, and it is there that the plaintiff sought to enforce his statutory charge and was defeated. Now, under the Madras Estates Land Act it is in exercise of the right to a charge conferred by section 5 that the landholder can bring the ryot's holding to sale under section 111. This he can do either summarily by an application to the Collector, or under section 132 when he has obtained a decree for arrears of rent and executes it in a Revenue Court. But if a money decree passed by a Revenue Court is transferred to a Civil Court, under section 201 for execution, the power to execute it under the provisions of Chapter VI does not go with it to the executing Court, as those powers are peculiar to Collectors, as may be seen from Part B of the schedule to the Act, serial No. 18, and from the words of section 132, which run thus:

"The provisions of this chapter shall be applicable as far as may be, to the execution by a Revenue Court of any decree for arrears of rent."

If a decree for rent is transferred to a Civil Court for execution the provisions of the Civil Procedure Code at once become applicable to the execution proceedings, and the Court executing the decree passed by another Court transferred to it for execution has no authority to go behind the decree and enforce a charge which is not declared in the decree to be executed; nor can the Civil Court assume powers which by law have been definitely conferred on Revenue Courts only. This in my opinion is the short answer to the plaintiff's present claim.

I think that the suit was rightly dismissed by the Courts below and that the Second Appeal should now be dismissed with costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

KAROOOTH PARAKOTE AMMUKUTTY *alias*
LAKSHMIAMMA (PLAINTIFF), APPELLANT,

v.

K. P. K. P. T. MANAVIKRAMAN *alias* KUNHUNNI
THAMBURAN AND SIX OTHERS (DEFENDANTS NOS. 2, 3, 4, 6, 7,
8 AND 9), RESPONDENTS.*

1920,
February
24.

Receiver, suit against—Sanction of Court for institution of the suit—Want of previous sanction—Effect of—Jurisdiction, whether affected—Sanction, subsequently obtained—Illegality, whether cured.

Where a suit is instituted against a Receiver appointed by a Court, without obtaining the previous sanction of that Court, the omission to obtain such sanction does not affect the jurisdiction of the Court in which the suit is laid but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation.

Banku Behari Dey v. Harendra Nath Mukerjee, (1919) 15 C.W.N., 54, and *Jagat Tarini Dasi v. Naba Gopal Chaki*, (1907) 1 L.L.C., 34 Cal., 305, followed.

SECOND APPEAL against the decree of G. H. B. JACKSON, District Judge of South Malabar, in Appeal Suit No. 679 of 1915, preferred against the decree of K. GOPALAN NAYAR, District Munsif of Walluvanad, in Original Suit No. 235 of 1914.

The material facts appear from the judgment. The District Munsif decreed the suit in favour of the plaintiff. On appeal the District Judge held that the suit ought to have been dismissed on the ground that sanction of the Sub-Court of Calicut, which had appointed the Receiver, ought to have been obtained previous to the institution of this suit in the District Munsif's Court, and that the defect was not cured by sanction having been obtained after the institution of the suit. He also held that specific performance could not be decreed, as there was no proof of a definite contract for renewal of the kanom or of payment of consideration. The plaintiff preferred this Second Appeal.

K. P. M. Menon and Padmanabham Pillai for appellant.

C. Madhavan Nayar and T. Esoman Unni for respondents.

* Second Appeal No. 219 of 1917.

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v.
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—
SADASIVA
AYYAR, J.

The JUDGMENT of the Court was delivered by
SADASIVA AYYAR, J.—The plaintiff is the appellant. Her suit for specific performance of an alleged contract of 20th March 1910 (under which the plaintiff was entitled to obtain a deed of renewal of a kanom mortgage which had been enjoyed by her deceased sister from 1897) was dismissed by the District Court on two grounds: (1) the present suit having been commenced in June 1914 against the Receivers (defendants Nos. 3 to 5), appointed by the Sub-Court of Calicut in Suit No. 18 of 1913 (brought for removal of the first defendant, the promisor under the plaint contract, from his position of karuavan by some members of his tavazhi), without previously obtaining the sanction of the Sub-Court, it could not be sustained even though in July 1914 (before even the Receivers filed their written statements) the plaintiff obtained the Sub-Court's sanction to proceed with the present suit against the Receivers, (2) though "there was a general understanding" between the plaintiff and the first defendant that the first defendant "would be agreeable to the plaintiff" (in the matter of the renewal of the kanom of 1897 in the plaintiff's name) "if she evicted one Syed Ali" (in possession of one of the kanom lands), "there was no definite contract" for renewal.

We are unable to agree with the learned District Judge as regards the first ground of his decision. Though the judgment in *Pramatha Nath Gangooly v. Khetra Nath Banerjee* (1) (the decision of a single Judge) is in favour of the view of the District Judge, and though a decision of this High Court (again, that of a single Judge), *U. Venkatarubbaramiah v. Namburu Ramiah Sethi* (2), also contains observations in support of the same view, we think that the better opinion is the one enunciated by Division Benches of the Calcutta High Court in *Banku Behari Dey v. Harendra Nath Mukerjee* (3) and *The Maharajah of Burdwan v. Apurba Krishna Roy* (4) and in *Jagat Tarini Dasi v. Naba Gopal Chaki* (5) (one of the members of the said Benches having been that very learned Judge Sir ASHUTOSH MOOKERJEE). That

(1) (1905) I.L.R., 32 Cal., 370.

(2) (1914) 24 I.O., 222.

(3) (1910) 15 O.W.N., 84.

(4) (1911) 15 O.W.N., 872.

(5) (1907) I.L.R., 34 Cal., 305.

opinion is also supported by text writers of acknowledged authority, like High, Woodroffe (page 91) and Kerr (page 167). That opinion is to the effect that the omission to obtain previous sanction (a sanction which is not a condition imposed by statutory law like the sanction mentioned in section 92 of the Code of Civil Procedure, or section 17 of the Presidency Insolvency Act, but one imposed by the common law to enforce due respect towards Courts of Justice) does not affect the jurisdiction of the Court, but is an illegality which can be effectively cured by the plaintiff obtaining the sanction during the course of the litigation.

[Their Lordships then proceeded to deal with the facts of the case and agreeing with the findings of the lower Appellate Court, dismissed the Second Appeal.]

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

LAKSHMINDRATHIRTHA SWAMIAR, MINOR, BY GUARDIAN
RAJAGOPALACHARYA (DEFENDANT), APPELLANT,

v.

K. RAGHAVENDRA RAO (PLAINTIFF), RESPONDENT.*

Mutt, head of—Sanyasi—Simple money debts incurred by head for necessities of the mutt—Suit against successor—Liability of mutt properties—Personal liability of the debtor—Lay trustee, executor or administrator, analogy of.

In a suit to recover a simple money debt, incurred by the sanyasi head of a mutt for the necessary purposes of the mutt, the properties of the mutt can be made liable, whether the suit is brought during the lifetime of the incumbent who incurred the debt or his successor.

Cases of debts incurred by lay trustees of religious or charitable institutions, executors or administrators, distinguished.

Shankar Bharati Swami v. Venkapa Naik, (1885) I.L.R., 9 Bom., 422, followed.

SECOND APPEAL against the decree of L. G. MOORE, District Judge of South Kanara, in Appeal Suit No. 251 of 1918, preferred

* Second Appeal No. 648 of 1919.

AMMUKUTTY
v.
MANA-
VIKRAMAN.
—
SADASIVA
AYYAR, J.

1920,
February 26.

LAKSHMIN-
DEATHIRTHA
SWAMIAH
v.
RAGHAVEN-
DEA RAO

against the decree of M. ANANTAGIRI RAO, District Munsif of Udipi, in Original Suit No. 521 of 1917.

The material facts are set out in the Judgment.

C. V. Anantakrishna Ayyar and K. Sundara Rao for the appellant.

B. Sitarama Rao and K. Yajnanarayana Adiga for the respondent.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The defendant is the appellant. The suit was brought for the recovery of Rs. 1,500, and interest due thereon, being loans of money advanced to the head of the Shirur muttam, one of the eight Udipi muttams. The swami to whom the loans were made is dead and the suit was brought against his successor, the allegation in the plaint being that the debts were incurred for the benefit and necessities of the mutt. The plaint prayed that a decree should be passed directing the defendant to pay the sum due to the plaintiff out of the estate of the God Vittalar of the defendant's muttam. The District Munsif found that, of the 76 items making up Rs. 1,500, the third item was clearly proved to have been borrowed for the necessities of the muttam. As regards the other items making up Rs. 1,000, they were borrowed from him for the ordinary expenses of the muttam, but the creditor had not shown that the means then in the hands of the madhathi-pathi were not sufficient to meet those expenses. He, therefore, gave a decree as regards Rs. 500 against the defendant as the representative of the muttam, to be recovered from the rents and profits of the muttam, but as regards the remaining Rs. 1,000 and interest thereon, he directed the defendant to pay it out of the assets of the predecessor in his hands, such assets, according to the District Munsif, consisting of the income which accrued due from the mutt properties during the lifetime of the defendant's predecessor but not realized by that predecessor during his lifetime. The District Munsif in forming such an opinion was guided by the view of the law as it was understood in this Court prior to *Ram Parkash Das v. Anand Das*(1) and *Arunachellam Chetty v. Venkatachalapathi Guruswamigal*(2), that view being that the head of a mutt is the private and absolute owner of the income of the mutt accruing during his lifetime.

(1) (1916) I.L.R., 43 Cal., 707 (P.O.). (2) (1920) I.L.R., 43 Mad., 263 (P.O.).

The learned District Judge on appeal was inclined to hold that the sum of Rs. 1,000, made up of the items other than the third item, did not stand on a lower footing than the third item itself and that the District Munsif would have been 'justified in holding' that necessity had been proved for borrowing these sums also. As, however, the plaintiff had not filed any memorandum of objections in the District Court, the learned District Judge contented himself with confirming the District Munsif's decision.

In this Second Appeal several points were argued. Two of them were: (1) that in the absence of any charge created by a trustee on the trust properties for loans obtained by him the creditor cannot obtain a decree making the trust properties liable, (2) that the finding that there was necessity to borrow either the third item or the other items was erroneous. (The other points argued by the appellant's vakil need not be noticed as they do not arise if he fails on the second point, as he does, in my opinion.)

As I understand the District Judge's judgment, he did not, in arriving at his finding on the second point, lose sight of the consideration mentioned in *Nataraja Desikar v. Karutha Ravuthan*(1), viz., that it was not sufficient for the creditor to prove that the moneys were borrowed for the purposes of the mutt, but that it must also be found that there was an existing necessity for then incurring the debts, that is, that the necessary expenses could not have been met out of the mutt funds then available to the trustee. The learned District Judge has considered the evidence in the case, which shows that the defendant's predecessor was a prudent and honest man, and given weight to the fact that the defendant was withholding the temple accounts; and I cannot say that his finding of fact can be successfully attacked in Second Appeal.

Then the only question remaining for consideration is whether in a suit to recover simple money debts incurred by the sanyasi head of an institution, the trust itself can be made liable and, in considering this question, it is, of course, immaterial whether the suit is brought during the lifetime of the trustee who incurred

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(1) (1911) 21 M.L.J., 129.

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—
SADASIVA
AYYAR, J.

it or against his successor. If his position was wholly analogous to that of an executor, or an administrator, or the lay trustee of a charitable or religious institution, the answer must be in the negative. See *Swaminatha Aiyar v. Srinivasa Aiyar*(1) *Chidambaram Pillai v. Veerappa Chettiar*(2) and *Parvathi Ammal v. Namagiri Ammal*(3). The principle underlying these decisions is that such a trustee, or other person in the position of a trustee, has got his personal credit to pledge, and the presumption should be that when he incurred a debt without charging the trust properties, the creditor lent the money on such personal credit and could look to that credit alone and to the principle of subrogation for recovery of his loan. I think the same principle would apply even to an ordinary trustee of a temple who is not a sanyasi. But as regards sanyasi trustees, a distinction has been suggested in *Shankar Bharati Swami v. Venkapa Naik*(4). I shall quote the following sentences from page 425:

"The case was said to be similar to that of an executor contracting a loan for the purposes of the estate by English Law—see *Farhall v. Farhall*(5); or that of the manager of a charitable institution incurring a liability for the purposes of the institution—*Strickland v. Symons*(6). It is sufficient for the present case to say that those decisions are, in our opinion, inapplicable to the case of the swami of a mutt, who presumably has no private property, and must, therefore, be presumed to be pledging the credit of the mutt when he borrows money for the purposes of the mutt. That being so, the bond was binding on the savasthan if the loan was for the purposes of the mutt, or the plaintiff had bona fide reason to suppose it was intended for such purposes."

Again in *Nataraja Desikar v. Karutha Ravuthan*(7), though the ultimate decision was in favour of the successor of the mutt who was the defendant in that case, the law laid down recognizes that the loans incurred by the head of the mutt for necessary purposes of the mutt can be treated as pledging the credit of the mutt and as justifying a decree against the mutt. I find from the back of the printed papers in that case that *Shankar Bharati Swami v. Venkapa Naik*(4) was cited before

(1) (1917) 32 M.L.J., 259.

(3) (1917) 6 L.W., 722.

(5) (1871) 7 Ch. App., 123.

(2) (1917) 6 L.W., 640.

(4) (1886) I.L.R., 9 Bom., 432.

(6) (1884) 26 Ch.D., 245.

(7) (1911) 31 M.L.J., 129.

the learned Judges, and though the loans in question in that case were obtained by the head of the mutt through merely signing acknowledgments of indebtedness in the plaintiff's account books, the judgment proceeds on the footing that he thereby pledged the credit of the mutt and not any personal credit of his. I am clear that a Hindu sanyasi has no personal credit whatever of a monetary or proprietary character, and that it is a contradiction in terms to state that any loan was made to a sanyasi on his personal credit. I would therefore hold that *Swaminatha Aiyar v. Srinivasa Aiyar*(1), and the other cases already referred to, do not apply when the question of the liability of the mutt or other institution for the debt incurred by a sanyasi as head of the institution comes into question.

In the result I would dismiss the Second Appeal with costs.

SPENCER, J.—I agree with my learned brother in thinking that cases where the head of a mutt borrows money for purposes binding on the mutt, without showing any indication that he intends to make himself personally liable, are distinguishable from cases of trustees borrowing money for purposes of their trusts upon promissory notes. In all the cases relied upon by the appellant's learned vakil—*Swaminatha Aiyar v. Srinivasa Aiyar*(1) and *Chidambaram Pillai v. Veerappa Chettiar*(2) and *Parvathi Ammal v. Namagiri Ammal*(3)—there were promissory notes executed by the trustees or executors concerned, and in the case of such promissory notes there is always a presumption that the promisor intended to make himself personally liable [see *Palaniappa Chettiar v. Shanmugam Chettiar*(4)], and this is especially so when the trust which he represents is an inanimate object which has no personal liability of itself. To the cases quoted by my learned brother I would add *Srimath Deivasikumani Pandarasannidhi v. Noor Mahomed Rauthan*(5). All these are cases in which the head of a mutt, either directly or by implication, pledged the credit of the mutt in incurring debts for purposes necessary for the maintenance of the institution. In such cases there is no presumption that the head of the mutt

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(1) (1917) 32 M.L.J., 259.

(2) (1917) 6 L.W., 640.

(3) (1917) 6 L.W., 722.

(4) (1918) I.L.R., 41 Mad., 815.

(5) (1908) I.L.R., 31 Mad., 47.

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(mahant, swamiyar or whatever other title he may possess) intended to make himself personally liable. From this point of view, the decrees of the Courts below were right and the Second Appeal should be dismissed with costs. K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1920,
March 2.

SOMASUNDARAM CHETTY (THIRD RESPONDENT),
APPELLANT,

v.

UNNAMALAI AMMAL AND TWO OTHERS [PETITIONER
(PLAINTIFF) AND FIRST AND SECOND RESPONDENTS],
RESPONDENTS *

Hindu Law—Decree for maintenance to a widow of a joint family creating a charge on family properties—Subsequent purchaser of such properties under money decree binding on family—Priority of charge.

A charge on joint family properties created by a decree for maintenance payable to the widow of a member of a joint Hindu family takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family.

APPEAL against the order of A. EDGINGTON, District Judge of South Arcot, in Execution Petition No. 66 of 1917 in Original Suit No. 33 of 1914.

The facts are stated in the Judgment.

S. Duraiswami Ayyar and A. Raghunatha Rao for appellant.
S. T. Srinivasu Gopala Achariyar for first respondent.

The JUDGMENT of the Court was delivered by

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—This matter arises in execution. A suit was brought in July 1913, against the father of a debtor who was undivided from his father, for money borrowed. The son had died in March 1918. An application for attachment before judgment was obtained on 11th July 1918. There was a simple money decree against the father, executable against the assets of the son in his hands. On 30th July 1914, the widow of the son sued her father-in-law for maintenance, and claimed that it should be charged against the family properties.

* Appeal against Order No. 90 of 1919.

The decree as prayed for was made on 28th of November 1914. Meantime, the decree holder under the money decree brought the property to sale; he had notice of the charge created in favour of the daughter-in-law. This lady has now applied to execute her decree for maintenance against the purchaser under the money decree. It must be taken to have been found that the decree against the father-in-law was for a claim binding on the family. The first question which was argued was that as the decree creating a charge was during the pendency of the attachment under the money decree the charge is affected by *lis pendens*. One answer to this contention is that section 64 of the Civil Procedure Code relates to voluntary transfers and not to charges created by a decree. However this may be, we have not materials to enable us to say that the sale and purchase were in pursuance of the attachment before judgment, and that such an attachment was subsisting when the charge was created.

The more important question is whether the charge is ineffective as against a creditor whose debts are binding on the family. In the first place, it seems undesirable to draw a distinction between the kinds of charges created under a decree. Whatever may have been the original obligation which was pursued in a Court of law, the moment that a Court declares that its decree is to be discharged by the creation of a charge on immovable property it is as binding on all subsequent purchasers of the property, at least, as if there was a mortgage for a binding debt created by the debtor on the property. In this view, the charge would take precedence over all claims which have not ripened into a lien on the property. Secondly, the proposition that a debt binding on a Hindu family takes precedence over a maintenance claim in all cases is not supported by any clear authority. It may be stated as a general proposition, that in the administration of a Hindu's estate, binding debts would take precedence over mere claims for maintenance, or residence, on the part of the female members of the family. But there is no clear authority for the proposition that a charge *bona fide* created for maintenance can be defeated by a creditor who has lent money for family purposes. *Sham Lal v. Banna*(1), and *Gur Dayal v. Kaunsila*(2),

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(1) (1862) I.L.R., 4 All., 296 (F.B.). (2) (1883) I.L.R., 5 All., 367.

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have been relied on before us. In neither of them was a charge created for the maintenance claimed. The *obiter dictum*, that even if there is a charge it would be subordinated to the claim of the creditor, is not supported by any text of Hindu Law or by any decided case. The observations in *Krishna Patter v. Sinnapponnu*(1), are of the same character. On the other hand there are the observations of RHASHYAM AIYANGAR, J., in *Jayanti Subbiah v. Alamelu Mangamma*(2), which are to the effect that a creditor transferee can under certain circumstances be subjected to the obligation of paying maintenance. In *Rangammal v. Echammal*(3), SUBRAHMANYA AIYAR, J., pointed out that the moral obligation to maintain a daughter-in-law would under certain circumstances ripen into a legal obligation. It would be on a *fortiori* case where a decree charges specific property. In our opinion the rule of Hindu Law is limited in its application only so long as the two obligations—the one to pay a binding debt and the other to pay maintenance—are both of them not made charges on the property. If either of them assumes that shape, then it would take precedence over the other. This is the principle underlying section 39 of the Transfer of Property Act and that principle is quite consistent with the rule of Hindu Law. In our opinion, therefore, the Lower Court is right and this Appeal should be dismissed with costs.

N.R.

(1) (1914) 25 I.C., 759.

(2) (1904) I.L.R., 27 Mad., 45.

(3) (1899) I.L.R., 22 Mad., 305.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnam.

NEELAMANI PATNAIK MUSSADI (PLAINTIFF), APPELLANT,

v.

SUKADUVU BEHARU AND FIFTEEN OTHERS (DEFENDANTS
Nos. 1 to 3, 5 to 11 and 15 to 20), RESPONDENTS.*

1919,
October, 2,
1920,
March, 24.

Mortgage bond—Transfer—Absence of notice to mortgagor—Payment to mortgagee by mortgagor, after transfer, without notice thereof—Payment in full settlement of debt—Effect of payment—Receipt by mortgagee, necessity for registration—Registration Act (XVI of 1908), s. 17 (b)—Civil Procedure Code, O. XLI, r. 38—Memorandum of objections, whether necessary—Transfer of Property Act (IV of 1882), s. 180, principle of.

Payment by the mortgagor to the mortgagee after, but without notice of, a transfer of the mortgage, must, in the absence of collusion, be allowed to the mortgagor as against the transferee.

Where such payment was accepted by the mortgagee in full settlement of the debt due, the mortgagor is entitled to get credit, as against the transferee, not only for what he actually paid but for the whole mortgage-debt.

Where a receipt by the mortgagee, in terms, only discharges a mortgage-debt, it does not fall under section 17 (b) of the Registration Act, and is admissible in evidence, though it was not registered.

Where, in a suit for sale instituted by the transferee of a mortgage bond against the mortgagee and mortgagor, a decree was passed against the latter, but on appeal by him, the decree against him was reversed, the Appellate Court had power, under Order XLI, rule 33, Civil Procedure Code, to pass a decree against the mortgagee, who was a respondent in the appeal, even though the plaintiff had not filed an appeal or memorandum of objections.

SECOND APPEAL against the decree of B. C. SMITH, District Judge of Ganjam at Berhampur, in Appeal Suit No. 358 of 1916, preferred against the decree of M. V. HAYAGREEVA RAO, Additional District Munsif of Berhampur, in Original Suit No. 209 of 1916.

The defendants Nos. 1 to 3 and the father of defendants Nos. 8 and 9 had executed the suit mortgage bond to the twelfth defendant on 26th July 1908.

The latter transferred the bond on 18th October 1911 to the plaintiff, who instituted this suit, on 11th March 1915, against the original mortgagors and the mortgagee as twelfth

* Second Appeal No. 597 of 1918.

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defendant. The mortgagors pleaded that they had paid off the mortgage to the twelfth defendant and produced a receipt from him (Exhibit I, dated 30th November 1911), that they had no notice of the assignment to the plaintiff, that their payment was in full discharge of the amount due on the bond, a portion of the interest being given up by the mortgagee, who accepted the payment in full settlement of his claim under the bond, and that the said payment was binding on the plaintiff.

The receipt, which was not registered, was in these terms:—

Payment receipt given on the 30th day of November 1911 to, etc.
I have this day received payment from you of Rs. 350 on account of the principal and interest due under the registered mortgage bond executed by you in my favour on 26th July 1908. I have excused payment of balance of interest. Nothing remains due under the said document.

(Sd.) B.P.

The District Munsif disbelieved the discharge set up, and passed a decree in favour of the plaintiff. On appeal by defendants Nos. 1 to 11, the lower Appellate Court held that the payment alleged by the mortgagors was true and binding on the transferee as it was made without notice of the transfer, and reversed the decree and dismissed the suit. The plaintiff who, was a respondent in the appeal had not preferred a memorandum of objections in the lower Appellate Court against the twelfth defendant's legal representatives, who were defendants Nos. 15 to 19, and respondents Nos. 3 to 7 in the Appeal, and had been exonerated in the first Court. The plaintiff preferred this Second Appeal.

O. S. Venkata Chariyar for the appellant.

P. Nagabhushanam and B. Jagannatha Doss for respondents.

SPENCER, J. The JUDGMENT of the Court was delivered by
SPENCER, J.—We must accept in Second Appeal the findings of fact of the learned District Judge that the mortgagors made the payment they pleaded to the mortgagee and that they did so without notice of the prior assignment of the mortgage to the plaintiff. We think the learned Judge is right in holding that on the above findings plaintiff was bound by the payment so made,

The English Law on the point is quite clear. In Halsbury's Laws of England, Volume 21, page 179, paragraph 334, it is stated:

"That the mortgagor is entitled to make payments to the mortgagee, whether of principal or interest, and to have credit for them as against the transferee after the transfer until he has received notice of it."

And several English cases, including *Bickerton v. Walker*(1) and *Dixon v. Winch*(2), are quoted.

There does not seem to be any good reason why that rule, which is founded on principles of equity, should not be followed in this country. It is true that after the amendment of the definition of the term "actionable claim" by Act II of 1900, so as to exclude mortgage debts, section 130 of the Transfer of Property Act (IV of 1882) does not apply to mortgage debts, and the statutory provision in it that the payment to a transferor will be valid against a transferee save when the debtor is a party to the transfer or has received notice thereof does not apply *ex proprio vigore*. But this rule itself is based on the equitable principle referred to and recognized in the English cases, and it subsists apart from the section itself. We think therefore the principle is applicable to payments by mortgagors though the section does not apply.

It is true that notice is not necessary for the validity of the assignment of a mortgage—see *Govindrao v. Rauji*(3). But that is not the question before us. No doubt "where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between mortgagor and mortgagee at the date of the transfer" as observed by COZENS-HARDY, J., in *Dixon v. Winch*(2) above referred to. See *Turner v. Smith*(4). But that observation also has no reference to the present question.

No Indian case has been cited to us on the exact question before us, but Dr. Ghose in his book on the Law of Mortgages in India, Volume I, page 330, observes:

"It is also well settled that payment made by the mortgagor to the mortgagee after, but without notice of, a transfer must in the absence of collusion be allowed to the mortgagor as against the transferee."

(1) (1886) 31 Ch.D., 151.

(3) (1888) I.L.R., 12 Bom., 33.

(2) [1900] 1 Ch., 736.

(4) [1901] 1 Ch., 213 at 219.

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We accept this as a correct statement of the law so far as it goes.

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SPENCER, J.

It was then argued that the mortgagors were guilty of negligence, as they did not make proper inquiries of the transferor about the absence of the mortgage deed from his possession. The learned Judge, however, finds that the mortgagors did make inquiries and they were given an explanation which they believed. We see no reason to suppose that the mortgagors acted negligently in these circumstances and no inference of constructive notice of plaintiff's assignment can be drawn against them.

The next question raised is that the mortgagors can get credit for only what they actually paid, though that payment was accepted by the mortgagee in full settlement of the debt due, and not for the whole mortgage debt. As the mortgagors were entitled to deal with their mortgagee as if no assignment took place when they had no notice of the transfer, we think the arrangement set up must be held to be binding on the transferee.

It is next argued that Exhibit I, which evidences the payment pleaded by the mortgagors, is inadmissible in evidence, as it is unregistered and as it purports, according to the plaintiff's *vakil*, to extinguish the mortgage. On a reference to Exhibit I we find it to be merely a receipt for money actually paid, which was taken in full discharge of the mortgage debt, the payment of the balance of interest due being excused. There is nothing in the document to show that the mortgage interest was expressly extinguished by it; it is only a discharge of the mortgage debt. We think there is a clear distinction between a discharge of a debt and the extinguishment of a mortgage interest, though one may be the result of the other. Where a receipt, in terms, only discharges the debt, it cannot be brought under section 17 (b) of the Registration Act (XVI of 1908). In this particular this case is distinguishable from *Namagiri Lakshmi Ammal v. Srinivasa Aiyangar*(1) where there was an agreement to cancel and return the mortgage deed. In *Mallappa v. Matum Nagu Chetty*(2), also cited, there was only an oral agreement to take a smaller sum for the mortgage amount and the question

(1) (1916) 21 I.O., 269.

(2) (1919) I.L.R., 42 Mad., 41.

raised was quite different from the one before us. In *Lakshmana Setti v. Chenchuramayya*(1) also, the agreement was not merely to receive the Rs. 8,000 in full settlement but also to return the documents, that is, the mortgage deed and the title-deeds. There was, therefore, in it a proposal to extinguish the mortgage interest.

All the points raised against the mortgagors, respondents Nos. 1 to 10, thus fail. It is finally urged that a decree for money should be given to the plaintiff against the representatives of the original mortgagee, who is found to have received the mortgage money from the mortgagors after the transfer to the plaintiff, as money had and received for his use. In view of the findings come to by the learned District Judge, we think the question whether any relief, and if so what relief, should be given to the plaintiff against those representatives should have been considered. The fact that they were exonerated in the first Court, and that the plaintiff filed no appeal or Memorandum of Objections against such exoneration in the appellate Court, will not stand in the way of plaintiff being given relief now, under Order XLI, rule 33, Civil Procedure Code. As there is no finding by the lower Appellate Court on the point, we must call for a finding on it and allow fresh evidence, as the point, though in a manner raised in issue V, does not seem to have been properly tried. Finding in two months, objections seven days.

[In compliance with the order contained in the above judgment, the District Judge of Ganjam at Berhampur submitted a finding to the effect that the nineteenth defendant, who was the son of the deceased twelfth defendant, the original mortgagee, would only be liable for Rs. 350 received by his father under Exhibit I, and that the other defendants were not liable. This Second Appeal coming on for final hearing the Court delivered the following:—]

JUDGMENT

As against the nineteenth defendant, the son of twelfth defendant, the deceased assignor of the plaintiff, the plaintiff's suit for money had and received is barred under article 62, Limitation Act [*Sriramulu v. Chinna Venkatasami*(2)]. We

(1) (1918) 34 M.L.J., 79.

(2) (1902) I.L.R., 25 Mad., 396.

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do not pronounce on any other cause of action that the plaintiff may have against this defendant. The Second Appeal is dismissed with costs of respondents Nos. 1 to 10.

SPENCER, J.

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APPELLATE CIVIL.

*Before Mr. Justice Sadasiva Ayyar and Mr.
Justice Spencer.*

1920,
March 15.

PUJARI BHIMAJI, MINOR BY NEXT FRIEND PUJARI
NAGAPPA, PLAINTIFF (APPELLANT),

v.

RAJABHAI HUSSAIN SAHEB AND ANOTHER,
DEFENDANTS (RESPONDENTS).*

Civil Procedure Code (V of 1908), Order XXXII, rule 4 (2)—Existence of a guardian appointed for a minor by a competent authority—Suit and decree against such minor represented by another guardian, validity of.

If a minor has a guardian appointed for him by a competent authority he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the Court acted in ignorance of the existence of such appointed guardian is not binding on the minor.

Rashid-un-nisa v. Muhammad Ismail Khan, (1909) I.L.R., 31 All., 572 (P.O.), followed; *Dummar Singh v. Purbhu Singh*, (1907) I.L.R., 29 All., 290, not followed.

SECOND APPEAL from the decree of A. J. CURGENVEN, Temporary Subordinate Judge of Bellary, in Appeal No. 136 of 1918, filed against the decree of P. NARAYANA MENON, District Munsif of Hospet, in Original Suit No. 484 of 1917.

The facts are given in the Judgment of SADASIVA AYYAR, J.

P. R. Ganapati Ayyar for appellant.

K. Rajah Ayyar for first respondent.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff represented by his certificated guardian (appointed by the District Court) is the

* Second Appeal No. 97 of 1919.

appellant before us. He sued to set aside the decree passed against him in a suit brought by the present first defendant as plaintiff, on a mortgage bond executed by the plaintiff's mother. The short question for decision is whether the plaintiff was properly and legally represented in that suit. An officer of the Court was appointed in that suit at the instance of the then plaintiff (present first defendant) as guardian (for the suit) of the minor defendant (present plaintiff). If there was no proper representation, if the representation by that officer was not merely irregular but also illegal, there can be no doubt that this suit to set aside the decree and the other proceedings in the former suit is sustainable. The lower Courts held that because the Court and the present first defendant (the then plaintiff) were not aware that a guardian had been appointed by the District Court for the minor, the appointment of an officer of the Court as the guardian for the former suit was neither illegal nor irregular and therefore the decree in the former suit should not be set aside. I am unable to agree with the conclusions of the lower Courts. Order XXXII, rule 4 (2), so far as it relates to a minor defendant, is as follows:—

“Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall be appointed his guardian for the suit”

(that is, in the case where a minor is a defendant)

“unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed.”

The old section 457, Civil Procedure Code, prohibited a married woman being appointed as guardian for the suit for a minor defendant and thus created a legal disability in her to act as such. Now Order XXXII, rule 4 (2), in the case where a minor is a defendant, similarly prohibits any person other than the guardian appointed or declared by competent authority to act as guardian for the suit of a minor defendant. The legislature clearly made this provision because it was strongly of opinion that it was not for the minor's welfare that anybody else except such certificated guardian, where one exists should act for a minor defendant. Where there is such a clear prohibition by the legislature, the Court's ignorance of the existence of a certificated guardian cannot be taken into consideration in deciding the question whether there has been a proper

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representation of a minor in the suit, any more than the ignorance of a Court under the old provision that a woman appointed by it as a guardian was a married woman could affect the decision of the question whether the minor was properly represented by such a woman. I think the decision in *Hanuman Prasad v. Muhammad Ishaq*(1), confirmed in *Rashid un-nissa v. Muhammad Ismail Khan*(2), is almost conclusive on this point. On behalf of the respondent, we have been referred to *Dammar Singh v. Pirbhu Singh*(3), in which the question is very meagrely discussed, and it was decided before the Privy Council decision above referred to. The *obiter dicta* in *Jogeswar Narain v. Lala Mooraidhar*(4), and *Midnapore Zemindari Co., Ltd. v. Gobinda Mahto*(5), approving *Dammar Singh v. Pirbhu Singh*(3), do not carry us much further. *Mathuramalai v. Palani*(6) was not a case decided on the rule which we are now considering, but the decision turned upon the question whether failure to give notice to a person alleged to be then in charge of the minor wholly vitiated the appointment of a third person by the Court as the minor's guardian, that is whether non-compliance with the provisions of Order XXXII, rules 3 and 4, made the appointment wholly illegal, or whether it was only an irregularity. I do not think that a prohibition to anybody else to act, enacted in Order XXXII, rule 4 (2), can be put on the same footing as the direction to give notice to the person in whose care the minor is before making the appointment of a proper guardian. On the whole, I think that there was no legal representation of the minor plaintiff in the former suit. I hope that plaintiffs will hereafter take care, when they implead a minor as a party defendant and when they apply to the Court for appointing a guardian for the suit, to inquire whether a certificated guardian has been already appointed for the minor defendant. I would also add that there are observations in *Narsingh Narain v. Sheikh Jaji Mistry*(7), which doubt the soundness of *Dammar Singh v. Pirbhu Singh*(3). I would decree the suit, setting aside the decree of the lower Courts. As allegations of fraud and collusion made in paragraphs 8 (b)

(1) (1906) I.L.R., 28 All., 187.

(3) (1907) I.L.R., 29 All., 290.

(5) (1908) 8 C.L.J., 31.

(2) (1909) I.L.R., 31 All., 572 (P.C.).

(4) (1908) 7 C.L.J., 270.

(6) (1914) I.L.R., 37 Mad., 535.

(7) (1912) 15 C.L.J., 3.

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and 8 (c) of the plaint were not proved according to the findings of both Courts, and as the illegality of the appointment of the Court officer under the provisions of the Code was not expressly set up in the plaint, I would direct the next friend to bear personally the costs of this litigation incurred on the plaintiff's behalf. The defendants will of course bear their own costs.

SPENCER, J.—I agree. I think that when there is a definite prohibition of law in such words as those in Order XXXII, rule 4, Civil Procedure Code, "no person other than such guardian shall act as the next friend of the minor, or be appointed guardian for the suit unless, etc.", that a decree obtained against a minor represented by some other person is an illegal decree void as against the minor and not a decree obtained by a mere irregularity. I would follow in this matter, the Privy Council decision, *Rashid-un-nissa v. Muhammad Ismail Khan*(1), and another case of the Privy Council, *Khizarajmal v. Daim*(2), where it was held that a decree obtained against a person who was not properly represented on the record was void and without jurisdiction against such person. I agree with my learned brother that *Dammar Singh v. Pirbhu Singh*(3), is not a case which we can follow without hesitation. There was another case, *Ram Barechha Ram v. Tarak Tewari*(4), quoted by the respondent's pleader. In that case, the minors belonged to an undivided Hindu family and the manager of that family was a party and fully contested the suit. There was, therefore, no necessity to appoint a guardian at all, and a decree obtained against the minors, on whose behalf a guardian not properly representative of their interests was appointed, was not on that account an invalid decree. The appeal will have to be allowed, the directions as to costs being as mentioned in my learned brother's order.

N.R.

(1) (1909) I.L.R., 31 All., 572 (P.C.).

(2) (1905) I.L.R., 32 Cal., 296 (P.C.).

(3) (1907) I.L.R., 29 All., 290.

(4) (1916) 14 A.L.J., 589.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Justice Seshagiri Ayyar.

1920,
March 15.

AYYA MUDALI VELAN (PETITIONER), APPELLANT AND PETITIONER,

v.

VEERAYEE (RESPONDENT), RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 2 (2)—Decree—Order refusing to recognize a person as legal representative of deceased plaintiff—Appeal from order, maintainability of.

An order rejecting the claim of a person to be the legal representative of a deceased plaintiff and to continue the suit amounts to a decree dismissing the suit and thus gives him a right of appeal from the order.

Rama Rao v. Rajah of Pittapur, (1919) I.L.R., 42 Mad., 219, applied; *Lakshmi Achi v. Subbrama Ayyar*, (1916) I.L.R., 39 Mad., 488, distinguished; *Suppu Nayakan v. Perumal Chetty*, (1916) 30 M.L.J., 486, considered.

CIVIL Miscellaneous Second Appeal and Revision Petition against the order of E. H. WALLACE, District Judge of Tanjore, in Appeal No. 947 of 1917, filed against the order of R. BALASUBRAHMANYA AYYAR, District Munsif of Pattukkottai, in Interlocutory Application No. 1120 of 1917, in Original Suit No. 683 of 1916.

The plaintiff in this suit claimed to be the owner of the plaint mentioned properties which he alleged were purchased out of his funds benami for him in the name of his concubine, Devayanai. First and second defendants are respectively the daughter and son of the deceased Devayanai. As a result of the decision of Second Appeal No. 888 of 1915, to which the defendants herein were parties, the plaint properties were declared to belong to the first defendant herein as heir to her deceased mother. The plaintiff alleged that he was not a party to the above litigation, that the first and second defendants, colluded together and obtained the decree as aforesaid in Second Appeal No. 888 of 1915, and that he came to know of the same in July 1916, after the Second Appeal was disposed of. The plaintiff died on 5th April 1917, and the second defendant

applied to be made his legal representative and to continue the suit. The District Munsif held that since the plaintiff attacked the conduct of the second defendant, and alleged a cause of action against him, the cause of action did not survive to him, and that he should not be allowed to continue the suit. He accordingly dismissed the application. The second defendant filed an appeal from the said order to the District Court. The District Court dismissed the appeal, holding that no appeal lay from an order under Order XXII, rule 3, Civil Procedure Code. From the order of the District Court the second defendant filed this appeal under sections 2 and 100, Civil Procedure Code, and also filed a Civil Revision Petition.

K. Rajah Ayyar for appellant.

S. Muthayya Mudaliyar for respondent.

OLDFIELD, J.—This appeal is against the decision of the OLDFIELD, J. lower Appellate Court that no appeal lay to it against the District Munsif's order refusing to implead the appellant as legal representative of a deceased plaintiff.

The lower Appellate Court's main ground of decision is that the appeal should be against the order of abatement or dismissal of the suit. It is not possible to understand how appellant could appeal against an order to which he would not be a party, and on this ground without deciding whether under the present Code an order of abatement is in any respect equivalent to or appealable as a decree dismissing the suit and without expressing any opinion as to the propriety of some portions of the language used in the judgments in *Suppu Nayakan v. Perumal Chetty*(1), I must reject this ground of decision.

The correct view of the law is in my opinion that indicated in *Rama Rao v. The Rajah of Pittapur*(2). The order appealed against in the lower Appellate Court was a decree, because it negatived the appellant's right to the relief, which the original plaintiff had sought in the suit, and was an adjudication on appellant's claim within the definition in section 2 (2) of the Civil Procedure Code; and as a decree such an order is appealable. Some argument to the contrary was founded on *Lakshmi Achi v. Subbrama Ayyar*(3), and the *dictum* at page 493 that the

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(1) (1916) 30 M.L.J., 486.

(2) (1919) I.L.R., 42 Mad., 219.

(3) (1916) I.L.R., 39 Mad., 488.

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legislature has given no right of appeal against orders under Order XXII, rule 3. I am content to read this as referring only to the fact that no appeal has been given against those orders as such or except in cases in which they also have the character of decrees. That was sufficient for the decision of the case before the learned Judges, one in which no abatement was in question, appeal being against a refusal to make the appellant a plaintiff, when one representative of the deceased plaintiff, who could prosecute the litigation in succession to him was already on the record, and the refusal involved only an adjudication between that representative and appellant, not between appellant and the defendants in the suit.

The order of the lower Appellate Court must be set aside and the appeal remanded for disposal on its merits. Costs to date in the lower Appellate Court and here will be costs in the case and be provided for in the order to be passed.

The Civil Revision Petition is dismissed. No order as to costs.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. Plaintiff sued for a declaration that the decree obtained in respect of the property in suit by the second defendant is not binding on him. Defendants Nos. 1 and 2 are his illegitimate daughter and son, respectively. The plaintiff died pending the suit. The second defendant applied to be brought on the record as the legal representative of the deceased plaintiff. The District Munsif held that the cause of action did not survive to him, his reason being that there was an attack against the second defendant also by the plaintiff. An appeal was taken to the District Court. The learned Judge rejected it on the ground that no appeal lay.

It seems to me that he is wrong. The order refusing to allow the second defendant to continue the suit on the ground that the cause of action does not survive to him finally deprives him of all his rights in the suit, and has the effect of putting an end to the litigation altogether. It was suggested that notwithstanding the refusal to permit him to prosecute the suit, the second defendant, if he waited till the expiry of six months, might on the abatement of the suit, prefer an appeal making the refusal a ground of complaint. As at present advised I am unable to agree with this contention. If the Court was right, at

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this stage of the suit, in holding that the appellant was not the legal representative and that no cause of action survived to him, it would be anomalous to permit him to file an appeal which can only be done by him in his capacity of legal representative of the deceased plaintiff. In *Suppu Nayakan v. Perumal Chetty*(1) and in *Subramania Iyer v. Venkatramier*(2), this question did not come up directly for decision. The difference between the old and the new Code of Civil Procedure, on the question of abatement makes it doubtful whether some of the observations of the learned Judges in that case are not too broadly expressed. However that may be, both the above decisions recognize that an order refusing to allow an applicant to continue the suit finally determines his right in the suit, and as such comes within the definition of 'decree' in section 2. *Rama Rao v. The Rajah of Pittapur*(3), although it related to striking out the name of a defendant from the array of parties, is an authority for the proposition that the addition or deletion of a person as a party to a suit is a final adjudication of the applicant's rights on the cause of action put forward.

I think the principle of that decision governs the present case. Mr. Muthyaya Mudaliyar relied on *Lakshmi Achi v. Subbrama Ayyar*(4). In that case, there was no question of the suit abating; one of the two rival claimants was allowed to continue the suit and to obtain the preliminary decree. At this stage, the other claimant applied to be brought on the record in the place of the deceased person, and for an order that the name of the party who was brought in should be deleted. It was held that an order dealing with such a claim was not appealable. In the present case there is no question of any other person being permitted to prosecute the suit. The rejection of the applicant's petition entails the refusal of any relief to the party on the cause of action alleged in the suit. I am therefore of opinion that an appeal lay to the District Court. I agree in the order proposed by my learned brother.

N.R.

(1) (1916) 30 M.L.J., 486.

(2) (1915) 31 I.C., 4.

(3) (1919) I.L.R., 42 Mad. 219.

(4) (1916) I.L.R., 39 Mad., 488.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1920,
February 13
and March
15 and 18.

RANGASWAMI PILLAI (PLAINTIFF), APPELLANT,

v.

SANKARALINGAM AYYAR (FOURTH DEFENDANT), RESPONDENT.*

Negotiable Instruments Act (V of 1881), ss. 5 and 6—Cheque—Bill of Exchange—Banker—Local Boards Act (V of 1884), ss. 54, 144 to 147—Government Treasury, whether a banker—power of Local Board to make or issue negotiable instruments—Implied power—Rules and Forms under the Act—Local Fund Code, rule 549—Indorsee of an order of District Board, whether holder in due course.

A Local Board is impliedly empowered, under the Local Boards Act (V of 1884) to make, endorse or accept negotiable instruments, as such a power can be inferred from the rules and forms made by the Governor in Council under section 144, clause (16) of the Act and contained in the Local Fund Code, which have the force of law under section 147 of the Act.

A Government Treasury, in which a District Board deposits its money under section 54 of the Act and issues orders for payment out which are respected by the former, is not a 'Bank.'

Foley v. Hill, (1848) 2 H.L. Cas. 28 at p. 43; and *Halifax Union v. Wheelwright*, (1875) L.R. 10 Exch. 183, followed.

An unconditional order in writing for payment of money to, or to the order of a person, issued by a District Board on the Government Treasury, is not a cheque under section 6 but is a bill of exchange under section 5 of the Negotiable Instruments Act; and a *bona fide* endorsee for value of such an order is entitled to payment as a holder in due course.

SECOND APPEAL against the decree of J. G. BURN, District Judge of Trichinopoly, in Appeal Suit No. 97 of 1918, preferred against the decree of T. N. LAKSHMANA RAO, District Munsif of Trichinopoly, in Original Suit No. 52 of 1916.

The plaintiff obtained a decree for money in S.C.S. No. 101 of 1914 against the first defendant who was a contractor doing road work for the District Board of Trichinopoly. In execution of the decree, the plaintiff attached a certain sum of money alleged to be due to the first defendant from the District Board for work done by him. The second defendant, who was the son of the first defendant, filed a claim petition which was allowed on 16th October 1914 on the ground that the

contract had been transferred to the name of the son, who subsequently continued the contract in his name and that the money was due to him and not to the first defendant.

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The plaintiff thereupon filed this suit (subsequently numbered as Original Suit No. 52 of 1916) on 17th October 1914, against the first and second defendants as well as the President of the District Board of Trichinopoly as the third defendant. The suit was for a declaration that the amount in the hands of the District Board was liable to be attached in execution of his decree in Small Cause Suit No. 101 of 1914, against the first defendant, and for a permanent injunction restraining the second defendant from taking the amount from the third defendant. A temporary injunction was also applied for and granted on 20th October 1914, and served on the President of the District Board on 22nd October 1914, who communicated the injunction order on the same date to the District Board Engineer who was the disbursing officer. But before the communication reached him, the latter had issued a cheque on 22nd October 1914, in the name of the second defendant and delivered it to him. On the 23rd October 1914, the District Board Engineer sent a letter to the Treasury Deputy Collector not to cash the cheque. In the meantime the second defendant had negotiated the cheque by endorsing it over to the fourth defendant (subsequently added as a party to this suit), who was a banker carrying on the business, *inter alia*, of discounting cheques, bills, etc., in the usual course of his business.

The fourth defendant applied to the Treasury for payment of the cheque, but payment was refused owing to the order received from the Court which had been communicated to the Treasury Officer as already stated. Subsequently, the fourth defendant obtained cancellation of the injunction in this suit by giving an undertaking to deposit the amount of the cheque into Court in the event of the plaintiff being successful in this litigation, and the cheque was accordingly cashed and the fourth defendant received its amount. The fourth defendant instituted another suit (Original Suit No. 483 of 1916) in the same Court against the second defendant and the plaintiff in the prior suit and the District Board Engineer. In the latter suit, the plaintiff sought to recover the amount of the cheque

* Second Appeal No. 888 of 1919.

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from the first and second defendants therein, or in the alternative for a declaration that his right as a bona fide holder of the cheque could not be affected by the claims of the third defendant (the plaintiff in Original Suit No. 52 of 1916). The District Munsif decided the prior suit (Original Suit No. 52 of 1916) in favour of the plaintiff, holding that the fourth defendant was not a bona fide holder of the cheque, that the endorsement was a collusive one and was not supported by consideration. He directed the fourth defendant to deposit into Court the amount of the cheque drawn by him for payment to the plaintiff in execution of his decree. He also dismissed the other suit. The fourth defendant preferred an appeal to the District Judge in this suit, as well as another appeal in his own suit. The learned District Judge held that the cheque was a negotiable instrument, that the fourth defendant was a bona fide holder for value and was entitled to payment of the cheque. He consequently reversed the decrees of the District Munsif in both suits. The plaintiff in Original Suit No. 52 of 1916, who was the third defendant in the other suit, preferred the two Second Appeals against the respective decrees.

R. Srinivasa Ayyangar for the appellant.

S. T. Srinivasa gopala Achariyar and *K. P. Ramakrishna Ayyar* for the respondent.

OLDFIELD, J. OLDFIELD, J.—I agree with the judgment which my learned brother is about to deliver. I desire only to add that it is probably impossible, and for the purpose of the present case is unnecessary, to give an exhaustive definition of the term 'bank' or 'banker', and that in agreeing with my learned brother's observations I do not desire to commit myself to any.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—The first defendant in Original Suit No. 52 of 1916 was a contractor under the District Board of Trichinopoly. The plaintiff obtained a decree against him. He attached a certain sum of money in the hands of the District Board Engineer on the allegation that the money belonged to the first defendant. Thereupon, the second defendant put in a claim petition on 16th October 1914. His claim was allowed. On 17th October 1914, the plaintiff brought the present suit

(Original Suit No. 52 of 1916) for a declaration that he is entitled to attach the money as belonging to the first defendant. He obtained an injunction on 20th October 1914. It was served on the District Treasury of Trichinopoly on the 22nd. On the very same day, without knowledge of the injunction, a cheque was issued to the second defendant. He endorsed it over on 28rd October to the fourth defendant, who was a banker. Subsequently, the money was paid to the fourth defendant on his undertaking to return it in case the plaintiff succeeded in the suit. Plaintiff succeeded before the District Munsif, but that judgment was reversed by the District Judge. He has preferred this Second Appeal.

The main question for consideration is whether the fourth defendant is a holder in due course. To decide this question, we have to see what the position of the Treasury is with reference to the District Board of Trichinopoly. In form, the order which directed the payment of money to the second defendant is a cheque. If it is a cheque, there can be no doubt it can be negotiated. The learned vakil for the appellant contended, that as the Treasury is not a Bank, it was not competent to the District Board Engineer to issue a cheque on it, under section 6 of the Negotiable Instruments Act. Mr. Srinivasagopala Achariyar contended that the Treasury is a 'bank' within that section. After giving careful consideration to the question, I have come to the conclusion that the Treasury is not 'a bank'. Many of the Judges in England have felt considerable difficulty in defining 'a bank'. LORD BROUGHAM in *Foley v. Hill*(1) mentions certain characteristics of a bank. In the view of the noble and learned Lord, the element of making a profit by the business must exist in such cases. The case nearest in point is *Halifax Union v. Wheelwright*(2). In that case Baron CLEASBY, delivering the judgment of the Court, expressed himself thus at page 193:—

"First it was said that, taking that statute together with several other statutes on the same subject, the word 'banker' was not to be restricted to persons regularly engaged in the business of banking, but that any person who receives the money of another into his charge, and according to the course of business between them,

(1) (1848) 2 H.L. Cas., 28, 43.

(2) (1875) L.R., 10 Exch., 183.

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pays it out by having drafts drawn upon him payable to order, ought to be considered a banker within that enactment. We cannot accede to that argument."

The present case is practically identical with the one decided by the Exchequer Court. The definition attempted by Mr. Hart in his book on the 'Law of Banking', namely that

"A banker is one who, in the ordinary course of his business, honours cheques drawn upon him by persons from and for whom he receives monies on current accounts,"

Indicates that the business must have a commercial side to it. The mere fact that a Treasury receives money from the District Board and respects orders issued to it for payment will not constitute the Treasury a bank; moreover, the District Board cannot be regarded as a customer.

It was suggested by the learned advocate for the respondent that as the money deposited by the Board is utilised by the Treasury, it must be taken that a profit was made by the Treasury. But the language of Lord BROUGHAM and the judgment of the Exchequer division both require that there must be the business of utilising the money for purposes of profit. I am, therefore, of opinion that the treasury is not a bank, and that consequently, the use of the word 'Cheque' in respect of orders issued by the District Board to the Treasury is a misnomer.

The next question is, whether the order in question cannot be construed as a bill of exchange. Apart from the concession made by the learned vakil for the appellant, I am clear, from the reading of section 5 of the Negotiable Instruments Act, that all ingredients of a bill of exchange are to be found in the order issued by the District Board. It is an instrument in writing containing an unconditional order, signed by the maker, directing the Treasury to pay a certain sum of money to, or to the order of, the second defendant.

The next question is, if it is a bill of exchange, is it within the competence of the District Board to issue such a negotiable document? The chief difficulty arises from the language of section 26 of the Negotiable Instruments Act. The proviso is in these terms:

"Nothing herein contained shall be deemed to empower a corporation to make, endorse or accept such instruments except in

cases in which, under the law for the time being in force, they are so empowered."

There can be no doubt that the District Board is a corporation. Section 27 of Act V of 1884 says that

"Every Local Board shall be a body corporate by the name of the Local Board."

Section 54 deals with the funds at the disposal of District and Local Boards. Clause (2) of that section enables the lodgment of the fund in a bank or Government Treasury. It is under this provision that monies are being deposited in the Treasury and orders are being issued for payment out. So far, there is nothing to indicate that the Board is authorized to issue negotiable instruments. Section 144 of the Act enables the Governor in Council by clause (XVI) to make rules consistent with the Act.

"For the guidance of Local Boards, their agents and officers and the officers of Government in all matters connected with the carrying out of this Act."

Under section 145 the rules are to be published. Section 147 is very important. It says that

"Such rules and forms shall, until they are cancelled or altered, have the force of law."

I must confess that the language that "the form shall have the force of law" does not strike me as either very clear or artistic; but, however, there can be no doubt that the legislature intended that the Governor in Council, to whom was delegated the prescription of rules and forms, should have power to give to these forms the force of law. Now, turning to the Local Fund Code, we find at page 379, a form which corresponds to the one issued in the present case. That undoubtedly contains language which denotes that the order can be negotiated. If the act of the Governor in Council in prescribing the forms was certainly *intra vires*, the question is whether we can infer from it that the District Board was impliedly authorized to issue negotiable orders. Rule 549 of the Local Fund Code says, that such forms shall be supplied to the Engineer or to other officer in books, to be operated upon. Reading, therefore, sections 144 to 147 of Act V of 1884, with rule 549 of the Local Fund Code and the form at page 379 of the Code, I am of opinion that the Local Board is empowered to make, endorse or accept negotiable instruments.

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It follows from this that the endorsement in favour of the fourth defendant was properly made. The District Judge has found that his action was bona fide and that he was a holder in due course. I see no reason for not accepting this finding of fact. I am, therefore, of opinion that the conclusion come to by the learned District Judge is right and that this appeal should be dismissed.

Civil Suit No. 483 of 1916 was rightly brought by the fourth defendant as plaintiff, because the action of the appellant in instituting Civil Suit No. 52 of 1916 necessitated his suing to have his rights secured as against him and in the alternative against the first and second defendants. But we think that the fourth defendant was not justified in preferring Appeal No. 97 of 1918 to the lower Appellate Court, in paying court fees, and as if the claim was one for recovery of the money. In the first Court, court fee was paid on the declaration prayed for. In this Court also, court fee was paid only on the declaration. Therefore, in directing the appellant in Second Appeal No. 838 of 1919 to pay the costs of the respondent (fourth defendant) the excess court fee paid by him in the lower Appellate Court should not be charged against him. In other respects, both the Second Appeals are dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

THAYARAMMAL (PLAINTIFF), APPELLANT,

v.

LAKSHMI AMMAL AND KUMARASWAMI REDDI

(DEFENDANTS), RESPONDENTS.*

Specific performance—Sale of land—Sale-deed, not registered—Vendee in default in paying purchase-money—Sale-deed, whether can be regarded as an agreement to sell—Suit by vendee for specific performance, whether maintainable.

Where a sale-deed, purporting to be a conveyance of some lands, was executed and delivered to the vendee, but was not registered, and the omission was not due to act of God or fraud on the part of the executant, it is not open to the vendee to treat the unregistered document as an agreement to sell and to sue for specific performance of such agreement.

* Second Appeal No. 940 of 1919.

Venkatasami v. Kristayya, (1898) I.L.R., 16 Mad., 341, followed.

Surendranath Nag Chowdhury v. Gopal Chunder Gosh, (1910) 12 C.L.J., 484, dissented from.

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SECOND APPEAL against the decree of T. M. FRENCH, the Temporary Subordinate Judge of Vellore, in Appeal Suit No. 18 of 1918, preferred against the decree of A RAMANATHA AYYAR, the District Munsif of Ranipet, in Original Suit No. 470 of 1916.

The material facts appear from the Judgment.

P. R. Srinivasa Ayyangar for the appellant.

C. V. Anantakrishna Ayyar for the respondents.

The JUDGMENT of the Court was delivered by

OLDFIELD, J.—Exhibit A was executed by the first defendant OLDFIELD, J.

to the plaintiff and he was given possession of it. It is in terms a sale-deed, but it was not registered. The finding is that the plaintiff made default in the payment of the purchase money and the document was not therefore registered. He now sues to enforce specific performance of an agreement which according to him is implied in the sale-deed A. The question for consideration is whether it is open to the plaintiff to regard Exhibit A, which has become inoperative by reason of non-registration, as an agreement to sell. In our opinion this remedy is not open to the plaintiff. He could have presented the document for registration under section 32 of the Registration Act and could have enforced the attendance of the first defendant to admit execution under section 36 of the same Act. If there was a refusal to register he could have enforced his further remedies in this behalf under the Act. If he failed to take advantage of these provisions of the law, it is not open to him to ignore the plain terms of the document and to read into it an agreement to sell which was superseded by the conveyance itself. It is true that Courts of Equity would assist a plaintiff to effectuate an incomplete title, if the default is due to act of God or conduct amounting to fraud on the part of the executant. But here no default is attributable to the first defendant. On the other hand, it is the default of the plaintiff in not paying the consideration that led to the document remaining unregistered. This case is within the principle of *Venkatasami v. Kristayya*(1). There, it was held that when the

(1) (1898) I.L.R., 16 Mad., 341.

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plaintiff did not avail himself of the remedies provided by the Registration Act, he was not entitled to ask either that the document should be registered or that a new document should be executed and registered.

This decision has not been dissented from in this Court hitherto. The *obiter dictum* in *Venkata Seetharamayya v. Venkataramayya*(1), that such a document can be treated as an agreement to sell was pronounced without adverting to *Venkatasami v. Kristayya*(2). In Calcutta, there are direct authorities against the Madras view. But with all deference, we fail to find the principle on which the contrary view can be based. The learned judges apparently misunderstood the view taken in *Chinna Krishna Reddi v. Dorasami Reddi*(3), in saying that *Venkatasami v. Kristayya*(2) was dissented from. We are, therefore, not prepared to follow *Surendra Nath Nag Chowdhury v. Gopul Chunder Gosh*(4), in preference to *Venkatasami v. Kristayya*(2). In *Amer Chand v. Nathu*(5), it is not shown who had the document and whether there was a suppression of it. On the whole it seems to us that there is no ground for not acting on the principle of the decision in *Venkatasami v. Kristayya*(2). The Second Appeal should be dismissed with costs.

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Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Krishnan.

SUBBARAMI REDDI (MINOR BY MOTHER AND GUARDIAN
KANAKAMMA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

RAMAMMA (PLAINTIFF), RESPONDENT *.

Hindu Law—Joint family—Will by a father bequeathing some family properties for maintenance of his wife, validity of.

A will made by a Hindu father who is joint with his infant son, bequeathing certain family properties to his widow for her maintenance, is invalid and inoperative as against the son, although it would have been a proper provision if made by the father during his lifetime.

(1) (1914) I.L.R., 37 Mad., 418. (2) (1898) I.L.R., 16 Mad., 341.

(3) (1897) I.L.R., 20 Mad., 19. (4) (1910) 12 C.L.J., 464.

(5) (1910) 7 A.L.J., 887.

* Appeal No. 167 of 1919.

Patra Charar v. Srinivasa Charar, (1917) I.L.R., 40 Mad., 1122, and *Kudumamma v. Narasimha Charyulu*, (1908) 17 M.L.J., 528, distinguished.

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APPEAL against the decree of W. L. VENKATARAMAYYA, District Judge of Nellore, in Original Suit No. 22 of 1918.

One Pichi Reddi, who owned considerable moveable and immoveable properties, worth about a lakh of rupees, died in September 1914, leaving behind him two widows and an infant son by the junior widow. By a will executed in July 1914, he bequeathed in favour of his senior wife, twelve acres of land, for maintenance, for her life, some jewels and a house to live in. After the death of her husband, the senior widow filed this suit against the minor son and his mother to recover the moveable and immoveable properties bequeathed to her, which she claimed to be a reasonable provision, and in the alternative to be given maintenance at Rs. 45 a month, a residence and some jewels. The defendants pleaded, inter alia, that the testator had no right to bequeath ancestral properties, that they passed to the minor son by survivorship, that the maintenance claimed was excessive, that the plaintiff was in possession of jewels belonging to her, and that the bequest of 12 acres was far in excess of what could be given as maintenance to the plaintiff. The District Judge gave a decree for the plaintiff for the lands bequeathed, some jewels and a house. The defendants preferred this Appeal.

A. Krishnaswami Ayyar and B. Somayya for appellants.

S. Varada Achariyar for respondents.

WALLIS, C.J.—This is an appeal from a decision of the WALLIS, C.J. District Judge of Nellore giving the plaintiff a decree in a suit brought by her to enforce the provisions of a will made in her favour by her deceased husband dealing with properties which at the time when he made the will and at the time of his death were the joint family properties of himself and his infant son. The learned District Judge has held that the provision made by the testator for his wife would have been a proper provision for him to make during his lifetime, that such a disposition of joint family properties during his lifetime would have been good, and that, if he could make such a provision during his lifetime, he could equally make it after his death, and he has relied on the decision of SADASIYA AYYAR

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and SPENCER, JJ., in *Patra Chariar v. Srinivasa Chariar*(1), which as I shall point out presently, is distinguishable from the present case. Mr. A. Krishnaswami Ayyar, for the appellants, has contended that it is now settled law that a co-parcener cannot devise joint family property by will because on the date of his death when the will takes effect, there is nothing for the will to operate on, as at the moment of his death his share passes by survivorship to the other co-parceners. That was very clearly laid down in *Vittla Butten v. Yamenamma*(2), where it is said, at page 12,

"that the will in the case referred to cannot take effect. At the moment of death, the right of survivorship, is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise."

It has been contended before us, and certain general dicta of the Privy Council have been referred to, to the effect that testamentary capacity is co-extensive with the right of making gifts *inter vivos*. That that principle has not a universal application is shown by the decision of the Privy Council in *Lakshman Dada Naik v. Ramachandra Dada Naik*(3), which expressly approved the decision of the Madras High Court to which I have just referred. At that time the view that prevailed in the Madras High Court was that a co-parcener might during his lifetime make a gift of his undivided share (a view which has since been overruled) and the Madras High Court held in *Vittla Butten v. Yamenamma*(2), that in spite of that he could not dispose of his undivided share by will. The Privy Council in *Lakshman Dada Naik v. Ramachandra Dada Naik*(3), says at page 62, with reference to the case :

"Its reasons for making the distinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition ; that that right dies with him : and that the title of his co-sharers by survivorship resting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in *Suraj Bansi Koer v. Sheo Proshad Singh*(4), and was fully recognized by their Lordships."

(1) (1917) I.L.R., 40 Mad., 1122. (2) (1874) 8 M.H.C.B., 8.

(3) (1881) I.L.R., 5 Bom., 48 (P.O.).

(4) (1880) I.L.R., 5 Cal., 148 (P.O.) ; L.R., 6 I.A., 88.

This principle has already been applied to a case exactly such as the present by MUTTUSAMI AYYAR, J., in *Lakshmi v. Subramanya*(1). At page 492, the learned Judge says :

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"It is conceded that where a Hindu father disposes by will of ancestral property, the disposition is inoperative as against his son, but it is argued that when the disposition made is in the nature of a provision for the maintenance of the testator's widow, the will is valid. I am unable to adopt this view. The ground on which a will in regard to ancestral or joint family property was found to be invalid in the case of *Vittla Butten v. Yamenamma*(2) is that directly the testator dies the co-parcener's right of survivorship takes effect and that a testamentary disposition cannot be permitted to prevail against that right. In the absence of the testamentary power, the contention that that power was exercised for the purpose of making a provision for the support of the testator's wife could not, in my opinion, validate the will."

I respectfully agree with these observations of this distinguished Hindu Judge which, in my opinion, are conclusive of the present case.

With regard to the more recent decisions of this Court, beginning with *Kudutamma v. Narasimha Charyulu*(3), that a managing member of a Hindu family may lawfully make certain gifts of ancestral properties to the female members of the family, I may merely point out that it is quite a different thing to say that he may do so during his lifetime and to contend that he may do so by a will operating after his death. Where he does so during his lifetime, he is acting as manager and as representative of the family. If he is to make such gifts by will to operate after his death, he is assuming a function which really belongs to the surviving co-parceners, and he is purporting to exercise powers and perform duties which have devolved upon them, and it seems to me that if we were to admit the principle contended for, it might have very far-reaching results.

As regards the decision in *Patra Chariar v. Srinivasa Chariar*(4), I may observe that none of the authorities which I have cited are referred to there. Further, the case is distinguishable on the facts. In that case the alienation in favour of

(1) (1889) I.L.R., 12 Mad., 490.

(3) (1907) 17 M.L.J., 528.

(2) (1874) 8 M.H.C.B., 8.

(4) (1917) I.L.R., 40 Mad., 1122.

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the daughter was made by the father with the consent of his adult son who was his co-parcener and also with the consent of the testator's wife who was the mother of an infant co-parcener. We have no doubt been referred to certain cases in which the Privy Council have suggested that a will which would otherwise be invalid might become operative by virtue of the consent of those co-parceners, but no such question has actually come before them for decision. Looking at the matter on principle, it might seem that a will made by one co-parcener with the assent of all the other co-parceners would be like a settlement or family arrangement between all the co-parceners to take effect from the death of the co-parcener who was the testator, unless that co-parcener in the meantime revoked it. It is not necessary to consider that question in the present case. After hearing very fully the arguments, I am satisfied that the Privy Council has never had to consider either that question or the question now actually before us. As I have said, the question of consent does not arise in this case, where the only members of the family were the testator and an infant son. In such a case, I do not think an alienation of this kind can be supported on the ground that the father must be taken to have consented to his own alienation in his capacity of guardian to his minor son.

We must, therefore, modify the decree by declaring that the will in so far as it contains dispositions in favour of the plaintiff is inoperative. The parties have left it to us to say on the materials before us what we think is a reasonable rate of maintenance, and I think that Rs. 30 a month is a reasonable sum, and that amount is payable by the defendants from 1st January 1916.

The parties are not agreed as to the provision to be made for the residence of the widow, which is the subject of the eighth issue. Therefore, before disposing of the appeal, we must ask the Court below to return a finding upon that subject within two months; seven days will be allowed for filing objections. Fresh evidence may be taken.

As regards the second issue, it has been found in favour of the plaintiff and therefore the decree will be modified by giving the plaintiff the jewels—items 1 and 2.

Maintenance will be charged upon a sufficient portion of the joint family properties to be determined by the Court below. A finding should be returned on this point also.

Costs reserved.

KRISHNAN, J.—I entirely agree with the learned Chief Justice in the order that he has just proposed in this case. He has dealt so fully with all the authorities that have been cited before us that it is quite unnecessary for me to go over them again. With all respect to the learned Judges who decided *Patra Chariar v. Srinivasa Chariar*(1), it seems to me that their decision is open to question. I was at first inclined to think that this question should be referred to a Full Bench for a final settlement, but as pointed out by the learned Chief Justice, the present case is distinguishable from that case, on the ground that in that case the consent of the adult co-parcener was obtained, and the decision was to a great extent based upon that consent. Such a consent is absent in the present case. I also agree with the learned Chief Justice that the testator in this case cannot be treated as having acted as the guardian of his infant son, and given consent to the arrangement made by himself in favour of his widow. He did not purport to act as his minor son's guardian with reference to his will, and to infer from the fact that he was the legal guardian of his son when he made the will, that he gave consent to the provisions in it as such guardian, will be, it seems to me, to introduce an unwarranted fiction into the case. This case being distinguishable from *Patra Chariar v. Srinivasa Chariar*(1), we need not express a final opinion about it. As regards the other points in the case, I entirely agree with the learned Chief Justice and have nothing further to add.

[The lower Court reported that the parties had filed a compromise petition and a petition for leave to enter into a compromise on behalf of the minor first appellant. Their Lordships thereupon delivered the following:—

JUDGMENT

We sanction the compromise as beneficial to the minor.

In the result we reverse the decree, and pass a fresh decree directing the defendants to deliver up to the plaintiff jewels

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SUBBARAMI forming items 1 to 10 of F Schedule to the plaint, or pay their value Rs. 1,800, and awarding to the plaintiff maintenance at 30 rupees per mensem from 1st January 1916 to be charged on the properties mentioned in the compromise, and further awarding her the provision for residence contained in the compromise. Parties will pay and receive proportionate costs throughout on the value of the properties claimed under the will.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

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March 26 and
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VELLANKI RAMAKRISHNA ROW (PLAINTIFF), APPELLANT,

v.

KOTAGIRI SUBBAMMA ROW AND NINE OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Marriage between a Telugu Sudra and his wife's sister's daughter, legality of.

The marriage of a Hindu with his wife's sister's daughter is valid, as well among Sudras as among Brahmans, and among the Telugus of the north as among the Tamils of the south.

APPEAL from the decree of K. KRISHNAMA ACHARYA, Temporary Subordinate Judge of Masulipatam, in Original Suit No. 52 of 1917.

The facts are fully stated in the Judgment.

K. Bhashyam Ayyangar for appellant.

A. Krishnaswami Ayyar, A.S. Viswanatha Ayyar and P. Mar-kandeyulu for respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J. KRISHNAN, J.—This is an appeal from the decree of the Temporary Subordinate Judge of Masulipatam dismissing the

* Appeal No. 105 of 1919.

plaintiff's suit for the declarations that the adoption of the third defendant by defendants Nos. 1 and 2 is not true in fact and valid in law, and that he, the plaintiff, is the next reversioner to the zamindari, and is entitled to succeed to it on the first defendant's death, and that the alienations by her to defendants Nos. 4 and 5 are not binding on him. The Subordinate Judge found the adoption to be proved on the evidence and he held it to be valid in law. On that finding plaintiff's suit failed and it was dismissed with costs. The plaintiff appeals.

He does not now dispute the fact of the adoption, but he contends that it is not valid in law. His argument is that the marriage between defendants Nos. 1 and 2 was invalid under the Hindu law, as being a 'Virudha Sambhandham', or a marriage between persons within the prohibited degree of relationship, and that they were therefore not legally husband and wife, and they could not validly adopt a son to themselves. The first defendant was admittedly the second defendant's deceased wife's sister's daughter. It is claimed that she could not therefore have legally married the second defendant. For this contention the appellant's vakil relies on a text in Grihya Parisishta, stated to be a work of the sage Aswalayana, and on the observations in *Minakshi v. Ramanada*(1), adopting the rule stated in the text. The text has been translated by Mr. Ghose in his 'Principles of Hindu law', 3rd edition, Volume II, page 830, as follows:—

"A girl with whom there is no relationship unseemly for marriage should be married. The relationship such as make the pair like parent and child to each other is relationship unseemly for marriage, such as the daughter of the wife's sister and the sister of the wife of the paternal uncle. Some exclude the mother's gotra."

That text no doubt treats a marriage like the one we have in the present case to be a Virudha Sambhandha. But the effect of that text has been considered at great length in *Rajavendra Rau v. Jayaram Rau*(2), and it was held that it was merely hortatory in character and not mandatory. The same view was taken by the Bombay High Court in *Ramchandra v. Gopal*(3) (see pages 630 to 632), which was followed in *Yamava v. Lazman Bhimrao*(4).

(1) (1888) I.L.R., 11 Mad., 49 (F.B.) at 51, 52. (2) (1897) I.L.R., 20 Mad., 288. (3) (1908) I.L.R., 32 Bom., 619, 630 to 632. (4) (1912) I.L.R., 36 Bom., 538.

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The rule is one of those moral precepts, the breach of which an orthodox Hindu views with disfavour, but which does not affect the legality of the marriage. The marriage is an undesirable one, but it is not an illegal one.

As the learned Judges in *Ragavendra Rau v. Jayaram Rau*(1), have discussed the question very fully, and as we entirely agree with their reasons and their view, it is unnecessary for us to go over the same ground again. That decision is one of special authority, because one of the Judges who took part in it was SUBBAMANIA AYYAR, J., who was himself a Brahman and was thoroughly conversant with the practice and sentiments of the Brahman community. The learned Judges, after examining a large body of unimpeachable evidence of well-known men in this Presidency, came to the conclusion that among Brahmans the custom of allowing a man to marry his wife's sister's daughter was established. They also referred to the observations of the learned Judges in *Minakshi v. Ramanada*(2), regarding the rule of Virudha Sambhandham, that we are considering, and rightly pointed out that it was rather assumed than decided in that case that the rule was in force. The decision in *Ragavendra Rau v. Jayaram Rau*(1), has stood unchallenged now for over twenty years, and we think that we should take it as having settled the question in favour of the validity of such a marriage among Brahmans.

The learned vakil for the appellant, thereupon, argued that the decision in that case should not be applied to the present case, because that case referred to a Tamil Brahman in the south of the Presidency whereas the present case refers to a Telugu Sudra in the Northern Circars, the parties being Velamas, who are Sudras of a high class. At first sight this distinction seems to be material, but on examination it will be found to be unsubstantial. The evidence given of the validity of the marriage in *Ragavendra Rau v. Jayaram Rau*(1), included that of such a man as the Hon'ble Mr. N. Subba Rao, who is a Telugu Brahman of the Northern Circars. The Court made no distinction in its finding between Tamil Brahmans of the south and Telugu Brahmans of the north, and there is no reason to suppose that there is any distinction between the two on the point. The

ruling therefore, we think, applies to both Tamil and Telugu Brahmans as it purports to do.

But it is no doubt a case relating to Brahmans while the present case relates to Sudras. The distinction, however, is not in favour of the applicability of the Grihya Parisishta rule to the latter. The rules in the Parisishta were meant for the twice born classes and for the Brahmans in particular; they were not meant to apply to Sudras at all. The Velamas no doubt follow Brahman customs and have copied several of their rules, but when the Brahman custom itself is in favour of the legality of such a marriage as we are now dealing with there is no room for assuming that the contrary rule prevails among the Velamas. At any rate, very little evidence is sufficient to justify the conclusion that the same custom as prevails among Brahmans is followed by them. There is evidence in the present case, as pointed out by the Subordinate Judge, to show that such a marriage is valid among them—see defence witnesses Nos. 2, 3 and 23. Instances among allied castes have also been referred to by several defence witnesses and though that evidence may have no direct bearing on the question of custom among Velamas it probabilizes the existence of a similar custom among them.

As against that evidence our attention was drawn to the evidence of plaintiff's witnesses Nos. 2, 3, 5, 6, 7 and 21. The effect of the evidence of the plaintiff's witnesses is, we think, correctly summed up by the Subordinate Judge when he says that they say that to their knowledge there were no instances of a person marrying his wife's sister's daughter and that there was no such usage so far as they knew. The positive evidence of defence witnesses Nos. 2, 3 and 23 which has been accepted by the trial Judge, and which we see no reason to discredit though they are not men of wealth as some of the plaintiff's witnesses are, we think outweighs the somewhat negative evidence of the plaintiff's witnesses. Such a marriage though legal is apparently not one looked on with much favour, and that probably explains why there are so few instances of it in the caste. But the paucity of instances does not detract from the value of those that have been proved.

It is for the plaintiff to establish his plea that the rule of prohibition relied on by him applies to the first defendant's marriage and renders it invalid. The Grihya Parisishta rule on

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(1) (1897) I.L.R., 20 Mad., 283.

(2) (1888) I.L.R., 11 Mad., 49 (F.B.) at 51, 53.

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the point is not observed even by the Brahmans. In itself it has no binding force particularly on the Sudras. It is only if the rule has been shown to have been adopted as a binding custom by the defendant's caste that we can give it any legal effect. The argument that there is a presumption that the caste custom is in accordance with the precepts of the sages than against them is of no force in this case, as the custom regarding this marriage was established to be otherwise by *Rajavandra Rau v. Jayaram Rau*(1), with reference to Brahmans whose ways these Velamas copy. We agree with the Subordinate Judge that the plaintiff has failed to establish that there is any rule of law or caste custom against the validity of the first defendant's marriage with the second defendant, and that on the other hand the defence evidence shows that it is in accordance with the recognized practice in the caste.

It is conceded that in the Velama caste a man may marry his own sister's daughter as also his wife's own sister. There does not seem to be anything very strange then in his being permitted to marry his wife's sister's daughter. The marriage of the defendants took place twenty-four years ago and no one seems to have taken any exception to it till now. The defendants had several children born to them but they seem to have lost them all and so they took the third defendant in adoption in 1910. The evidence of defendants Nos. 1 and 2 and the documents referred to by the Subordinate Judge, Exhibit II series, III, and X to XXI (a) show that plaintiff and his family and the defendants were moving on terms of intimacy till recently and that plaintiff himself took no exception to the marriage. In these circumstances it is a satisfaction to find that we are not obliged to declare the marriage illegal.

No other point has been argued before us. Finding the 1 and 2 defendants' marriage to be perfectly legal it follows that the objection to the legality of the third defendant's adoption based solely on its illegality fails. The plaintiff's appeal must therefore be dismissed with costs.

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(1897) I.L.R., 20 Mad., 212.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

MUHOMED ABDUL KADIR MARAKAYAR, MINOR BY
GUARDIAN MAHOMED KASIM MARAKAYAR
AND NINE OTHERS (DEFENDANTS), APPELLANTS,*

1920,
March 31
and
April 8.

v.

SAMIPANDIA TEVAR AND TWENTY-TWO OTHERS (PLAINTIFFS),
RESPONDENTS.

*Limitation Act (IX of 1908), art. 182 (2)—Appeal filed in wrong Court—
Order of Court returning appeal for presentation to proper Court—'Appellate
Court' meaning of—Time for executing decree.*

Where a court decides that an appeal has been wrongly presented to it and orders a return of it for presentation to the proper court, such an order is neither 'a final order' of the Appellate Court, nor a 'withdrawal of the appeal' within article 182 (2) of the Limitation Act.

'Appellate Court' in the article means an appellate court having jurisdiction to hear the appeal.

Per OLDFIELD, J. (SESHAGIRI AYYAR, J., doubting)—A mortgagor in whose favour a decree for redemption has been passed can execute the decree by sale of the mortgaged properties.

Govinda Targan v. Veeran (1918) I.L.R., 36 Mad., 32, followed.

APPEAL against the order of C. KRISHNASWAMI RAO, District Judge of Ramnad, in Appeal No. 346 of 1918, filed against the order of P. SUBBAYYA MUDALIYAR, Subordinate Judge of Ramnad, in Execution Petition No. 300 of 1916, in Original Suit No. 18 of 1900.

The facts are stated in the Judgment of SESHAGIRI AYYAR, J. The judgment-debtors preferred this appeal.

C. V. Anantakrishna Ayyar for appellant.

The Hon'ble The Advocate-General (S. Srinivasa Ayyangar), K. P. Lazmana Rao, R. Kesava Ayyangar for respondent.

OLDFIELD, J.—The first question raised in this appeal is ^{OLDFIELD, J.} whether the plaintiffs, mortgagors, are entitled to execute their decree for redemption, by asking the Court to sell the mortgaged property. It is prima facie concluded in their favour by *Govinda Targan v. Veeran*(1), since we have been shown no case

* Appeal against Appellate Order 10 of 1919.
(1) (1918) I.L.R., 36 Mad., 32.

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in which that decision has been doubted and in *Venkatachalam Pattar v. Ramayyar*(1) it has been followed, and since Mr. Ananthakrishna Ayyar for defendants has declined to argue against its correctness. He has relied only on the fact that the decree provides for a sale at the instance only of the mortgagee. But that appears to have been the case also in the decision referred to. This objection to the order under appeal must therefore be disallowed.

The more important contention before us is, however, that the plaintiffs' application for execution was made too late; and certainly it was so, unless time ran, as they contend, from the date 10th February 1915 on which an order was passed by this Court returning their memorandum of appeal against the decree for presentation to the District Court, as the proper Court to entertain it. Was the High Court in these circumstances 'the Appellate Court' and was this its 'final order' within the meaning of article 182, Schedule 1, Limitation Act?

This Court's order in no degree decided the appeal; and its final character has been supported mainly by comparison of its effect with that of the withdrawal of the appeal, reference to which as a starting point was introduced into the article by its amendment in 1908. But this argument is unsustainable, if, as in *Peria Kovil Ramanuja Peria Jeeyangar v. Lakshmi Doss*(2) and *Fazl-ur-Rahman v. Shah Muhammad Khan*(3), which were reproduced in the amendment, there is besides the withdrawal an order dismissing the appeal as withdrawn. Further there is an order of the Appellate Court, such as the article contemplates directly. And it may be doubted whether there can be cases of withdrawal without such an order. For the procedure for withdrawal of a suit with leave to sue again under Order XXIII corresponds with nothing in the specification of the powers of the Appellate Court in section 107, Civil Procedure Code. But, it is useless to consider further the applicability of the reference in the article to withdrawal or the analogy between it and the order in question at present, when in my opinion plaintiffs must fail, because this Court was not 'the Appellate Court', inasmuch as the proceedings before it were not within its jurisdiction.

(1) C.M.A. 99 of 1915 (unreported).
(2) (1907) 1 L.R., 30 Mad., 1 (F.B.). (3) (1908) 1 L.R., 30 All., 885.

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In *Akshoy Kumar Nundi v. Chunder Mohun Chathati*(1), it was held that the appeal was presented to the proper Court, and in the present case, in which this Court returned the appeal memorandum for want of jurisdiction there was no legally constituted appeal and no final order by the Appellate Court. It is suggested that the order of return was final, so far as this Court was concerned, and that it was the order of the Appellate Court, because this Court has appellate powers, a distinction being attempted between failures of jurisdiction on territorial grounds and on the pecuniary grounds referred to in this Court's order. I was unable to follow that distinction and it was supported by no authority. The remainder of the argument is inconsistent with the reference to "the" not "an" Appellate Court in the article and its best support was the reference to *Krishnasami v. Kanakasabai*(2) and the cases therein cited. But the principle for which plaintiffs contend, was referred to only *obiter* in this Court's decision and was applied in *Matra Mondal v. Hari Mohun Mullick*(3) and *Nidhi Lal v. Mazhar Husain*(4) to proceedings actually completed in the wrong Court, through mistake and without objection, and was authorized by the reference in the various Civil Courts Acts concerned to the jurisdiction in question as concurrent. Here we are concerned with the more general principle that no party shall be allowed to obtain a longer period of limitation on the ground of his own mistake, and no attempt has been, or indeed could fairly be made, to invoke section 14 or any other provision of the Limitation Act by which exceptions to it are recognized, as authorizing plaintiffs' contention. As there was no final order of the Appellate Court, time cannot be calculated from one; and the application was therefore out of time and should have been dismissed.

The appeal is allowed, the lower Appellate Court's order being set aside and that of the Subordinate Judge being restored with costs throughout.

SESHAGIRI AYYAR, J.—The decree under execution is one for redemption and was passed on 19th March 1898. The time fixed for payment expired before the new Civil Procedure Code

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(1) (1889) 1 L.R., 16 Calc., 250. (2) (1891) 1 L.R., 14 Mad., 183.
(3) (1890) 1 L.R., 17 Calc., 155. (4) (1885) 1 L.R., 7 All., 436.

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came into force. An appeal was preferred to the High Court within the time limited by law. It was returned on 10th February 1915 for presentation to the proper Court, as the High Court was of opinion that the appeal lay to the District Court and not to itself. The present application for execution was made on 21st September 1916 for sale of the mortgaged property.

Two objections were taken to it. The first was that under the decree, the mortgagor is not entitled to apply for sale. The second that the application was barred by limitation. The District Judge overruled both these objections.

The first point is covered by *Govinda Targan v. Veeran*(1). In that case, the learned Judges were of opinion that although express power was given by section 93 of the Transfer of Property Act only to the mortgagee to apply for sale, the mortgagor has also an inherent right to apply for a similar order. This decision was followed in *Venkatachelum Pattar v. Ramayyar*(2), to which my learned brother was a party. Speaking for myself, I would have required more argument to convince me of the correctness of the view taken in these two decisions, and would have suggested a reference to the Full Bench if our decision depended upon the first point alone. Notwithstanding the argument addressed to us by the learned Advocate-General regarding the procedure adopted in England, by which power is reserved to the mortgagor to apply for sale where a decree for redemption is passed, I am not convinced that we should read into section 93 of the Transfer of Property Act, or into Order XXXIV, rules 7 and 8, Civil Procedure Code, such a power. However, as the conclusion which I have come to is not dependent upon the view I take on the first point, and as Mr. Anantakrishna Ayyar, who appeared for the appellant, did not ask us to dissent from the view in *Govinda Targan v. Veeran*(1) but only attempted to distinguish that case from the present, I do not propose to say anything more about it.

The second question is practically bare of authority. The point for determination is that where an appeal is presented to a Court to which appeals do not ordinarily lie and that Court ultimately passes an order returning the appeal for presentation

(1) (1913) I.L.R., 36 Mad., 32.
(2) C.M.A. No. 99 of 1915 (unreported).

to the proper Court, whether such an order is within article 182 of the third column of the first schedule of the Indian Limitation Act. That clause runs thus :

“ Where there has been an appeal the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal.”

The words “ or the withdrawal of the appeal ” were inserted by the Amending Act of 1905. Is the order of the High Court, returning the plaint for presentation to the proper Court, an order of the Appellate Court, or can it be regarded as a withdrawal of the appeal ?

Under the Civil Courts Act (III of 1873), section 13, the legislature has prescribed which shall be the Appellate Court, and the circumstances under which appeals from one Court can be taken to another.

In conformity with that Act, in the present case, the view of the High Court was that the subject-matter of the original suit was above Rs. 2,500 and below Rs. 5,000 in value, and that consequently an appeal lay to the District Court and not to the High Court. The language of the second clause of article 182 which I have quoted refers to ‘ the Appellate Court ’. In my opinion, that language means that the Appellate Court should be the proper Appellate Court, not any Appellate Court, which a party, bona fide or otherwise has chosen to file an appeal in. The learned Advocate-General who appeared for the respondent, contended that the High Court has a general power of hearing appeals from the subordinate courts. It is true that by virtue of section 24 of the Code of Civil Procedure, the High Court can withdraw any appeal pending in any of the subordinate courts and hear it itself ; but the disposal of an appeal in the exercise of the powers given by section 24 would not constitute the High Court ‘ the Appellate Court ’, as contemplated by clause (2) of article 182 of the Limitation Act.

It was also contended before us that all appellate authorities must be regarded as possessing fundamental jurisdiction to hear appeals. The argument was, as was held in *Krishnasami v. Kanakasabai*(1) that as there is a general power in a Subordinate Judge or in a District Judge to hear suits which ordinarily District Munsifs alone can try, similarly there is a general

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(1) (1891) I.L.R., 14 Mad., 183.

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power in the High Court to hear appeals although, ordinarily, such appeals would be heard only by a District Judge or a Subordinate Judge.

The language of section 24, which contemplates an order of transfer, does not indicate the existence of such a general power. The right of appeal is the creature of the statute, and the right to resort to particular grades of tribunals is equally a statutory right, and not a common law right. It is because of the powers of supervision which are vested in the High Court under the Charter Act, and by the Letters Patent, that the legislature has enacted under section 24 of the Code of Civil Procedure that the High Court can withdraw to its own file appeals pending in the lower courts. Moreover, section 15 of the Code of Civil Procedure provides that every suit shall be instituted in the Court of the lowest grade competent to try it. In my opinion, this provision is applicable to appeals also.

Section 96 of the Code provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decision of such a Court. I take it that the authorization herein referred to is what is contained in the Civil Courts Act of each of the Presidencies. Apart from authority, therefore, on the construction of the above sections and on general principles of jurisprudence, I am of opinion that clause 2 of article 182 should be interpreted as referring to the Appellate Court which ordinarily is empowered to hear appeals from the subordinate courts. If we make a departure from this rule, there is nothing to prevent a suitor from claiming that the time during which an appeal has been pending in a Revenue Court, in which he has wrongly filed an appeal, should be deducted in computing the period of limitation.

In this connexion, I am not clear that, even if the High Court can be regarded as 'the Appellate Court' within the meaning of that expression in clause 2 of article 182, whether the order directing the return of the plaint for presentation to the proper Court is within the same clause. I attach no importance to the fact that the order itself was not complied with, as the appeal was never presented to the Subordinate Judge. As at present advised, I am of opinion that the order contemplated is one

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which disposes of the appeal on the merits in some form, and not simply one which intimates to the party that the appeal should be filed elsewhere. I may here refer to the decision of the Judicial Committee in *Batuk Nath v. Munni Dei*(1), where it was held that an order of the Privy Council dismissing an appeal for default of prosecution is not an order in council, contemplated by article 182. The reason for that dictum is that there was no adjudication on the merits. I confess that the introduction of the clause by the amending Act, "or the withdrawal of the appeal" to some extent weakens this suggestion of mine; but in the case of a withdrawal—I take the withdrawal to be an unconditional one—there is an end to the litigation; but from the order returning the appeal for presentation of the appeal to a proper Court, the same result does not necessarily follow. It is not a strained construction upon the second clause of article 182 to say that the decree, order or withdrawal contemplated, must all have the effect of putting an end to the litigation. However that may be, as I am of opinion that the order in question was not passed by the Court contemplated in clause (2) the respondent is not entitled to claim that limitation starts against him only from 10th February 1915 and not earlier. When we remember that under the Indian Law, there is nothing to prevent a party entitled to a benefit under the decree from executing that decree, there is no necessity for reading into this article words which are not to be found there. *Wazir Mahton v. Lulit Singh*(2) contains observations which to some extent, support the respondent. The appeal in that case was certainly a competent one. I do not feel pressed by the *obiter dictum* contained in that judgment. *Akshoy Kumar Nundi v. Chunder Mohun Chathati*(3) is not entirely reconcilable with the observations in *Wazir Mahton v. Lulit Singh*(2) relied on by the District Judge. Very recently the Judicial Committee held that, where an application was presented bona fide to a Court which had no jurisdiction to execute a decree, the application was not one made to the proper Court in accordance with the law within the meaning of these words in clause 5 of article 182. The principle of

(1) (1914) I.L.R., 36 All., 284 (P.C.).

(2) (1883) I.L.R., 9 Cal., 100.

(3) (1889) I.L.R., 16 Cal., 250.

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that decision applies equally to the present case; vide *Ramabhadra Raju Bahadur v. Maharajah of Jeypore*(1).

For all these reasons, I am of opinion that the decision of the District Judge must be reversed and the execution application should be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

KUPPUSWAMI AYYANGAR AND DEVANATHA
AYYANGAR (PLAINTIFFS), APPELLANTS,

v.

KAMALAMMAL AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1920,
April,
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Limitation Act (IX of 1908), Arts. 44 and 144—*Alienation by mother as guardian of the sons—Decree against the sons represented by the mother as guardian ad litem—Sale in execution—Decree and sale, whether nullities—Suit by minors to recover possession—Limitation—Civil Procedure Code* (V of 1908), O. XXXII, r. 4 (1).

Where a mother acting as the guardian of her minor sons mortgaged their property and a decree on the mortgage was passed against the minors represented by the mother as guardian *ad litem* and the property sold in execution, and subsequently the sons sued to recover possession of the properties more than three years after the elder of them attained majority but within twelve years of the sale, alleging that their mother was not competent to represent them in the previous suit, as her interest was adverse to theirs,

Held, that the decree against the minors was not a nullity and had to be set aside, and that the suit was consequently barred by limitation.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, Temporary Subordinate Judge of Cuddalore, in Appeal Suit No. 118 of 1917, preferred against the decree of K. L. VENKATA RAO, Additional District Munsif of Villupuram, in Original Suit No. 1 of 1916.

One Venkataswami Ayyangar executed a will, dated 27th December 1897, whereby he appointed Thiruvankata Achariyar as guardian in respect of the joint family properties of his two minor sons, aged five years and one year, respectively. The mother of the minors, professing to act as their guardian alienated the property by way of mortgage to different persons; and two suits were

(1) (1919) I.L.R., 42 Mad., 813 (P.C.); L.R., 46 I.A., 151.

* Second Appeal No. 784 of 1919.

instituted (Original Suit No. 217 of 1903, and Original Suit No. 597 of 1904 on the file of the District Munsif's Court of Tindivanam) against the minors represented by their mother as guardian *ad litem*; decrees were passed and the properties were sold and purchased by the second and third defendants. The sons instituted the present suit on 28th June 1914 for recovering possession of the lands sold in execution, on the ground that the alienation was not for any necessity, and that the suit and decree and the execution sale were not binding on them. The suit was filed more than three years after the first plaintiff attained majority. The plaintiffs contended, inter alia, that the decree and sale were nullities, as the mother was not a proper guardian *ad litem* as required by Order XXXII, rule 4 (1), Civil Procedure Code, and that consequently the sale need not be set aside, and that article 144 and not article 44 of the Limitation Act applied to the case. The lower Courts held that the suit was barred by limitation as regards both the plaintiffs, and dismissed the suits. The plaintiffs preferred this Second Appeal.

K. Bashyam Ayyangar and T. G. Raghava Achariyar for the appellants.

L. S. Virarayhava Ayyar for the respondent.

The JUDGMENT of the Court was delivered by

OLDFIELD, J.—The lower Appellate Court held that the suit was barred, because a previous decree having to be set aside, before relief could be given, article 144, Schedule 1 of the Limitation Act was inapplicable.

Appellants contend that the previous decree need not be set aside, being a nullity, inasmuch as it was obtained against them as minors with their mother as guardian *ad litem* and her interest in the litigation being adverse to theirs, she was not competent to represent them with reference to Order XXXII, rule 4 (1), proviso. Assuming, but not deciding that the mother had any sort of adverse interest, we are not prepared to hold that she was so wholly disqualified that her representation must be treated as no representation and the decree must be regarded as null and need not be set aside on proof of fraud or otherwise. No authority cited for appellants goes that length; *Bajinath Rai v. Dharam Deo Tiwari*(1) has been relied on. But in it the question was not whether a previous decision should be set aside, but

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(1) (1916) I.L.R., 38 All., 315.

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whether it was *res judicata*, when it was alleged to have been obtained through the guardian's gross negligence, and it is not clear that the same considerations arise on the latter question as on the former. The other case mainly relied on was *Khiarajmal v. Daim*(1), and in it the Judicial Committee no doubt referred to decrees obtained and sales held, when the persons directly concerned were not parties to the proceedings or properly represented, as nullities. But the question then is what constitutes proper representation, their Lordships not dealing with the point further except by reference to *Kishan Chunder Ghose v. Mussumat Ashoorun*(2), in which there was no representation at all. On the other hand, in *Walian v. Banke Behari Pershad*(3), it was pointed out that a defect in following the rules as to representation of minors was not necessarily fatal to the proceedings. We are not, in the circumstances, prepared to hold that any possible adverse interest on the part of the mother rendered the decree against the present plaintiffs, the minors, a nullity. It, therefore, had to be set aside and the present suit is out of time.

Next it is argued that this suit should have been regarded as one against the second defendant to recover from him the advantage which he has realized as implied trustee for the plaintiffs during their minority. It is not necessary to set out in detail the facts on which this plea is based, or to deal with it on its merits, because it was not in our opinion relied on in the Court of first instance and we are not prepared to consider it for the first time in Second Appeal.

Lastly, the suit has been held barred, on the assumption that time ran from the date on which the elder of the plaintiffs attained majority, consistently with *Doraisami Serumadan v. Nondisami Saluvan*(4). Reference has been made to *Nobin Chendra Barna v. Chandra Madheb Barna*(5), in which it is said a plea of limitation was disallowed in similar circumstances. There, however, perhaps with reference to the Dayabhaga law, the elder of the plaintiffs concerned was held not capable of giving a discharge and that case must be distinguished on that ground.

The Second Appeal is dismissed with costs.

K.B.

(1) (1905) I.L.R., 32 Calc., 296 (P.C.).

(2) (1868) Marshall, 647.

(3) (1908) I.L.R., 30 Calc., 1021.

(4) (1915) I.L.R., 38 Mad., 118.

(5) (1917) I.L.R., 44 Calc., 1 (P.C.).

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Seshagiri Ayyar.

MUTHUVEERAPPA CHETTY (FIRST DEFENDANT),
APPELLANT,

v.

ADAIKAPPA CHETTY AND ELEVEN OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 3 TO 10), RESPONDENTS.*

Limitation—Accord and satisfaction—Annulment of satisfaction on the ground of coercion, effect of—Fresh cause of action for original claim, on annulment.

A debtor who satisfied, by payment, his creditor's claim for balance of money due, sued to annul the satisfaction on the ground of coercion and obtained a decree for refund.

Held, that the annulment gave the creditor a fresh cause of action upon the original claim, and time began to run from the date of annulment.

Rames Surnomoyee v. Shoshee Mookhee Burmonia, (1888) 12 M.I.A., 244 and *Huro Pershad Roy v. Gopal Das Dutt*, (1883) I.L.R., 9 Calc., 255, at 259 (P.C.), followed.

APPEAL from the decree of A. NARAYAN NAMBIYAR, Temporary Subordinate Judge, Sivaganga, in Original Suit No. 74 of 1916.

The plaintiff in this case is the principal and the defendant his agent who was managing plaintiff's shop at Rangoon till 1905. The plaintiff having a claim against the defendant in respect of the agency preferred a complaint against him in 1907 of misappropriating bangles and had him arrested, and he was afterwards let out on bail. Then the defendant was induced to appoint an arbitrator and the plaintiff appointed another arbitrator to settle their differences, and the award of the arbitrators was that the defendant should pay the plaintiff Rs. 10,000 in full satisfaction of all the plaintiff's claims and that the prosecution should be dropped. On 30th November 1907, the defendant paid Rs. 7,000 and gave a hundi for Rs. 3,000. Then he refused to pay the balance of Rs. 3,000 and successfully sued to recover

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the Rs. 7,000 which he had paid on the ground that it was obtained by coercion. The plaintiff's suit for recovery of Rs. 3,000 on the hundi was dismissed for the same reason. All this took place on 8th December 1915. Thereupon, the plaintiff filed this suit on 7th November 1916 for an account of the agency and for recovery of the amount that might be found due. The defendant pleaded *inter alia* that nothing was due under the agency, and that the suit which was based on the original cause of action was barred by limitation. The Subordinate Judge holding that a fresh cause of action arose on 8th December 1915 passed a preliminary decree for accounts against the defendant.

The defendant preferred this appeal.

R. Kuppuswami Ayyar (with *V. Pattabhirama Ayyar*) for appellant.—The suit which is based on the original cause of action is barred by limitation, as more than three years have elapsed, and no circumstances are alleged which suspend or postpone the period of limitation, as provided by the Limitation Act. The plaintiff cannot claim any exemption which is not provided for by the Limitation Act.

K. Balasubrahmanya Ayyar for *A. Krishnaswami Ayyar* for respondent.—The claim is not barred by limitation. As soon as the High Court set aside the result of the award, a new cause of action arose; for so long as I had the benefit of the Rs. 10,000, I could not have sued and if I had sued I would have been met by the plea of satisfaction, however irregularly it might have been procured; *Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*(1), *Kanjayya Appa Rao v. Bobba Sriramulu*(2), *Bajinath Sahai v. Ramgut Singh*(3), *Muthu Korakkai Chetty v. Madar Ammal*(4), *Surjiram Marwari v. Barhamdeo Persad*(5), *Doraisami Padayachi v. Vaidyalinga Padayachi*(6) and *Huro Pershad Roy v. Gopal Das Dutt*(7).

R. Kuppuswami Ayyar in reply. A new cause of action will arise only if the remedy by which satisfaction was obtained was lawfully open to the party. This is what is laid

(1) (1868) 12 M.I.A., 244. (2) (1904) I.L.R., 27 Mad., 143 (P.O.).
(3) (1896) I.L.R., 23 Calc., 775 (P.O.). (4) (1920) I.L.R., 43 Mad., 185 (F.B.).
(5) (1906) 1 C.L.J., 387 at p. 347. (6) (1917) 33 M.L.J., 46.
(7) (1888) I.L.R., 9 Calc., 255 (P.O.) at 259.

down in *Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*(1). The creditor cannot take the law into his own hands. For an accord and satisfaction it is the debtor's voluntary act of satisfaction that constitutes the plea. If the debtor does not consent to the satisfaction, there is no satisfaction.

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WALLIS, C.J.—The plaintiff in this case is a principal and the defendant an agent. The plaintiff having a claim against the defendant preferred a complaint against him of misappropriating bangles and had him arrested, and he was afterwards bailed. Then the defendant was induced to appoint an arbitrator and the plaintiff appointed another arbitrator to settle their differences, and the award of the arbitrators was that the defendant should pay the plaintiff Rs. 10,000 in full satisfaction of all the plaintiff's claims and that the prosecution should be dropped. The defendant paid Rs. 7,000 and gave a hundi for Rs. 3,000 at the time. Then he refused to pay the balance of Rs. 3,000 and successfully sued to recover the Rs. 7,000 which he had paid on the ground that it was obtained by coercion. It was held by this Court reversing the decision of the Subordinate Judge that he had been induced to consent to this arbitration by coercion and that the money so obtained from him in the circumstances which I have mentioned must be refunded. Now, the plaintiff-principal accepting that state of things brings this suit and alleges that, the agreement evidencing the settlement of the first defendant's agency accounts having been annulled, the cause of action with respect to delivery by the first defendant of accounts has accrued to the plaintiff afresh. That is the plaintiff's case.

The defendant pleaded that there had been no arbitration and no award at all. The Subordinate Judge finds that there was no binding agreement to refer to arbitration which is not questioned, but he mentions that the findings of fact of this Court in the other suit were accepted by both the parties, and included findings that there had in fact been an arbitration and a payment by the defendant pursuant to it. The result of the previous suit was that the present plaintiff had to pay back the

(1) (1868) 12 M.I.A., 244.

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sum which he had accepted pursuant to the arbitration from the defendant in full satisfaction of all his claims against the defendant. The question then is whether as the result of the previous suit he has not acquired a fresh cause of action in the nature of his original cause of action for an account which was satisfied so long as the adjustment to which I have referred stood. In my opinion he has.

It is unnecessary to refer to all the cases which were cited before us. There is *Mussumat Ranees Surno Moyee v. Shooshee Mokhee Burmonia*(1), a decision of the Privy Council which has been explained by their Lordships in *Huro Pershad Roy v. Gopal Das Dutt*(2). The latter case contains, at page 259, a clear statement of the principle which is applicable to this case. Their Lordships say :

"The effect of that case [*Mussumat Ranees Surno Moyee v. Shooshee Mokhee Burmonia*(1)] may be shortly stated. The zamindar brought a certain patni taluk to sale, and sold it to a purchaser who was put in possession of it, and out of the purchase money the arrears of rent were paid. Subsequently this sale was set aside for irregularity; the zamindar had to refund the purchase money received by her, and the patnidar, who succeeded in setting it aside, obtained also the mesne profits for the time during which he was ousted. Under those circumstances this Committee, whose judgment was delivered by Sir JAMES COLVILLE, observe: 'It is clear that until the sale had been finally set aside, she'—that is the plaintiff—'was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect.' In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the patnidar having recovered possession, together with mesne profits, it was equitable that he should pay the amount of rent that was in arrear; but that amount of rent did not accrue until the sale of the patni had been set aside, and, therefore, until that time the statute could not run."

Applying those observations to the present case, it is equitable that the plaintiff should be allowed to prefer a fresh claim seeing that he has been deprived of the satisfaction which he had originally obtained. The fact that satisfaction was obtained by coercion was good reason for ordering the money to be

(1) (1888) 12 M.I.A., 244.

(2) (1882) 1 L.R., 9 Calc., 255 (P.O.).

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CORRIGENDA. (NOVEMBER PART).

Page 804, line 30.—For "The Judgment of the Court was delivered by SPENCER, J." read "The Judgment of the Court was delivered by KRISHNAN, J." and in the side notes at pages 804 to 807, for "SPENCER, J." read "KRISHNAN, J."

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<i>Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter's son, whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption—Subsequent adoption, whether barred—Subsequent upanayanam, whether competent.] Adoption of a daughter's son is valid by custom among the Brahmans of the Andhra or Telugu portion of the Madras Presidency as it is in the southern districts.</i>	
<i>Consent of the sapindas to an adoption by the widow is material as guaranteeing the propriety of the widow's action in making the adoption.</i>	
<i>Where such consent has not been shown to have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption, and the Court's right to scrutinize the sapindas' reasons extends only to cases in which consent is refused, and not to cases where it is granted.</i>	
<i>A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a gnatis, and Bhinnagotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption.</i>	
<i>An upanayanam is not valid unless performed by the father or, in his absence, by another kinsman in the family to which the boy concerned actually belongs. The performance of the upanayanam in a family, into which the boy is wrongly believed to have entered by an invalid adoption, is a nullity and is no bar to his subsequent adoption.</i>	
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<i>of the latter before the former—Male reversioners—Right of inheritance, whether accelerated—Limitation Act (IX of 1908), art. 141—Suit by alienee from male reversioners, more than twelve years from death of latter widow, but within twelve years of the death of surviving widow—Limitation.] Where a Hindu widow gave up all her rights in her husband's estate in favour of her co-widow, and the latter predeceased the former, the right of succession of the male reversioners to the estate is not accelerated so as to entitle them to succeed to it immediately on the death of the widow in whose favour the relinquishment was made. A suit by the reversioners to set aside an alienation by the latter widow would be within time, under article 141 of the Limitation Act, if brought within twelve years from the death of the last surviving widow.</i>	
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*surviving daughters to recover deceased's share as heirs of their father—Estoppel—Oral partition whether valid—Survivorship, whether extinguished—Rights of reversioners.] A Hindu widow, inheriting her husband's estate, treated it as her absolute property and bequeathed it absolutely to her three daughters, who divided it into three equal shares by an oral partition and took each one share purporting to take it absolutely under their mother's will. One of the daughters died leaving a daughter as her heir who took possession of the deceased's share. The two surviving daughters sued, as heirs of their father, to recover the share of the deceased daughter from her daughter who was in possession: Held, that the plaintiffs were not estopped from claiming to recover the property as heirs of their father. *Dalton v. Fitzgerald*, [1897] 2 Ch., 86, distinguished; that a partition of immoveable properties of whatever value can be effected orally and without a registered instrument; that the partition made between the daughters operated to extinguish the right of survivorship as between them, although it might not affect the rights of the ultimate reversioners to the estate; and that, consequently, the plaintiffs were not entitled to recover *Gyannessa v. Mobaraknessa*, (1870) I.L.R., 25 Cal., 210, followed and *Latchumammal v. Gangammal*, (1911) I.L.R., 34 Mad., 72, applied.*

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MADRAS ESTATES LAND ACT (I OF 1908), SEC. 189 (3)—CIVIL PROCEDURE CODE (V OF 1908), s. 11—*Res judicata—Suit to enforce acceptance of patta—Decision by Revenue Court—Decision as to occupancy right or title to land claimed as part of the holding—Subsequent suit in a Civil Court for ejectment of tenant as trespasser—Decision of Revenue Court, whether binding as res judicata in the suit in Civil Court.] Section 189 (3) of the Madras Estates Land Act does not constitute the decisions of the Revenue Courts, on an issue as to title to land or occupancy rights therein arising incidentally in suits to enforce the acceptance of pattas which are cognizable exclusively by such Courts, res judicata in a subsequent suit in a Civil Court instituted by the landlord for ejectment of the tenant from such land.*

Appa Rao v. Gurraju ... (1920) I.L.R., 48 Mad., 852

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1884), ss. 216 to 221—*Duty of Municipality to carry night-soil from houses to Municipal depots—No rights in the Municipality to levy fees from house owners. A Municipality constituted under the Madras District Municipalities Act (V of 1884) has no power to levy fees from owners or occupiers of houses and buildings within the Municipality, for carrying night-soil and other offensive matter accumulating on their premises from inside those premises to the municipal depots wherever situated, such duty being cast on the Municipality by the Act.*

South Indian Railway Co. v. Municipal Council, Trichinopoly ... (1920) I.L.R., 48 Mad., 905

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SEC. 19 (g)—*Suit for stones of a well or their value—Title to the well questioned—Jurisdiction of the Small Causes Court. A suit to recover stones forming part of a well and said to*

have been wrongfully removed by the defendant, or their value is cognizable by the Presidency Small Causes Court, in spite of the fact that it is necessary to determine the question of title to the well. Puttangoonda v. Nilkanth Kalo Deshpande (1913) I.L.R., 37 Bom., 675 (F.B.), followed. *Tirupati Raju v. Vissam Raju* (1897) I.L.R., 20 Mad., 155, considered and distinguished.

Krishnamachari v. Komalammal ... (1920) I.L.R., 48 Mad., 903

PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 16 (2), 18 (2) AND 19 (2)—*Adjudication of a person as insolvent—Necessity of an order appointing a person as Receiver of the insolvent's estate.] Section 18 (2) of the Provincial Insolvency Act (III of 1907) contemplates on every adjudication of insolvency an order by the Court appointing a Receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under section 19 (2). Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title. Official Receiver of Trichinopoly v. Somasundaram Chetty* (1915) 30 M.L.J., 415, followed.

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refunded but is no reason for depriving the plaintiff of all remedy on his original claim. In the case cited, the Privy Council say that a fresh claim for the arrears of rent accrued when the patni sale was set aside, and that until the patni sale had been set aside the statute could not run. That, in my opinion, amounts to saying that a fresh cause of action arose. Both in that case and in this, the statute ran as against the original claim. But when the original claim was satisfied there was an end of the statute running in respect of that cause of action, and on the annulment of that satisfaction a fresh cause of action arose and the statute began to run again. If there was a fresh cause of action, this suit is in time whatever article is applicable. The appeal therefore fails and is dismissed with costs.

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WALLIS, C.J.

SESHAGIRI AYYAR, J.—I agree.

N.B.

SESHAGIRI
AYYAR, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

ALAMELU AMMAL AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

BALU AMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1914,
October 15.

Hindu Law—Widow—Will by widow bequeathing husband's estate absolutely to her three daughters—Oral partition by daughters—Share taken absolutely by each—Death of one of the daughters, leaving her daughter as heir—Suit by surviving daughters to recover deceased's share as heirs of their father—Estoppel—Oral partition whether valid—Survivorship, whether extinguished—Rights of reversioners.

A Hindu widow, inheriting her husband's estate, treated it as her absolute property and bequeathed it absolutely to her three daughters, who divided it into three equal shares by an oral partition and took each one share purporting to take it absolutely under their mother's will. One of the daughters died leaving a daughter as her heir who took possession of the deceased's share. The two surviving daughters sued, as heirs of their father, to recover the share of the deceased daughter from her daughter who was in possession:

Held, that the plaintiffs were not estopped from claiming to recover the property as heirs of their father.

* Second Appeal No. 119 of 1913.

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Dalton v. Fitzgerald, [1897] 2 Ch., 86, distinguished;
that a partition of immoveable properties of whatever value can be effected orally and without a registered instrument;
that the partition made between the daughters operated to extinguish the right of survivorship as between them, although it might not affect the rights of the ultimate reversioners to the estate;

and that, consequently, the plaintiffs were not entitled to recover the properties from the deceased daughter's heir.

Gyunnessa v. Mobaraknessa, (1893) I.L.R., 25 Cal., 210, followed, and *Latchumammal v. Gangammal*, (1911) I.L.R., 34 Mad., 72, applied.

SECOND APPEAL against the decree of D. VENKOBA RAO, Subordinate Judge of Tanjore, in Appeal Suit No. 2 of 1911, preferred against the decree of P. G. RAMA AYYAR, District Munsif of Tiruvadi, in Original Suit No. 71 of 1910.

The material facts are set out in the Judgment.

T. Narasimha Ayyangar, for A. Venkatrama Ayyar for appellants.

C. V. Anantakrishna Ayyar and P. S. Vaidyanatha Ayyar for the respondents.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The plaintiffs are the appellants. They are two out of the three daughters of one Sambasiva Aiyar who died in 1880. The first defendant is the daughter and heir of Subbammal who is now dead and who was also a daughter of Sambasiva Aiyar, like the two plaintiffs. The mother of the plaintiffs and of Subbammal died in 1899 having enjoyed a widow's estate in the properties. Shortly before her death, however, she executed a will treating the properties as her absolute properties and bequeathing the lands described in the plaint B schedule absolutely to her three daughters, namely, the two plaintiffs and Subbammal. The daughters accordingly divided the B schedule properties into three equal shares by an oral division shortly after their mother's death, purporting to take each one-third absolutely, according to the will of their mother. Subbammal died in 1908, and her one-third share in the plaint schedule lands was taken possession of by her daughter (the first defendant) as her heir. The two plaintiffs have brought the suit, out of which this Second Appeal has arisen on the allegation that the plaint schedule property was taken by their sister Subbammal as heir of their father Sambasiva Aiyar after the death of their mother in 1899, and that that property which the first defendant has so taken possession of belongs to them

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after the death of their sister Subbammal. (The plaintiffs in their plaint dishonestly suppressed the fact that Subbammal had been enjoying the plaint one-third share separately under a partition to which the plaintiffs were parties, and they made a false allegation that the plaintiffs' two shares and Subbammal's share were all enjoyed according to the convenience of the three sisters, without any permanent division by the plaintiffs and their sister Subbammal, till the latter's death.)

The lower Courts dismissed the plaintiffs' suit on the ground that the plaintiffs are estopped from claiming title to possession of this one-third share as heirs of their father, because they and their sister purported to take the lands under the will of their mother which gave one-third absolutely to Subbammal. The Subordinate Judge relied upon the English case of *Dalton v. Fitzgerald*(1) in support of his view. *Dalton v. Fitzgerald*(1), and the prior case of *Paine v. Jones*(2), were considered in *Rup Chand Ghosh v. Sarveswarchandra Chandra*(3). RAMPINI, J., says:

"In *Dalton v. Fitzgerald*(1), the defendant obtained possession of certain land from a grantor, who had no title to it. By means of that possession, he was able to acquire a good title by possession against the true owner. Hence, he was held to be estopped as against the grantor and his remaindermen from disputing the validity of the deed of grant."

Thus, *Dalton v. Fitzgerald*(1) is authority only for the proposition that if possession is acquired under a particular grant, and could not be traced to any other title, then as regards that particular property of which possession was so obtained the grantee cannot claim the benefit of the English Statute of limitations, i.e., a claim to acquire an absolute title by adverse possession so as to deprive the remaindermen who were granted rights in remainder under the same grant under which the life tenant secured possession and entered into possession as life tenant. As RAMPINI, J., says,

"the rule of estoppel laid down in *Bigelow* would seem to be that the estoppel only exists so long as the grantee claims under the title of his grantor alone."

(1) [1897] 2 Ch., 86.

(2) (1874) L.R., 18 Eq., 320.

(3) (1906) I.L.R., 38 Cal., 915.

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WOODROFFE, J., says,

"that if a grantee assert no other right or title than that from a common grantor, he will be precluded as against another grantee under the same instrument from denying that his grantor had a title, when he conveyed."

See also Bigelow on Estoppel, 6th edition, pages 376 and 377, as to the limits within which the doctrine of estoppel laid down in *Dalton v. Fitzgerald*(1) should be confined.

Without going so far as to say that section 115 of the Evidence Act is exhaustive on the law of estoppel to be applied by the Courts in India, as was said in *Rup Chand Ghosh v. Sarveswar-chandra Chandra*(2), I am of opinion that *Dalton v. Fitzgerald*(1) should not be extended beyond what is absolutely necessary to support the decision on the facts of that particular case. So confining it, the present case is clearly distinguishable, because (1) the plaintiffs do not rely upon the possession got under the will to claim the benefit of any statute of limitations giving the possessor absolute title, (2) the plaintiffs do not claim a higher right to the two-third share which was granted to them by the will (and of which they are in possession) than the right which was so given by the will but their claim relates to the other one-third share to which no right was granted to them by the will, (3) neither their title nor their possession as regards the two-third share, need be traced to the invalid will at all but it can be traced to their undoubted right as legal heirs of their father. The decisions of the lower Courts cannot therefore be supported on the ground on which they have based their decisions. Mr. C. V. Anantakrishna Ayyar, vakil for the respondent, argued that the lower Court's decisions could be supported on two other grounds: (a) that the plaintiffs are estopped by section 115 of the Evidence Act from claiming title to the one-third share, (b) that in any event, as the plaintiffs and Subbammal effected partition on the understanding that Subbammal should enjoy the property without any right in the plaintiffs to take her one-third share from her heirs or her assignees on her death, the plaintiffs cannot rely on their right of survivorship which they relinquished by the partition arrangement. As regards the first contention, I do not

think there is anything on the record from which it could be established that the plaintiffs by their conduct induced Subbammal to do anything to her own detriment. Subbammal and the plaintiffs all allowed their mother to execute the will and they all took under that will. No representation was made by the plaintiffs to Subbammal, or by Subbammal to the plaintiffs. Either, all of them were ignorant of their real rights or all of them knew their real rights and chose to act according to their ignorance, or in spite of their knowledge as the case may be. This contention therefore fails. The second contention involves more difficult questions. It must be now taken as settled that a partition of immoveable properties of whatever value can be effected without any registered instrument in writing, as it is not an exchange, sale, mortgage or lease. (See *Gyannessa v. Mobarakannessa*(1) which was decided by AMEER ALI and MACPHERSON, JJ.) I feel bound by the authority of the decision of the eminent judges who took part in that case, as that decision seems not to have been questioned in any other High Court. In *Satya Kumar Banerjee v. Satya Kripal Banerjee*(2), *Gyannessa v. Mobarakannessa*(1) is followed and reference is further made to the Privy Council case of *Rewun Persad v. Mussumat Radha Beeby*(3). But the Privy Council case had been decided long before the Transfer of Property Act came into force. In *Subramania Iyer v. Savitri Ammal*(4), it was held that if a partition was effected by an instrument in writing and if the property was of the statutory value, the deed of partition must be registered. But, as pointed out in *Satya Kumar Banerjee v. Satya Kripal Banerjee*(2), *Subramania Iyer v. Savitri Ammal*(4) does not lay down that partition cannot be effected orally. As I said before, I am not prepared to dissent from the view that notwithstanding the Transfer of Property Act, a partition of immoveable property of whatever value may be effected by oral arrangement. In *Ariyaputhira v. Muthukomaraswami*(5), I have ventured to state that all conveyances of rights of ownership in lands were intended to be brought under 'sales' or 'gifts' or 'exchanges,'

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(1) (1898) I.L.R., 25 Calc., 210.

(2) (1909) 10 C.L.J., 508.

(3) (1846) 4 M.I.A., 137.

(4) (1908) 4 M.L.T., 354.

(5) (1914) I.L.R., 37 Mad., 423.

(1) [1897] 2 Ch., 86.

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and to be effected as a rule by registered instruments, and I also expressed the wish that the British Indian Legislature would pass an enactment making a registered writing indispensable for the validity of all settlements, partition agreements, and wills and authorities to adopt, making very few exceptions in special cases (such as soldiers' and sailors' wills). I took it for granted in that decision that it was too late to hold that partition agreements could be validly made only by registered instruments.

In *Latchumammal v. Gangammal*(1), BENSON and KRISHNASWAMI AYYAR, JJ., held that there is nothing in the Transfer of Property Act to prevent co-widows from effecting an absolute division of properties orally. It seems to have been conceded there that if the partition be only for life with the right of survivorship, it may be valid though oral. Reliance was placed in that case on *Thiruvengidachariar v. Ranganatha Aiyangar*(2) for the view that partition need not be in writing. But *Thiruvengidachariar v. Ranganatha Aiyangar*(2) was a case of an oral transfer of lands to a sister by two brothers in satisfaction of a claim made by her. I ventured to doubt the correctness of that decision in *Ariyaputhira v. Muthukomaraswami*(3). But, so far as partition agreements are concerned, I have not come across any case which treats such transactions as coming under 'sales' or 'exchanges.' While I do not adopt the entire reasoning in *Latchumammal v. Gangammal*(1), therefore, I think that if a partition (which involves relinquishment of mutual rights) can be effected orally, the mere fact that the rights mutually relinquished under the oral partition are to continue for periods of greater or less duration cannot have much bearing on the question whether written instruments are required to effect valid partitions. In this view, the plaintiffs having effected an oral partition with Subbammal, giving her under the oral partition-agreement an absolute right in the plaint properties, which gift involves the relinquishment by themselves of their right to claim possession of the properties if they survived Subbammal, the said partition arrangement is binding upon them, though it may not bind the reversioner entitled

(1) (1911) I.L.R., 84 Mad., 72.

(2) (1903) 18 M.L.J., 500.

(3) (1914) I.L.R., 37 Mad., 423.

to the estate of Sambasiva Aiyar after the plaintiffs' death, and hence I hold that the plaintiffs' suit was rightly dismissed. [See *Ramakkal v. Ramasami Naickan*(1).] In the result the Second Appeal is dismissed with costs.

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NAPIER, J.—I concur with my learned brother in holding that there was an oral partition acted on by the parties, and that accordingly the Second Appeal should be dismissed.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

MUTHIYALA CHENGAPPA (PLAINTIFF), APPELLANT,

1920.
July 30.

v.

BURADAGUNTA alias AKULA VENKATASAMI
(FIRST DEFENDANT), RESPONDENT.*

Hindu Law—Co-widows—Relinquishment by one in favour of the other—Death of the latter before the former—Male reversioners—Right of inheritance, whether accelerated—Limitation Act (IX of 1908), art. 141—Suit by alienes from male reversioners, more than twelve years from death of latter widow, but within twelve years of the death of surviving widow—Limitation.

Where a Hindu widow gave up all her rights in her husband's estate in favour of her co-widow, and the latter predeceased the former, the right of succession of the male reversioners to the estate is not accelerated so as to entitle them to succeed to it immediately on the death of the widow in whose favour the relinquishment was made. A suit by the reversioners to set aside an alienation by the latter widow would be within time, under article 141 of the Limitation Act, if brought within twelve years from the death of the last surviving widow.

SECOND APPEAL against the decree of J. C. H. FOWLER, acting District Judge of North Arcot, in Appeal Suit No. 799 of 1917, preferred against the decree of C. BHASHYAM AYYANGAR, District Munsif, Madanapalle, in Original Suit No. 366 of 1916.

One Gurappa died issueless in 1883, leaving two widows, Papakka (senior) and Papakka (junior). The junior widow on receipt of rupees thirty gave up all her rights in her husband's

(1) (1899) I.L.R., 22 Mad., 522.

* Second Appeal No. 1562 of 1919.

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estate to the senior widow under a registered document (Exhibit E), dated 22nd June 1883. The material terms of the document were as follows :—

“On my raising a dispute that I should get a share of the property earned by my husband, you and I have made an agreement between us. Accordingly, on receiving rupees thirty from you this day, I have given up my right to my husband's property now in your possession.”

After stating particulars of items, the document proceeded as follows :—

“I have given up right to a share in the property comprising the above lands and other brass things and other moveables worth Rs. 98 on receiving the above amount from you. So having yourself the proprietary right to that share you should enjoy it always, but I shall have nothing to do with it”

(Mark of) Router Gurumurta's second wife
Papakka.

Subsequently, the senior widow alienated the properties without necessity to the defendants in this suit, and died in 1902. The junior widow died in 1914. The nearest male reversioners, who succeeded to the estate on her death in 1914, sold the suit properties on 26th August 1916 to the plaintiff, who instituted the present suit on 16th October 1916 against the defendants who were the alienees from the senior widow. The defendants pleaded, inter alia, that the suit was barred by limitation. The District Munsif decreed the suit in favour of the plaintiff. On appeal, the learned District Judge held that the suit was barred by limitation, and, reversing the decree, dismissed the suit. The plaintiff preferred this Second Appeal.

P. Somasundaram and B. Somayya, for appellant.

L. A. Govindaraghava Ayyar for *A. Ramachandru Ayyar*, for respondent.

SADASIYA
AYYAR, J.

SADASIYA AYYAR, J.—The plaintiff is the appellant in this Second Appeal. He is the purchaser from the reversioner to the estate of one Gurappa. Gurappa died in 1883, leaving two widows as his heirs. The younger widow on receipt of rupees thirty gave up all her rights (about six months after her husband's death) in favour of the elder widow under the deed, Exhibit E. I agree with the Lower Appellate Court on the

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construction of Exhibit E, that she thereby gave up her whole life-interest in her husband's estate, whether that interest might have extended beyond the lifetime of the elder widow or whether it would have come to an end during the lifetime of the elder widow. The elder widow died in 1902 and the younger widow in 1914, and the present suit was brought by the purchaser from the male reversioner in 1916. The learned District Judge dismissed the suit on the preliminary ground of limitation. His argument was, that by the junior widow giving up her right of survivorship (if she happened to survive the senior widow), the senior widow not only represented the whole widow's estate during her own lifetime, but that on her death, the fact that the junior widow was still living was no obstacle to prevent the reversioners from coming in, the junior widow's relinquishment having accelerated the succession of the male reversioner, and as such acceleration took place in 1902 and the suit was brought in 1916, the plaintiff was barred under article 144 of the Limitation Act.

It was argued before us, in the first place, by the appellant's learned vakil that the senior widow on her death owned a sort of stridhanam in her husband's property which was inherited by her own heirs, that the junior widow was the heir to that stridhanam estate (which however lasted only till the junior widow died in 1914), and that the reversioner became entitled to inherit the whole of the husband's estate only afterwards; and reliance was placed on *Pappammal v. Venkatasami Naikar*(1). As this question of the right of a widow who had parted with her rights to her co-widow to inherit the right again on the death of the co-widow is said to be under consideration before another Bench of this Court, and as I feel doubts as to an estate surrendered by a widow to a co-widow constituting in some sense or to any extent the property of the surrenderee held by her in a different capacity from that of the widow of her husband, I shall not deal with this question further in this case, it not being necessary for the purpose of deciding this Second Appeal to express a final opinion on that question.

The next point is whether there was this acceleration of the right of the male reversioner on the death of the elder widow.

(1) S.A. No. 356 of 1918 (unreported.)

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Ayyar, J.

Acceleration by surrender to the next male reversioner (which I take it, means a surrender known to and accepted by him) is, no doubt, known to the law.

Acceleration caused by the statute law declaring that a widow contracting second marriage shall be deemed to have died can also be understood: but acceleration of the right of a male reversioner by transactions between two or more joint female heirs cannot in my opinion be contrived by them without the knowledge or consent of the reversioner. Article 141 of the Limitation Act, though it uses the word 'female' in the singular clearly covers a case where the Hindu reversioner is entitled to the property on the deaths of more than one female heir inheriting jointly. And when the last column speaks of 'when the female dies' it clearly means in such a case 'after the deaths of all the female co-heirs.' That a male reversioner's right should be accelerated by agreements to which he is not a party is to me a very startling proposition, and even though there may be more startling propositions and anomalous rules in the modern Hindu Law, I do not see why I should extend such anomalies unless I am bound by clear authorities and precedents to do so. Mr. Govindaraghava Ayyar relied upon a passage in *Rindamma v. Venkataramappa*(1). That was a case in which the appellant alone was heard, the respondent being absent. The appellant's counsel had evidently argued that there might be an agreement between co-widows so as to let in the next heirs of the husband immediately upon the death of the widow who died first. The learned Judges of the Bench remarked upon this argument:

"We are not prepared to say that they might not enter into such an agreement as would bind each to an absolute surrender of all interest in the other's share so as to let in the next heirs of the husband immediately upon the death of that other. But there is no such agreement in the case."

Thus the learned Judges finally stated that the argument had no relevancy to the facts of that case, though they began by saying that they were not prepared to say that there might not be something in the argument. This is a very weak foundation for the contention that an agreement by which the succession

(1) (1886) 3 M.H.C.R., 268.

of the reversioner can be accelerated might be made behind his back. Further, the acceleration can affect (if at all) only the half share which belonged to the elder widow who died first (and the right to enjoy which half share by survivorship was abandoned by the younger widow), and could not apply to the share of the younger widow who conveyed her rights to the widow who died first (because that share was not surrendered to any reversioner, and surrender which accelerates is surrender to the succeeding reversioner and not a surrender to a co-widow).

In the result, I would set aside the judgment of the District Judge who proceeded upon the sole ground of limitation, and would remand the appeal to him for disposal on the other questions arising in the case.

NAPIER, J.—I entirely agree.

K.R.

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APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

SRI RAJAH SOBHANADRI APPA RAO BAHADUR,
ZAMINDAR GARU (THIRD PLAINTIFF), APPELLANT,

v.

GURRAJU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (1 of 1908), sec. 189 (3)—Civil Procedure Code (V of 1908), s. 11—Res judicata—Suit to enforce acceptance of patta—Decision by Revenue Court—Decision as to occupancy right or title to land claimed as part of the holding—Subsequent suit in a Civil Court for ejectment of tenant as trespasser—Decision of Revenue Court, whether binding as res judicata in the suit in Civil Court.

Section 189 (3) of the Madras Estates Land Act does not constitute the decisions of the Revenue Courts, on an issue as to title to land or occupancy rights therein arising incidentally in suits to enforce the acceptance of pattas which are cognizable exclusively by such Courts, res judicata in a subsequent suit in a Civil Court instituted by the landlord for ejectment of the tenant from such land.

SECOND APPEAL against the decree of V. R. KUPPUSWAMI AYYAR, Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 262

* Second Appeal No. 2123 of 1918.

1920,
March 19
and 22.

APPA RAO v. GURRAJU. of 1917, preferred against the decree of R. V. KRISHNA AYYAR, District Munsif of Ellore, in Original Suit No. 667 of 1915.

The material facts are set out in the judgment.

T. Ramachandra Rao for appellant.

V. Suryanarayana for respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The third plaintiff is the appellant, he being the Zamindar of Nuzvid. The defendants in these suits claimed to hold what are called 'Banjar' lands as part of their respective jirayati holdings. The plaintiff's case is that these banjar lands are not parts of these defendants' jirayati holdings, but had been in their occupation on temporary grazing leases, and that on the date of the suits the defendants were in possession as mere trespassers. The suits were brought, on the strength of section 163 of the Estates Land Act (I of 1908), in the Civil Court.

Both the lower Courts found as a matter of fact that these banjar lands were jirayati lands, that they were treated by the Zamindar from time immemorial as parts of the respective holdings of the defendants which contained other lands admitted to be jirayati, and that the defendants were not trespassers. But the plaintiff argued, that by reason of the decisions in certain prior suits brought by the plaintiff (or rather the person who then represented the interests of the plaintiff) for the enforcements of pattas for the former fasli, the question whether the defendants were entitled to hold these particular lands as ryots must be decided against them as *res judicata*. For this contention the language of section 180, clause (3) of the Estates Land Act is relied on.

It is admitted that the matter is not *res judicata* if section 11 of the Civil Procedure Code, or if the principle embodied in section 11, can alone be relied upon in argument, because the present suits in ejectment are not cognizable by the Revenue Court which tried the former suits. Hence, the appellant was constrained to rely in support of his argument upon what he contended was the true meaning of section 189 (3) of the Estates Land Act.

Now, where Revenue Courts and Civil Courts are thus exercising jurisdiction in disputes between the same parties (one kind of Court in certain matters and the other kind in some other matters), it is desirable that the legislature clearly set out in detail

the particular matters over which each set of Courts is intended to have jurisdiction, and also provide clearly and definitely what has to be done when conflicts arise between the opinions of the two sets of Courts on the same question, when they are dealing with the separate matters within their respective jurisdictions. I shall just quote a few passages from *Sheo Narain Rai v. Parmeshar Rai*(1) (such conflicts having apparently arisen in the United Provinces frequently) :

"As it is not conceivable that the legislature could have intended that there should be of its own creation two sets of Courts in these provinces, each having jurisdiction to determine the same questions of title to land let to agricultural tenants and neither having any power to compel the other to accept its decision by revision or other procedure or by process, we must assume that in all cases in which it is clear that for the purposes of adjudicating upon an application or making a decree in the suit it was the intention of legislature that the decision on the question of title of the Court which was given the exclusive jurisdiction to entertain the application or the suit should, subject to such rights of appeal as was allowed by the Statute, be final between the parties unless the contrary intention was expressed."

Then in another part of the judgment (at page 280) the learned Judges say—

"It may be inferred from a long series of decisions . . . that the opinion was entertained by all the Judges who in these provinces or in the Lower Provinces of Bengal have considered the question, that questions of proprietary title to land and of title to tenancies between rival claimants but not questions as to the status of a tenant of agricultural land, are questions which should be determined by the Civil Courts and not by the Court of Revenue in the more or less summary proceedings of the latter Courts."

Then they consider the particular provisions of the Act which had to be considered in that case and arrive at the conclusion that on a particular point the decision of the Revenue Courts should be treated as final. The difficulties which the learned Judges felt in arriving at their conclusion are indicated by other passages in the judgment (at page 275) :

"It frequently happens that a Court of Revenue and a Civil Court come to different conclusions on the same question of title

(1) (1896) I.L.R., 18 All., 270 (F.B.).

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litigated between the same parties in reference to the same lands. In such a case which decision is to prevail? Is that decision to prevail which was first given or is that decision to prevail which was given in the proceeding or suit first instituted or is the time of one of such Courts to be taken up in arriving at a decision which when pronounced will not be binding on the other Court and will be for all practical purposes a *brutum fulmen*? How is such decision to be enforced? It is clear that unless a question of title arising in proceedings in ejectment under Act XII of 1881 had been determined between the parties by a reference to a Civil Court under section 204 of that Act or in a suit instituted in accordance with an order of a Court of Revenue, made under section 208-A of that Act, the Court of Revenue would not be bound by the finding as to title of a Civil Court. The decision of an issue as to title by a Civil Court would not operate *res judicata* under section 13 of Act XIV of 1882 as to the same question of title in proceedings under sections 36 and 39 of Act XII of 1881, although between the same parties and relating to the same land; and similarly a decision of a Court of Revenue under section 39 of Act XII of 1881, adverse to the application under that section, contesting the liability of the person upon whom a notice of ejectment had been served, would not operate as *res judicata* under section 13 of Act XIV of 1882 in a suit for ejectment in a Civil Court between the same parties, the Court of Revenue not having jurisdiction to try a suit to eject a trespasser, and a Civil Court not having jurisdiction to try an application under section 39 of Act XII of 1881 contesting liability to ejectment."

At page 273 they say :

"This is one of that class of cases which exemplifies the mischief which arises when the jurisdiction of Courts created by the legislature is not plainly and explicitly and sharply defined. That mischief is intensified when, as in these provinces, there are two sets of Courts, the Courts of Revenue and the Civil Courts, each having in some matters exclusive jurisdiction whilst as to other matters the question as to which of such Courts has exclusive jurisdiction depends, not upon plain and explicit language of the legislature but upon inference to be drawn, from a painstaking examination of a variety of sections in an Act and upon general principles of jurisprudence upon which it is assumed that the legislature has acted."

Having made the above quotations to indicate the difficulties created by the legislature, I shall approach the consideration of

this case, with reference to certain general principles of jurisprudence. Civil Courts have got unlimited jurisdiction over Civil rights, except when such jurisdiction is expressly taken away and conferred upon another kind of Court. Hence, provisions of statutes taking away or restricting the jurisdiction of Civil Courts ought to be strictly construed. Further, it is the duty of special Courts having restricted jurisdiction to respect and follow the decisions of ordinary Civil Courts on matters of title to land and on such important questions as questions relating to status and rights, even though the former Courts have jurisdiction to decide such important questions incidentally when dealing with special matters which have been placed by the legislature within their exclusive jurisdiction. That duty is recognized expressly by the legislature in the Provincial Small Cause Courts Act, and in the possession chapter of the Criminal Procedure Code. That duty has been enforced by the decisions of this High Court in cases arising under the maintenance chapter of the Criminal Procedure Code. Section 213, clause (3) of the Estates Land Act also recognizes that general principle. No doubt in the absence of a decision of a Civil Court on a question of title, the principle embodied in section 11, Civil Procedure Code, though not that section itself (because that section is not one of the sections made applicable to the Revenue Courts expressly by section 192 of the Estates Land Act), would apply, and a Revenue Court deciding a subsequent suit ought to accept the findings (even incidental but necessary findings) of the same Court in a former suit. See *Bayyan Naidu v. Suryanarayana*(1) and *Venkatachalapati v. Krishna*(2). But (1) if a question of title arises in the Revenue Court for the first time incidentally and is decided in one way; (2) if it then arises in a Civil Court and was decided in the opposite way; and (3) if it again arises in the Revenue Court in a third suit exclusively cognizable by that Court the Revenue Court, in my opinion, should, on this third occasion respect the decision of the Civil Court given on the second occasion and not follow its own finding in the first suit. I have carefully considered the several relevant sections of the Estates Land Act (sections 40, 51, 57, 153, 163 and 213 besides the section directly in question, viz., 189) and have come to the conclusion

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(1) (1914) I.L.R., 37 Mad., 70.

(2) (1890) I.L.R., 18 Mad., 287.

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that section 189 (3) was not intended to go beyond section 11, Civil Procedure Code, and to constitute the decisions on issues arrived at in the Revenue Court, in suits cognizable exclusively by the Revenue Courts, binding on a Civil Court as *res judicata*, even though the subsequent suit brought in the Civil Court could not be brought in a Revenue Court. That principle seems to me to follow from the observations found in *Subbanna Achariar v. Gopalakrishna Achariar*(1), *Chidambaram Pillai v. Muthumal*(2), *Gouse Moideen Sahib v. Muthialu Chettiar*(3) and *Seetharamayya v. Narasimulu*(4). I do not think it necessary to elaborate the matter, because I am glad to find that the question was considered so recently as last week in *Sri Rajah Satrucharla Sivaskandamraju v. Venkandhora*(5) by a Division Bench of this Court (AYLING and COUTTS TROTTER, JJ.). The learned Judges held that the decision of a Revenue Court, on the question whether the relationship of landlord and tenant existed or not, was not *res judicata* in a subsequent suit in a Civil Court as this subsequent suit was not cognizable by a Revenue Court. Section 189, clause (3), was quoted before the learned Judges, but they held that it did not extend the scope of the doctrine of *res judicata* in favour of the decision of Revenue Courts beyond what was enacted in section 11, Civil Procedure Code.

As I said already, I think it is the duty of the legislature to make the provisions in the Estates Land Act on these points more clear and definite. I might even say that whenever the relationship of landlord and tenant is denied in a Revenue Court, or a question of title which cannot be finally decided by a Revenue Court is raised in that Court, provision ought to be made to stay the proceedings in the Revenue Court till this matter is finally decided by a suit in a Civil Court. I shall just quote what the Allahabad High Court has said on this matter in *Sheo Narain Rai v. Parmeshwar Rai*(6) (modifying the language of the learned Judges slightly because they were dealing with a different enactment):

"In our opinion whenever, in suits or applications exclusively cognizable by a Revenue Court, the relationship of landlord and tenant between the parties or between those through whom they

(1) (1916) 34 I.C., 354.

(3) (1918) 14 M.L.T., 523.

(5) S.A. No. 786 of 1919.

(2) (1914) 15 M.L.T., 340.

(4) S.A. No. 1002 of 1916.

(6) (1896) I.L.R., 18 All., 270 at 281 (F.B.).

claim had not been admitted . . . it should be compulsory on the Court of Revenue to pass an order staying the proceedings before it for a limited time within which the party denying that the relationship of landlord and tenant existed might bring a suit in a Civil Court to determine the question of title. If no such suit should have been brought within a limited time, the Court of Revenue should without further inquiry decide finally the question of title against the party who had denied that the relationship of landlord and tenant existed. If such suit were brought, the Court of Revenue should be bound to accept the result of that suit as determining the question of title whether the suit was determined in the Civil Court by a dismissal for default or upon an adjudication on the questions of title."

In the result, I agree with the Lower Appellate Court's conclusion on the question of *res judicata* argued before us and would therefore dismiss these Second Appeals with costs.

SPENCER, J.—In these suits there can be no doubt that no plea of *res judicata* under section 11 of the Civil Procedure Code can be maintained, as the Revenue Court which decided the previous suits for acceptance of patta in 1909 was not competent to try the present suits for delivery of possession. But the plaintiff relies on section 189, clause (3), of the Estates Land Act which declares that

"the decision of a Revenue Court or of an appellate or revisional authority in any suit or proceeding under this Act on a matter falling within the exclusive jurisdiction of the Revenue Court shall be binding on the parties thereto and persons claiming under them in any suit or proceeding in a Civil Court in which such matter may be in issue between them."

It is argued that suits to enforce acceptance of pattas under section 56 are suits within the exclusive jurisdiction of Revenue Courts. With this argument I agree. Similarly, suits under section 30 for enhancement of rent, section 38 for reduction of rent, section 40 for commutation of rent, and section 55 to obtain a patta, are suits exclusively cognizable by Revenue Courts.

Next it is argued that since, in such suits, the Collector is bound by the provisions of section 57 to first inquire whether the defendant is bound to accept a patta and secondly whether the patta tendered is a proper one, and since in section 51 the local

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description and extent of the land, and all special terms by which the parties are to be bound are some of the details to be contained in the patta, a Civil Court is precluded from going into the question whether a ryot, who was previously a party to suits for acceptance of patta, has occupancy rights in any portion of the land in that patta. I think the District Munsif has given the correct answer to this argument in paragraph 11 of his judgment. He says:

"in deciding the propriety of the terms of a patta the question of the defendants' . . . occupancy rights does no doubt arise for incidental decision, but it cannot be said that it arises so directly and substantially for decision that the decision thereon by a Revenue Court can be said to be res judicata in a subsequent ejectment suit in a Civil Court where the question may again directly and substantially crop up."

I think that the intention of the legislature in framing section 189 was that such questions as those relating to the fairness and propriety of the rate of rent fixed by a Revenue Court which a Collector from his experience of the agricultural conditions and the rates and prices prevailing in his district is in a position best fitted to settle, should not be again agitated in a Civil Court after they have been once decided in suits instituted in Revenue Courts under sections 30, 38, 40, 55 and 56 of the Estates Land Act. In the present case, I am of opinion that the prior decision having been a decision upon an incidental question as to occupancy rights, and not a matter falling within the exclusive jurisdiction of a Revenue Court, is not binding on the Civil Court under section 189 (3), although it did arise in a suit to enforce acceptance of patta which was exclusively cognizable by a Revenue Court. This view is supported by the opinion expressed in two unreported cases, *Setharamayya v. Narasimulu*(1), decided by SESHAGIRI AYYAR and NAHER, JJ., and *Sri Rajah Satrucharla Sivaskandamraju v. Venkandhora*(2), decided by AYLING and COTTS TROTTER, JJ. I agree with my learned brother that these appeals should be dismissed with costs.

K.R.

(1) S.A. No. 1002 of 1916 (unreported). (2) S.A. No. 786 of 1919 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

SOORATHA SINGA (PLAINTIFF), APPELLANT,

v.

KANAKA SINGA (DEFENDANT), RESPONDENT.*

1919,
August 5,
1920,
March 26.

Hindu Law—Adoption—Brother's daughter's son, adoption of, whether valid—Custom—South Kanara—Kshatriyas—Custom whether established.

Adoption of a brother's daughter's son is allowed by custom which has been proved to exist among a community of Rajputs of the Kshatriya caste settled in South Kanara.

SECOND APPEAL against the decree of L. G. MOORE, District Judge of South Kanara, in Appeal Suit No. 189 of 1915, preferred against the decree of V. KUNHI RAMAN NAYAR, District Munsif of Kasaragod, in Original Suit No. 7 of 1914.

This Second Appeal arises out of a suit by the plaintiff for a declaration that a deed of adoption, Exhibit A, executed by him by which he adopted the defendant as his son was invalid and inoperative. The defendant was the plaintiff's brother's daughter's son. The parties belonged to a community of Rajputs of the Kshatriya caste, who had migrated from Rajputana and long settled in South Kanara. The Lower Courts dismissed the suit. On Second Appeal, the High Court remanded the case for finding on the issue as to custom among the parties to the suit. The other facts are set out in the judgment.

S. Srinivasa Ayyangar and K. P. Lakshmana Rao for the appellant.

K. Sadasiva Rao and K. Sundara Rao for the respondent.

The case came on for hearing before BAKEWELL and ODGERS, JJ., and the JUDGMENT of the Court was delivered by

BAKEWELL, J.—The general rule of Hindu Law is against the validity of the adoption in this case: *Minaskhi v. Ramanada* (1); but this rule may be varied by custom, and such a custom has been held to obtain in the southern districts of the Madras Presidency [*Vayidinada v. Appu*(2), *Appaya Bhattar v. Vengu*

* Second Appeal No. 1129 of 1918.

(1) (1888) I.L.R., 11 Mad., 49 (F.B.). (2) (1816) I.L.R., 9 Mad., 44 (F.B.)

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Bhatlar(1)]. The Lower Appellate Court has not found upon the evidence whether such a custom exists in the caste of the plaintiff and defendant, or in South Kanara, which does not form part of the southern districts. The appellant is responsible for all the costs of this litigation, and we direct him to pay all costs incurred up to this day, before the 15th September 1919. Upon payment of the costs before that day, we direct the District Judge to record a finding upon the following issue:—

Is the adoption in this case valid according to the customs observed by the parties?

No additional evidence will be taken. In default of payment the appeal will stand dismissed with costs.

The finding is to be returned before the 15th of October 1919, and seven days will be allowed for filing objections.

[The District Judge of South Kanara accordingly submitted a finding that the adoption was "valid according to the custom observed by the parties." The JUDGMENT of the Court was delivered by—

SADASIVA
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SADASIVA AYYAR, J.—We think that the plaintiff's admission in Exhibit A was an admission both of the fact and of the validity of the defendant's adoption [see *Ramalinga Pillai v. Sadasiva Pillai*(2)]. The burden of proving that it was not valid was therefore shifted on to the plaintiff's shoulders. Even if it is not so, the custom against the supposed rule, based on the text relating to the reflection of a son is so widespread that very little evidence will turn the scale against that rule. The plaintiff admitted in his evidence that the usages of his community did not differ from those of the Gowd Saraswat Brahmans. He being a Kshatriya (presumably not very pure in extraction, clans of pure Kshatriyas being very rare), the customs of his community could not be more strict than those of Saraswat Brahmans. In *Manjunath v. Kaveri-bai*(3) it was held that the custom among Gowd Saraswat Brahmans of Kanara (both north and south which were situated near the Dravida country) allowed the adoption of a sister's son [see as regards Dravida custom, *Vayidinada v. Appu*(4)]. The case of a

(1) (1905) 15 M.L.J., 211.

(3) (1902) 4 Bom. L.R., 140.

(2) (1884) 9 M.I.A., 510.

(4) (1886) I.L.R., 9 Mad., 44 (F.B.).

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brother's daughter's son (against whose adoption there is no direct text as in the case of a daughter's son, sister's son and mother's sister's son) stands on a more favourable footing. The community of the parties to the suit migrated from Rajputana and have settled in South Kanara for long. The law which they brought with them did not evidently prohibit the adoption of a brother's daughter's son [see *Biswanath v. Kalicharan*(1) and *Yamnavu v. Lazman Bhimrao*(2)].

Though the oral evidence on defendant's side in this case is meagre, we think that that evidence, being corroborated by the probabilities, by *Manjunath v. Kaveri-bai*(3), and by the admission of the plaintiff as to the customs and usages of his community not differing from those of Saraswat Brahmans, can be treated as sufficient under the circumstances to establish the custom which allows the adoption of a brother's daughter's son.

In the result, we accept the finding and dismiss the Second Appeal with costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

MUTHUSWAMI SWAMIAR (PLAINTIFF), APPELLANT,

v.

SOMOO KANDIAR AND THREE OTHERS (DEFENDANTS),
RESPONDENTS.*

*Provincial Insolvency Act (III of 1907), ss. 16 (2), 18 (2) and 19 (2)—
Adjudication of a person as insolvent—Necessity of an order appointing a
person as Receiver of the insolvent's estate.*

Section 18 (2) of the Provincial Insolvency Act (III of 1907) contemplates on every adjudication of insolvency an order by the Court appointing Receiver for the insolvent's estate and without such an order the estate does not vest in the Official Receiver under section 19 (2). Hence a sale of the estate by the Official Receiver without such an order does not give the vendee any title.

Official Receiver of Trichinopoly v. Somanundaram Chettiar, (1916) 30 M.L.J. 415, followed.

(1) (1918) 27 C.L.J., 119 (2) (1912) I.L.R., 36 Bom., 533.
(3) (1902) 4 Bom. L.R., 140.

* Second Appeal No. 604 of 1918.

1920,
April 8.

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SECOND APPEAL against the decree of G. ANANTA NARAYANA AYYANGAR, Temporary Subordinate Judge of Tanjore, in Appeal No. 135 of 1917, filed against the decree of K. S. GOPALARATNAM AYYAR, District Munsif of Tiruvadi, in Original Suit No. 63 of 1916.

The facts are set out in the Judgment.

K. S. Sankara Ayyar for T. R. Venkatarama Sastri, for the appellant.

C. A. Seshagiri Sastri and S. Rangachari for K. R. Rangaswami Ayyangar, for the respondents.

OLDFIELD, J.—Plaintiff, here appellant, purchased the mortgage right now sued on at a sale held by the Official Receiver, Tanjore District, in the insolvency of fourth defendant and has sued first defendant, the mortgagor, to recover by sale of the mortgaged property. The only defence, with which we are concerned at present, is that plaintiff did not obtain the mortgage right by his purchase because it had not vested in the Official Receiver and could not be sold by him. The Lower Courts accepted this with reference to *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1) in which two learned Judges held that, when, as in the present case, an adjudication of insolvency is made by an Official Receiver in the exercise of the powers delegated to him under section 52 (1) (a), Provincial Insolvency Act, the insolvent's estate does not vest in him under section 18, or any other provision, and will not do so unless an order vesting it in him is passed by the Court. *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1) has not been judicially noticed except, by one of the learned Judges responsible for it, in *Rama Aiyar v. Official Receiver, Tinnevely*(2). The reasoning supporting the portion of the judgment in question is very shortly stated; but the conclusion reached must affect insolvency practice throughout the Presidency. That conclusion entails the Official Receiver's inaction after passing the order of adjudication, until he has reported his doing so to the Court, which originally entertained the insolvency petition, and has obtained its order appointing him Receiver and vesting the estate in him. Any postponement of the vesting of the estate in an authority more competent to administer it than that Court is to be deprecated

(1) (1916) 30 M.L.J., 415.

(2) (1917) 32 M.L.J., 520.

and may have disastrous results, if moveable property is in question. We think it necessary to satisfy ourselves that this result is inevitable by close scrutiny of the law.

It is urged first that it is not, because the Official Receiver, in the exercise of his delegated powers under section 52, becomes 'the Court' for purposes ancillary to that exercise, of which the vesting of the insolvent's estate in the 'Court' under section 16 (2) (a) is one. This can be rejected shortly. The stages of adjudication and administration are distinct; under section 52 the Official Receiver does not become the 'Court' in the exercise of his delegated powers, but under section 52 (2) his orders or acts are merely to be deemed to be those of the Court; and he does not come within the definition of the 'Court' in section 2 (1) (9)—see *Alla v. Kuppai*(1).

To turn to more substantial considerations, the decision in *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(2) was reached with reference to the provision in section 16 (2) (a) for the vesting of the estate 'in the Court or a Receiver as hereinafter provided' and the construction of the last three words as relating only to the provision in section 18 (1) for the appointment of a Receiver and the vesting in him thereupon of the estate. Reliance is placed on the absence of any provision for vesting in section 19 relating to Official Receivers, and the argument that the Act does not provide for it except in connexion with an appointment, which is therefore necessary in each case. The alternative contention is that under section 19 (2) the Official Receiver becomes, by operation of law, the Receiver in each case and that such receivership also, and not only those conferred by appointment under section 18, are within the purview of the words already referred to, 'as hereinafter provided' in section 16 (2) (a).

The balance of convenience is, as I have pointed out, in favour of the second of these constructions. But consideration of the wording of section 18 (2) and of the English Act, on which this procedure is founded, forbids its adoption. For section 18 (2) assumes by its reference to an order of appointment of a Receiver that such an order is to be passed, even if the Official

(1) (1917) I.L.R., 40 Mad., 752.

(2) (1916) 30 M.L.J., 415.

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Receiver is to act; and, although there is separate provision for such an order, this reference cannot be disregarded. Its significance and probably its origin are disclosed by comparison with section 9 of the English Bankruptcy Act of 1883, under which 'on the making of a receiving order an Official Receiver shall be thereby constituted Receiver of the property of the debtor' the word 'thereby' supporting no appointment by mere implication, since, as the forms of receiving order Nos. 28 and 29 show, a distinct order constituting a Receiver for the estate is to be passed. The necessity for such an order is accounted for by the fact that in England, as section 66 (3) of the Act and rule 323-A framed under it show, the contingency of the existence of more than one Official Receiver for each area is contemplated; and it is possible that, although no explicit reference is made to this contingency in the Indian Act, it was in the mind of the draftsman and is provided for in section 19 (2), the introduction of the procedure authorized by section 17 of the Presidency Act with its immediate vesting of the property in the Official Assignee being deliberately avoided. It is consistent with this that, whilst under section 77, Presidency Towns Insolvency Act, only one person can be appointed to the office of Official Assignee of insolvents' estates for each High Court, under section 19 (1) of the Provincial Insolvency Act, there is no restriction on the number of appointments for a particular area. It may be said on the one hand that this conflicts with the reference in section 19 (2) to the appointment of an Official Receiver for the local limits of any Court having jurisdiction under the Act, his designation as the Receiver to act in all cases arising in it and the omission of any direction, such as the English Act gives, regarding the method of selection of the Official Receiver to act when more than one have been appointed; and on the other hand that the Indian provisions cannot be explained by reference to the English, when the scheme of the latter, including the employment as matter of course of the Official Receiver as Receiver from the receiving order until the order of adjudication and the subsequent vesting in him, as trustee under the English section 54, differs radically from that of the former. But the only conclusion can be that the adaptation of the English procedure to Indian circumstances has been imperfect, and that reason has not been shown for the

rejection of an explanation of the wording of the Indian section 19 (2), for which appellant has failed to account and which must receive effect.

In these circumstances I am constrained to hold that the law was stated correctly in *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1). The appeal is dismissed with costs.

SESHAGIRI AYYAR, J.—While not disagreeing with my learned brother, I cannot help saying that the previous decisions of this Court and the conclusion to which he has come have the effect of unsettling the practice in the lower Courts and of making an unnecessary departure from what obtains in insolvency matters in the Presidency towns. The drafting of the Act, and especially of clause (2), section 19 of the Provincial Insolvency Act is responsible for this state of things.

Mr. Justice OLDFIELD has stated the facts and the law fully. I shall only add a few sentences. The contention of Mr. Seshagiri Sastriyar, vakil for the third respondent, is that, unless the Official Receiver is appointed, in each case of insolvency, as receiver of the estate, the property of the insolvent does not vest in him. Section 16, clause (2), provides for the vesting of the property 'in the Court or in a Receiver as hereinafter provided.' Under section 52, the High Court, can, by rules, invest the Official Receiver with jurisdiction to hear insolvency petitions, to examine the debtors and to make orders of adjudication. Reading these two provisions, the natural inference is that the Official Receiver appointed by the Local Government and invested with powers to adjudicate by the High Court, would have the property of the insolvent under his control. Unfortunately section 19, clause (2) uses this language:

"Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the Receiver for the purpose of every order appointing a Receiver issued by any such Court . . ."

I do not find it easy to understand the meaning of the words italicised by me. If it was the intention of the legislature that the property should not vest in the Official

(1) (1916) 30 M.L.J., 415.

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Receiver unless he was appointed Receiver in the particular insolvency, fewer words would have sufficed. It is equally open to argument as was suggested by the learned vakil for the third respondent, that, if the legislature intended that, the property of the insolvent vests in the Official Receiver, by virtue of his appointment, the section would have been differently worded. The real trouble arises from the difference in language between the Presidency Towns Insolvency Act and the Provincial Insolvency Act. In section 17 of the Presidency Towns Insolvency Act, there is an express declaration, that on the making of an order of adjudication, the property shall vest in the Official Assignee. There is no reason why an Official Receiver appointed by the Local Government should not have the same authority. There is nothing in principle to suggest a distinction. In the Presidency towns, as in the mufassal, in addition to the Official Assignee or the Official Receiver, there can be a special trustee or receiver; but, whereas in the Presidency Towns Insolvency Act, a special provision is inserted for vesting the property in the Official Assignee, there is no such provision in the Provincial Insolvency Act.

My learned brother has referred to the sections of the English Bankruptcy Act. I shall examine them with some care. Section 7 of 4 & 5 George V says:

"On the making of a receiving order, an Official Receiver shall be thereby constituted receiver of the property of the debtor. . . ."

Section 18, clauses (6) and (8), provide for the Official Receiver assuming management and directing the proceedings in case the debtors do not appoint a trustee. Section 53, clause (1), says:

"until a trustee is appointed, the Official Receiver shall be the trustee for the purposes of this Act, and immediately, on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee."

There can be no doubt that this section makes the Official Receiver the trustee of the property without requiring that he should be appointed specially for that purpose. The next clause is:

"On the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed."

In this clause, the use of the words 'a trustee' indicates there is but one trustee from the beginning of the adjudication and that the Official Receiver will be that trustee until the creditors appoint a trustee, and on such an appointment the latter shall step into the shoes of the Official Receiver. That this is the meaning of the sections I have referred to is made clear in *In Re Cohen*(1). Lord Justice VUGHAN WILLIAMS, in delivering the judgment of the Court of Appeal, says (page 710):

"section 54, sub-section (2) (the learned Lord Justice was referring to the Act of 1883)—which provides that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed—in my judgment contrasts the case where the property of the bankrupt vests in the Official Receiver independently of any appointment of him as trustee, and the case where the property of the bankrupt passes to a trustee forthwith on his appointment. There can be no doubt but that in sub-section (2) of section 54 the word 'appointed' is used in the sense in which it is employed in section 21."

Then the learned Lord Justice quotes two decisions containing certain dicta of Lord SELBORNE and Lord ESHER and proceeds:

"The provisions of sub-section (1) of section 54 will necessarily, in every case in which the creditors appoint the trustee, make the Official Receiver the trustee before there is a creditors' trustee because a creditors' trustee is appointed by a meeting called after the adjudication."

A similar view was taken in an earlier case—*In re Calcott and Elvin's Contract*(2). There, the Court of Appeal had to consider whether an order of adjudication in bankruptcy is not a conveyance and whether the title of the Official Receiver was not postponed to that of the mortgagee until the adjudication order was registered. LINDLEY, the Master of the Rolls, says (page 465), referring to section 54 of the old Act:

"The order by which a man is adjudicated a bankrupt, and which by the rules has to be in writing and in a particular form is simply to the effect that the debtor has been adjudged a bankrupt. Is that a deed or conveyance within the meaning of the Statute of Anne? No doubt the effect of that is that all the property

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(1) [1905] 2 K.B., 704.

(2) [1898] 2 Ch., 463.

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vested in the debtor becomes vested in the trustee; but that does not make it a conveyance."

I may also mention that the law is stated in Volume 2, Halsbury, section 169, in the same way. Referring to the Official Receiver it is said:

"He is not appointed trustee under the provisions of the Bankruptcy Act, but he becomes so automatically."

This interpretation of the English statute is not quite consistent with forms Nos. 28 and 29 under the English Bankruptcy Act to which my learned brother has referred in his judgment. Those forms seem to contemplate that a prospective order in every case of bankruptcy is to be made constituting the Official Receiver the receiver of the estate of the debtor. These forms are known as the receiving orders. By adopting similar forms in this country also, the difficulty may perhaps be got over. For that purpose it may become necessary that the High Court should prescribe forms for employment by the mufassal Courts.

I am therefore not prepared to differ from the conclusion which my learned brother has reached, and which has the sanction of the previous decisions of this Court. I agree with the order as to costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

SRI VADREUVU VISWASUNDARA ROW AND ANOTHER,
(DEFENDANTS), APPELLANTS,

v.

RYALI SOMASUNDARA RAO (PLAINTIFF), RESPONDENT.*

1919,
April 15, 16,
17 and 29
and
1920,
April 29.

Hindu Law—Adoption of daughter's son or sister's son, validity of—Custom among Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter's son, whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption—Subsequent adoption, whether barred—Subsequent upanayanam, whether competent.

Adoption of a daughter's son is valid by custom among the Brahmans of the Andhra or Telugu portion of the Madras Presidency, as it is in the southern districts.

* Appeal No. 40 of 1917.

Consent of the sapindas to an adoption by the widow is material as guaranteeing the propriety of the widow's action in making the adoption.

Where such consent has not been shown to have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption, and the Court's right to scrutinise the sapindas' reasons extends only to cases in which consent is refused, and not to cases where it is granted.

A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a *gnati*, and Bhinnagotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption.

An upanayanam is not valid unless performed by the father or, in his absence, by another kinsman in the family to which the boy concerned actually belongs.

The performance of the upanayanam in a family, into which the boy is wrongly believed to have entered by an invalid adoption, is a nullity and is no bar to his subsequent adoption.

APPEAL against the decree of T. RAJARAM RAO, Temporary Subordinate Judge of Rajahmundry, in Original Suit No. 81 of 1914.

The plaintiff sues as the daughter's son of one Sundarappa Garu, the Zamindar of Vegayammampeta Estate, for a declaration that the adoption by the first defendant, his widow, of the second defendant, who was another daughter's son of the deceased zamindar, was untrue or if true, was invalid. The late zamindar died in 1865. The first defendant originally adopted the second defendant in 1900 under an alleged authority by her husband, and also set up that she had obtained the assent of the sapindas. The plaintiff had instituted a suit (O.S. No. 89 of 1900 in the Subordinate Judge's Court of Cocanada) for a declaration that that adoption was invalid. The Sub-Court held that the adoption was invalid as the boy was a daughter's son; but on appeal, the High Court held that the widow had neither authority from her husband nor consent from the sapindas. After the decree of the Sub-Court in the said suit and pending the appeal in the High Court the first defendant had the upanayanam of the second defendant performed in her husband's family into which the latter was believed to have entered by virtue of the adoption. After the decree of the High Court, the first defendant again adopted the second defendant in 1907 with the consent of four out of six of the nearest *agnatic* sapindas of her husband. She did not consult the plaintiff about the adoption or obtain his consent. The plaintiff thereupon

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instituted the present suit for a declaration that the adoption, if true, was invalid on the grounds, inter alia, (1) that the assent of the sapindas, if any, was obtained by the first defendant by corrupt means and illegal gratification to the sapindas, (2) that the adoption was invalid as his (plaintiff's) assent and that of other nearer heirs, who would succeed to the estate after first defendant, had not been obtained, (3) that the adoption of a daughter's son was invalid under Hindu Law, (4) that the second defendant having been already given in adoption and his upanayanam or thread marriage having been performed, in the adoptive family, he was not fit to be taken in adoption subsequently. The Subordinate Judge held that the adoption was invalid and decreed the suit. The defendants preferred this appeal.

The Hon'ble the Advocate-General (S. Srinivasa Ayyangar), with A. Krishnaswami Ayyar and S. Aravamudu Ayyangar, for appellant.—Assent of a daughter's son is not necessary for an adoption by a widow, as he is not an agnate of the widow's deceased husband. Only the consent of the nearest agnates who would succeed to the estate and who belong to the same family is necessary and not that of a cognate like a daughter's son: *Veerabasavaraju v. Balasurya Prasada Rao* (1), *Collector of Madura v. Sathupathy* (2), *Krishnayayya v. Lakshmipathy* (3), *Subrahmanyam v. Venkamma* (4), *Rama Rao v. Narasimha Nayanim Varu* (5), *Veerabasavaraju v. Balasurya Prasada Rao* (6), and *Vithoba v. Bapu* (7). Reason for this is to be found in the rule which vests the guardianship of a widow in her husband's *gnatis*. *Gnatis* means only agnates and not cognates. The adoption of the defendant is valid. A person's *gotra* is determined by birth, or by a valid adoption, and not by his upanayanam which is only an initiation into sacred literature. An invalid adoption must be considered as one not having taken place at all. Upanayanam can be performed only by the father or other near agnates, and not by any one else. Upanayanam performed by a person who has invalidly adopted a boy is not

(1) (1918) I.L.R. 41 Mad., 998 (P.C.). (2) (1869) 12 M.I.A., 397.
(3) (1916) 30 M.L.J., 265. (4) (1903) I.L.R., 26 Mad., 627, 635.
(5) (1915) 28 M.L.J., 363. (6) (1914) M.W.N., 502.
(7) (1891) I.L.R., 15 Bom., 110.

valid and does not prevent its being performed again by proper persons: *Viraragava v. Ramalinga* (1) *Parvatibayamma v. Ramakrishna Rau* (2), *Pichuvayyan v. Subbayyan* (3), *Venkatacharyulu v. Rangacharyulu* (4), *Dattaka Mimamsa*, section 4, placitum 30, *Stoke's Hindu Law Books*, page 578, *Mandlik*, page 472, *Sircar on Adoption*, page 365, *Strange's Hindu Law*, page 104, *Mayne's Hindu Law*, page 181, *Ghose's Hindu Law*, Volume I, page 652. Motive of the widow in adopting is immaterial; *Velanki Venkatakrishna Rao v. Venkata Rama Lakshmi* (5). If, as in this case, the majority of the Sapindas has consented to the adoption, the refusal of the minority is immaterial: *Virabasavaraju v. Balasurya Prasada Rao* (6) and *Venkatakrishnamma v. Annapurnamma* (7). Adoption of a daughter's son is valid.

P. Narayanamurti, with *P. Somasundaram*, for respondent.—The daughter's son's consent is necessary for adoption; and he is an heir nearer than any agnatic relation. Adoption is akin to alienation in effect as regards a reversioner's right to the estate. The rule is that the consent of all persons is necessary whose reversionary rights would be affected by the adoption: *Virabasavaraju v. Balasurya Prasada Rao* (6), *Collector of Madura v. Sathupathy* (8), *Krishnayayya v. Lakshmipathy* (9), *Bajrangi Singh v. Manokarnika Baksh Singh* (10), *Vinayak v. Govind* (11), *Debi Prasad Choudhury v. Golap Bhagat* (12), *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar* (13), *The Collector of Masulipatam v. Cavalry Venkata Narainappa* (14), *Sham Sundar Lal v. Achhan Kunwar* (15), and *Sircar on Adoption*, page 259. The word *gnati* in the text as to guardianship of woman has been translated not as agnates but as relations, by later commentators and text-writers. A daughter's son is entitled to be the guardian of his grandmother: see the texts

(1) (1896) I.L.R., 9 Mad., 149 (F.B.). (2) (1895) I.L.R., 18 Mad., 145.
(3) (1890) I.L.R., 13 Mad., 128. (4) (1891) I.L.R., 14 Mad., 316, 322.
(5) (1876) I.L.R., 1 Mad., 174 (P.C.). (6) (1918) I.L.R., 41 Mad., 998 (P.C.).
(7) (1909) I.L.R., 23 Mad., 436, 438. (8) (1863) 12 M.I.A., 397.
(9) (1916) 30 M.L.J., 265. (10) (1908) I.L.R., 30 All., 1 (P.C.).
(11) (1901) I.L.R., 25 Bom., 129, 133, 134, 140.
(12) (1913) I.L.R., 40 Cal., 721 (F.B.). (13) (1915) I.L.R., 42 Cal., 394 (P.C.).
(14) (1861) 8 M.I.A., 529, 550. (15) (1899) I.L.R., 21 All., 71, 79 (P.C.).

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quoted in *Krishnayayya v. Lakshmipathy*(1), *Suryanarayana v. Itamadoss*(2). Upanayanam by whomsoever performed is a bar to adoption; *Viraragava v. Ramalinga*(3), and *Ganga Sabai v. Lakhraj Singh*(4). There is only an *obiter dictum* in *Parvati-bayamma v. Ramakrishna Rau*(5), and that of a single judge; *Bhattacharis Hindu Law*, pages 455 and 456, Mayne, paragraph 140, *Dattaka Mimamsa*, Chapter IV, placita 30 to 36.

P. Somasundaram followed and argued on the facts that the consent for the adoption was bad as it had been purchased.

The *Advocate-General* in reply adoption cannot be likened to an alienation. The former is a religious act for which the nearest reversioner or a majority of nearest reversioners must consent, while the latter is a secular act to which all reversioners of the same degree must consent: *Suryanarayana v. Venkataramana*(6), and *Virabasavaraju v. Balasurya Prasada Rao*(7). For adoption consent is a condition precedent; for an alienation it need not be so.

OLDFIELD, J.

OLDFIELD, J.—The question in this case is generally whether second defendant is the adopted son of the late Zamindar of Vegayammampeta. Plaintiff originally denied that any adoption ceremony had been performed, but he abandoned that position at the trial. There and here he has pressed only four objections, two to the consent of the kinsmen, which in the absence of authority from her deceased husband, first defendant, the widow, required to enable her to make a valid adoption, and two to the capacity of second defendant to be adopted. I deal with them in order.

Of the kinsmen two, Bhimasankara Row and Suryaprakasa Row, died during the trial. Neither informed the first defendant of his reasons for not consenting to the adoption—vide *Venkatakrishnamma v. Annapurnamma*(8). The former in fact did not refuse his consent explicitly. Part of the lower Court's judgment is occupied with their failure to consent. But nothing has been

said regarding it by plaintiff in this Court and I therefore turn at once to his attack on the four kinsmen who consented.

The allegation is, first, that the consents of these four were obtained by corrupt means. Defendants before the trial naturally asked for particulars, but the lower Court in its order, Exhibit CXLII, did not insist on them on account of the delay in making the request, which may have been correct, although it also gave the remarkable reason that, plaintiff having stated that the corruption was by payments of money, defendants were entitled to nothing more and could not expect plaintiff to disclose his evidence. In fact, plaintiff in Exhibit CXLII (b) had said that he could not give any particulars of the money payments alleged, until he had inspected the defendants' accounts; and his case must therefore start under the strongest suspicion that the detailed story he attempted to prove was invented for the trial.

[His Lordship dealt with the evidence and continued:—]

I agree with the lower Court that the payment is not proved and that there is no ground for a conclusion that the consents of these four kinsmen were obtained by corruption.

The lower Court, however, in a portion of its judgment which it is not possible to understand, has nevertheless held that these consents were not such as to show that the adoption was made by the widow, not for corrupt or capricious motives, but on a fair consideration of what may be called the family council, although it afterwards found that the first defendant's motive is not very material in itself and that the plaintiff can question the first defendant's motive in so far as it can be inferred from the conduct of the sapindas who gave their consent. If this means, firstly, that the consent of the sapindas is material as guaranteeing the propriety of the widow's action and, secondly, that nothing can be deduced from the consent owing to the circumstances in which it was given, the first conclusion may be endorsed. But, as regards the second, it has been found that consents were given, which are not shown to have been obtained by fraud, coercion or corruption; and that is sufficient. The Court's right to scrutinize the kinsmen's reasons extends only to cases in which consents are refused, not to those in which they are granted. The responsibility is imposed by the law on the kinsmen, and the Court cannot interfere with their exercise of it.

(1) (1916) 30 M.L.J., 265.

(2) (1918) I.L.R., 41 Mad., 604.

(3) (1886) I.L.R., 9 Mad., 148 (F.B.).

(4) (1887) I.L.R., 9 All., 253, 304.

(5) (1895) I.L.R., 18 Mad., 145.

(6) (1906) I.L.R., 29 Mad., 382 (P.C.).

(7) (1919) I.L.R., 41 Mad., 998 (P.C.).

(8) (1900) I.L.R., 23 Mad., 486.

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We have here, subject to the argument to be next considered, the consents of the four nearest sapindas: and, if plaintiff's next objection cannot be sustained, the authority thus conveyed will be sufficient.

That objection is that plaintiff, as the daughter's son of the widow's deceased husband, was entitled to be consulted, and that the adoption made without consulting him was bad. There is no explicit decision that a daughter's son is to be considered a kinsman or *gnati* or should be consulted regarding an adoption. But plaintiff relies on, and the lower Court has found for him on consideration of, certain cases, in which consultation with or consent of the reversionary heirs of the deceased, to whom the adoption is made, is referred to as essential; and that he is such an heir there is no doubt. *Contra*, however, it is argued that in those cases the position of the daughter's son was not in question and that the reference to the reversionary heirs was made loosely, nothing in the circumstances turning on the distinction between them and the agnates, whose right to be consulted arises only from their responsibility for the spiritual welfare of the deceased. Plaintiff's contention has been supported by reference to principle and to authorities.

It is first material that in the earliest authority, the decision in the Rāmnād case, *Collector of Madura v. Sathupathy*(1), of the Judicial Committee in 1868, the doctrine of the widow's power to adopt with the consent of the kinsmen was recognized, not so much with reference to anything explicit in early texts as because it had been received by the particular school of Hindu Law, which governed the district in question. Accordingly, after reference to such reception as evidenced by the works of Mr. Colebrooke and of Sir Thomas Strange and the opinions of the pandits, the Committee observed that the assents of the kinsmen seem to be required by reason of the presumed incapacity of woman for independence rather than the necessity for procuring the consent of all those whose possible and reversionary interest would be defeated by the adoption. That this was the basis of the Committee's conclusion is material in connexion with the texts on which plaintiff has relied, as indicating the basis on which the doctrine is really founded.

(1) (1868) 12 M.I.A., 397.

For it will be seen that the portions of them on which plaintiff's argument depends, is not that which the Committee had in mind.

The earliest of the texts is Manu, Ch. V, pl. 148, which runs in Sir W. Jones' translation:

"In childhood must woman be dependent on her father; in youth on her husband, her lord being dead on her sons..... A woman must never seek independence."

This is repeated in Ch. IX, pl. 3 and its last sentence may be supposed to be the earliest appearance of the foundation for the Committee's conclusion, so far as texts were in question. Plaintiff, however, relies on the gloss of the wellknown commentator—Kulluka Bhatta, printed by Sir W. Jones—upon the sentence just quoted:

"If she has no sons, on the near kinsmen of her husband; if he left no kinsmen, on those of her father; if she has no paternal kinsmen on the sovereign;"

and it is on this and similar references to the widow's dependence that the theory of the right of the agnates to concern themselves with her adoption rests. Another such reference is to be found in Yagnavalkya, Ch. I, verse 85:

"Let a female be taken care of by her father, while a maiden; by her husband, when married; and by her sons, in old age. If none of these exist, let other gnatis take care of her. A woman is never fit for independence;"

and this, as appears from *Krishnayayya v. Lakshmipathy*(1) is interpreted by Viramitrodaya as follows:

"But, when the husband is dead, the assent of those only is necessary, on whom she is dependent."

Again in Narada, Ch. XIII, verse 28, quoted in Ghose's *Principles of Hindu Law*, 3rd Edition, Vol. 1, page 323.

"after the death of her lord, the relations of the husband shall be the guardian of the woman, who has no son. They shall have full authority to control her, to regulate her manner of life and maintain her. When the husband's family is extinct or contains no male or is reduced to poverty, or when no one related to it within the degree of a sapinda is left, the father's relations shall be the guardians of a woman."

And there is lastly the statement of Mr. Colebrooke in his commentary on the *Mitakshara*, Ch. I, sec. XI, pl. 9, that whilst

(1) (1916) 30 M.L.J., 265.

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the author of the Vyavaharamayuka admits the right of the widow to adopt without her husband's authority, he requires that she shall have the express sanction of his kinsmen, and there are certain cases to the same effect in Strange's Hindu Law and Hindu Law Cases. Plaintiff argues that the reference to kinsmen in those cases include cognates as well as agnates, not only because this is entailed by the words used, but also because it is involved in the underlying principle.

The term 'kinsmen' is of course ambiguous; and reference is necessary to the words used in the Sanskrit texts, 'Sapinda' and 'Gnati.' But the former may or may not include Bhinna Ghotra as well as Ghotraja Sapindas, the daughter's son being included only in the former; and we have not been shown authority for holding that Kulluka Bhatta in his gloss was using it in the one sense rather than the other. Similarly, as regards the reference to the exhaustion of the husband's sapindas in Narada. The difficulties in the way of adoption of one invariable rendering for the term in the case of one text, the Mitakshara, are illustrated by reference to *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(1). It is, however, significant that in the Rāmnād case one Muthusami, a Samanodaka, was excluded from the category of Sapindas, and that the Judicial Committee may therefore be supposed to have used the term in its stricter sense. It is possible to say only that plaintiff has not established the inclusion of Bhinnagotra Sapindas in it; and I, therefore, turn to the other expression which is in question.

The word *gnati* in its primary significance is no doubt limited to agnates, vide Apte's Dictionary. Mr. Ghose in one passage in his Principles of Hindu Law, Vol. I, page 183, dealing with inheritance, has no doubt translated it 'sapinda,' but in connexion with an argument limiting sapindas to agnates, and elsewhere in connexion with adoption (page 677), he translates it as 'agnate' directly. In Mr. Mandlik's Hindu Law, at page 57, the word is rendered in the passage from Yagnavalkya already quoted as 'clansmen,' and in West and Buhler (A Digest of the Hindu Law of Inheritance, Partition and Adoption, etc.), at page 1006, as 'the gentile relatives,' the agnatic significance being

clear. In *Krishnaynayya v. Lashmipathy*(1), *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(2) was read as showing that the text of Yagnavalkya should be understood as limiting the expression 'Gnatis' to those who are in the line of heirs to the last holder and to this decision I shall return. But in *Veerabasavaraju v. Balasurya Prasada Rao*(3), the Judicial Committee, at page 1004, itself explained the Rāmnād case(4) as deciding that the widow might adopt with the consent of the male agnates. All this is against, and nothing has been adduced in favour of this part of plaintiff's argument. It is in fact on the theory as deduced from the underlying principle that he relies.

Before examining that theory I refer to one form, in which it has been supported, that the daughter's son's consent is required to validate the widow's adoption, because it is required, in the case of her alienations, his heirship being the reason in both cases; and there is no doubt that this argument is referred to, although it does not appear to have been pursued in *Suryanarayana v. Ramadoss*(5) and *Vinayak v. Govind*(6), where the extract given above from Narada is quoted, and by the Judicial Committee in *Veerabasavaraju v. Balasurya Prasada Rao*(3); and it may be admitted that so far as the character of the consent is considered in them, as presumptive evidence, to use the words of SESHAGIRI AYYAR, J., in the first of these authorities, of the goodness of the widow's act, the analogy may be instructive. It does not however follow, and it is not the case, that a general argument from the persons who must give and the motives recognized for requiring consents in the one class of cases to the persons and motives appropriate in the other is admissible, for to contrast them, consultation with the kinsmen, if not their consent, is a condition precedent to a valid adoption; one consenting person may be regarded as representing others; and the consent of all who have to be consulted is not necessary. But in the case of an alienation the law, as stated recently in *Rangasami Goundan v. Nachiyappa Goundan*(7), is that an alienation can be supported on its merits with reference to

(1) (1916) 30 M.L.J., 265.

(2) (1876) I.L.R., 1 Mad., 69 (P.C.).

(3) (1918) I.L.R., 41 Mad., 998 (P.C.).

(4) (1868) 12 M.I.A., 397.

(5) (1916) I.L.R., 41 Mad., 604.

(6) (1901) I.L.R., 25 Bom., 129.

(7) (1919) 41 I.A., 72.

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necessity and independently of consent; that consent, not merely consultation, is essential, and that the consent of every person who may fairly be expected to be interested to dispute the transaction, is required. And in view of these differences it would be unsafe to assume, what has never statedly been decided, that the principle underlying the validation of the widow's act by consent of or consultation with other persons is the same in the two cases. The view of the necessity for the consents, for which plaintiff contends, is that they are required as a guarantee for the widow's motives in adopting, which should be, not only the promotion of the spiritual interests of her deceased husband, with which admittedly the daughter's son is not concerned, but also the protection of his estate for his heirs, and that the daughter's son being among those heirs is entitled to a voice in deliberations which affect his interests. It is no doubt not a valid objection to this theory that no similar claim is made for the daughter, who is a nearer heir, since, as a woman, she must be regarded as equally incompetent with the widow and as incapable of advising her. But, it is a practical consideration that ordinarily the daughter's son will be a minor and his advice will be useless, when the adoption is under discussion. Another difficulty arises in connexion with the position of the daughter's son, in the order of heirs before the parents and other agnates, since it is impossible to reconcile the right of the first mentioned to express a decisive opinion with the observations in the Rāmnād case(1), which have also been quoted in later decisions, on the exceptional value to be attached to 'the consent of the father-in-law to whom the law points as the natural guardian and venerable protector of the widow,' as in itself a sufficient justification for her action. In that case, the purpose for which the assent of the kinsmen is insisted on is stated solely and unambiguously, and in terms never subsequently repudiated, as being to show that the act was done by the widow in the proper and bona fide performance of a religious duty and neither capriciously nor from a corrupt motive; 'and the religious obligation to adopt' in order to complete or fulfil defective religious rites is mentioned. Again, in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta*

(1) (1868) 12 M.I.A., 397.

Deo(1), there was a reference to the principle that the validity of an adoption is to be determined rather by spiritual than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property an accessory of it. This statement is no doubt made by way of an *argumentum ad hominem* in respect of a previous judgment of HOLLOWAY, J.; and it is followed by the observation that, while it may be the duty of a Court of justice administering Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect on the devolution of the property as a mere legal consequence, it is impossible not to see that there are grave social objections to making the succession to property, and it may be in the case of collateral succession, the right of persons actually in possession, dependent on the caprice of a woman. But the only inference drawn was that the Court should keep the power strictly within the limits which the law has assigned to it, apparently in the particular case under disposal by refusing to extend it, as HOLLOWAY, J., proposed, to authorize an adoption made with the consent of any one Sapinda. The Rāmnād case(2) was further explained in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(3), and in connexion with the requirement in the former that

"the adoption should be made by the widow in the proper and bona fide performance of a religious duty and not capriciously or from a corrupt motive"

it was observed that it

"would be dangerous to introduce questions as to the particular motives operating on the mind of the widow"

and that only proof of

"such assent on the part of the sapinda was required as should be sufficient to support the inference that the adoption was made, not from a capricious or corrupt motive, but upon a fair consideration by what may be called a family council of the expediency of substituting a son by adoption to the deceased husband."

These cases are the foundation of the doctrine of the consent of kinsmen as the widow's authority. Throughout them the

(1) (1876) I.L.R., 1 Mad., 69 (P.O.). (2) (1868) 12 M.I.A., 397.
(3) (1876) I.L.R., 1 Mad., 174 at 190, 191 (P.O.).

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religious motive insisted on in the Rāmnād case(1) is not abandoned; and, if in the Chinnakimidi case(2) it is recognized that temporal considerations cannot be lost sight of, that can be explained consistently with the language used on the ground that reference to them will be a safeguard against the caprice or corrupt intention of the widow, as in many cases involving the disintegration of the estate. *Krishnayayya v. Lakshmi-pathy*(3) supplies an actual instance of the entertainment by her of such an intention, in case one is required.

It is in fact only after a considerable interval and in the case last cited, that plaintiff can find anything directly supporting his contention. There, SESHAGIRI AYYAR, J., after agreeing that the motive which should guide a widow, should be to minister to the spiritual wants of her husband, said that the assent of the sapindas should not necessarily be regarded as a religious act, because the text of Yagnavalkya already referred to implied that her protection by them in temporal affairs alone was contemplated. So far this is in plaintiff's favour. But it is not clear in what shape the argument from the existence of the religious motive was relied on or how its rejection influenced the decision, that the assent of a mere majority of sapindas, without reference to their character as mere reversioners was insufficient. For the learned Judge was dealing with a case, in which the consent of only one out of the six nearest sapindas had been obtained and the question was whether the other five should have been ignored. And he, therefore, had not to consider whether consultation with a more remote reversioner, such as the present plaintiff, was obligatory or whether heirship, apart from spiritual responsibility, was material. He, in any case, proceeded to hold, with reference to the interpretation placed on the text of Yagnavalkya by the Viramitrodaya, that the guardianship of the widow did not vest in the whole body of gñatis, the natural interpretation being that she was dependent on those nearest to her husband; and he regarded the judgment in the Guntūr case(4) as negating the plea that the widow in obtaining the consents did not act on spiritual considerations. Nothing then was actually decided against the view that the

(1) (1868) 12 M.I.A., 397.

(3) (1916) 30 M.L.J., 265.

(2) (1876) I.L.R., 1 Mad., 69 (P.O.).

(4) (1876) I.L.R., 1 Mad., 174 (P.O.).

spiritual should be the dominant consideration, and much was said in favour of its being so; and there is no departure from that view in the observation of the same learned Judge in *Suryanarayana v. Ramadoss*(1), that powers of consent had been given to the sapindas, as they were interested in the property, and were expected to see that the spiritual welfare of the deceased was not jeopardised. Plaintiff relied lastly on *Veerasavaraju v. Balaswarya Prasada Rao*(2). In this Court the question of spiritual motive was not dealt with, because the Bench, of which I was a member, reached a conclusion against the widow's authority on other grounds. But in appeal, the Judicial Committee, confirming this Court's decision, referred to it at some length and undoubtedly specified the possession of an interest in the protection of the estate as a qualification for inclusion in what was described in the Guntur case(3) as the family council. They, moreover, quoted the opinion expressed in Golapchandra Sarkar Sastri's Hindu Law of Adoption that adoption is more a temporal than a spiritual institution, and that the requisites for a valid adoption being all temporal the spiritual considerations should not be allowed to influence the judgment regarding the secular essential. If it were clear that this opinion had been adopted by their Lordships, it would go far towards supporting plaintiff's contention, that a daughter's son, on whom no spiritual responsibility rests and whose temporal interest in the reversion is comparatively close, is entitled to be consulted. But in fact the judgment does not either before or after this quotation express approval, either comprehensive or qualified, of the views contained in it, and there is no attempt to reconcile or contrast them with the references to religious duty contained in extracts from the Rāmnād case(4) occurring elsewhere in the judgment, except a statement with reference to it and the Guntur case(3) that rights of property cannot be left out of consideration when the question what sapinda's consent is primarily requisite is under consideration. It may be added that the learned author in the sentence prior to that cited by their Lordships (op. cit., p. 259), apparently describing the opinion of this Court in

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(1) (1918) I.L.R., 41 Mad., 604. (2) (1918) I.L.R., 41 Mad., 998 (P.O.).
(3) (1876) I.L.R., 1 Mad., 174 (P.O.). (4) (1868) 12 M.I.A., 397.

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language taken from the judgment in the Chinnakimidi case(1), admitted that it does not share his views; and I would observe with all respect that this reasoning, as it appears in earlier passages of his work (pages 43, 45, 142, 145) seems to be rather influenced by his own experience of the actual sentiments or conduct of particular sections of the public than by the origin and development of the doctrine of adoption by consent of kinsmen in the authorities usually relied on.

On these authorities the conclusion must, in my opinion, be that the spiritual motive is at least dominant and consultation with those who can appreciate it is essential. That the protection of the deceased's estate should be excluded from consideration as a motive is, as the authorities recognize, not to be expected or desired; and the extent to which it should be or in particular cases has been considered with reference, rather to an estimate of the purity of the widow's motives than to the reversioner's prospects, is incapable of precise definition. But the conclusion must be that it is of secondary importance; and that corroborates the construction placed on the actual wording of the texts by which the daughter's son, to whom, it is not disputed, only the temporal motive can be supposed to appeal, is not one of the *gnatis*, whom it is necessary for the widow to consult.

This conclusion entails that the consents obtained by the widow were a sufficient authority for her action, and I therefore turn to the first of plaintiff's objections to the capacity of the second defendant for adoption. The facts on which it is based are that first defendant originally went through the ceremony of adopting him in 1900. A suit similar to that now before us was brought, and the adoption was declared invalid by the lower Court on one ground, that he was incapable of adoption, being her daughter's son. She, however, performed the ceremony of his upanayanam, whilst an appeal to this Court was pending. After its decision against her on a different ground and the consequent failure of the adoption already made, she again on 24th January 1907 adopted the second defendant, that being the adoption with which we are concerned. The plaint averment regarding it was that, the ceremony of adoption having been

performed with regard to second defendant, although that adoption was found invalid, he was ineligible for any further adoption. On this the issue framed, it would seem without objection, was 'whether the adoption of a daughter's son' (meaning apparently a person of a different *gotra*) 'after his upanayanam is invalid?' and, although there is some divergence from the pleadings that, it is agreed, is what we have to decide. It has been necessary to state the point thus fully, because it has been dealt with by the lower Court, not, as it apparently was presented to it, and is presented here, with reference to the general incapacity of a person whose upanayanam has been performed, for adoption, but with reference to the effect of the upanayanam as introducing him into the *gotra* of his adoptive family and the impossibility of his acquiring any further rights in it, in case a subsequent adoption should be made. To such an argument the answer would be simple, that either the upanayanam did introduce him into the new *gotra* and fix his position there, a new adoption being superfluous, or that it did not, and there would be no obstacle to an adoption which would do so.

The argument, as it is put forward here, involves, it is plain, firstly, that the upanayanam, although celebrated by the first defendant on the incorrect assumption that the second defendant had entered her family and become her son, was a valid performance of the ceremony, and, secondly, that no person, who has undergone upanayanam, can be adopted into another *gotra*, inasmuch as his undergoing the ceremony in the *gotra* in which his spiritual duties are to be performed is an indispensable qualification for their performance. On both points we have been referred to the opinion expressed in Bhattacharyya's Hindu Law, Third Edition, Volume I, page 456, that

"even if the upanayanam and marriage are performed in the family of the adopter, the informally adopted boy will not lose his rights in the family of his natural father" and that "the ceremony of upanayanam performed by the adoptive father would be valid, as if performed by a volunteer priest."

On the second point above specified, this cannot be accepted since the decision in *Viraragava v. Ramalinga*(1) proceeds on

(1) (1886) I.L.R., 9 Mad., 148 (F.B.).

(1) (1873) 7 M.H.C.R., 301.

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the assumption, which apparently was not and has not since been contested, that a boy who has received upanayanam outside the *gotra* cannot enter it by adoption. On the first point, which alone remains, the opinion of the learned author, in support of which he adduces no authority, is contrary to the decision of COLVILLE, C.J., quoted by him, in *Sreemutty Raj Coomaree Dasi v. Nobo Coomar Mullik*(1) and also to the view taken in Sanskrit texts of good repute, of which we have been supplied with private translations, accepted by both sides. Thus, in the *Dharma Sindhu*, Nirnaya Sagara Press Edition (a work referred to as authoritative in Mandlik's Hindu Law, Introduction, lxx) at page 161, reference is made to one kind of upanayanam as that which is re-done on account of the first ceremony being inefficacious by reason of a defect in any of its parts, such as the time; and again at page 150, and in the *Nirnaya Sindhu* (a work cited in Trevelyan's Hindu Law, page 17) at page 244 there is the dictum,

"The father alone should perform the upanayanam of his son or in his absence the grandfather and in his absence the elder brother."

In the *Vaithianatha Dikshitiyam, Varnasrama Kanda, Kumbakonam Grandha Edition*, a work referred to in *Viraragava v. Ramalinga*(2), it is said, at page 179:

"The father is the primary or principal person entitled to perform Upanayanam" and at page 172 (for the performance of Upanayanam) only in the absence of any Sagotrāja (person of the same *gotra*) is a person of a different *gotra* to be sought for."

Lastly, and this is important with reference to the last portion of Mr. Bhattacharyya's opinion, the *Smriti Chandrika*, Mysore Government Edition, lays down at page 88 that

"he is called Guru, who does all the Samskaras (ceremonies) beginning with the Nishēka (nuptials) and ending with upanayanam and gives him (the boy) instruction in the Vedas. Here Guruhood belongs to the father alone and to nobody else. Thus it is established that the father alone is competent person to perform upanayanam and other ceremonies . . . But that which is said that an Acharya (voluntary priest) performs the upanayanam is only applicable, when there is no father or when he is disqualified. For there is no reason for leaving out a competent father."

(1) 1 Boulnois, 127.

(2) (1893) I.L.R., 9 Mad. 148 (F.B.).

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Plaintiff has not met these extracts by citation of others and their result, which I find no difficulty in accepting, seems to me to be that an upanayanam will not be valid unless performed by the father, or in his absence another kinsman in the family to which the boy concerned actually belongs; that his upanayanam performed in a family, which he had not in fact entered, would be invalid; and that such an upanayanam can and should be performed again. This entails that the irregular performance of an upanayanam in a family, into which the boy is wrongly believed to have entered, is a nullity and is no bar to his subsequent adoption.

The result is that the lower Court's decision cannot stand, and that we must in order to the disposal of the case call on it to return findings on the issues not yet dealt with, Nos. 9, 10, 12, 13, 16. The findings will be returned on the evidence on record within two months after the re-opening of the lower Court. Seven days will be allowed for filing objections.

PHILLIPS, J.—I agree and have nothing to add.

PHILLIPS, J.

[Accordingly the Temporary Subordinate Judge of Rajahmundry submitted findings on the following issues:—

(9) Whether the adoption of a daughter's son is illegal and invalid according to Hindu Law?

(10) Whether the custom of adopting a daughter's son or a sister's son obtains among Brahmans throughout the Madras Presidency or whether, as contended by plaintiff, it obtains only in the southern districts of the Presidency and does not obtain in the Andhra or Telugu portion of the Presidency?

(12) Whether the circumstances in paragraph 6 of the plaint are true, and if so, whether they render the second defendant's adoption invalid?

(13) Whether the succession to the estate of Vegayammupeta is governed by the law of lineal primogeniture?

(16) Whether the adoption is contrary to the provisions of the Impartible Estates Act?

The learned Subordinate Judge found, on the ninth issue, that the adoption of a daughter's son among the three regenerate classes was invalid under the Hindu Law; on the tenth issue, he went through a large mass of evidence as to custom adduced by the defendants and the counter-evidence let in by

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the plaintiff and came to the conclusion that the custom of adopting a daughter's son or a sister's son obtains among Brahmans of the Andhra or Telugu portion as in the rest of the Madras Presidency. The Subordinate Judge examined a large number of witnesses on the side of the defendants who proved as many as 65 instances of daughter's sons and sister's sons being adopted both among the Niyogi Brahmans of the Gōdāvari district in the Andhra Country, to which the parties to the suit belonged, as well as among the Oriya Brahmans of the Ganjām district, some of whom had long settled in the Gōdāvari district. The instances relating to Andhras were as many as 28, the rest relating to Oriya and other Brahmans. On the twelfth issue, the Subordinate Judge held that the allegations in paragraph 6 of the plaint, as to plaintiff being regarded as heir to the last male owner and performing his Shrādh and other ceremonies and managing the properties, were substantially true, but that they could not render the second defendant's adoption invalid, if it should be held otherwise valid. On the thirteenth issue he held that the succession to the plaint estate was governed by lineal primogeniture. On the sixteenth issue, he held that the adoption was not contrary to the provisions of the Impartible Estates Act.

On receipt of these findings the Judgment of their Lordships was delivered by :—]

OLDFIELD, J. OLD FIELD, J.—No objection has been taken before us to the findings on issues 12, 13 and 16, which are against plaintiff, or to the finding on issue 9 in his favour that the adoption of a daughter's son is invalid under Hindu Law. Argument has been confined to the finding on issue 10 that custom authorizes such an adoption among Telugu Brahmans; such as the parties. We concur in that finding and in the lower Court's reasons for it and therefore deal shortly with the objections advanced here against it.

The Telugu country begins roughly north of the City of Madras, being bounded on the south by the Tamil districts and on the north by the Oriya, though there is, particularly in the case of the latter, no sharp division. The materials before the lower Court consisted, firstly, in general evidence on the side of plaintiff, that such adoptions were not recognized as valid by Telugu and

Oriya Brahmans, secondly, on the side of second defendant, in evidence, that they had taken place in a sufficient number of instances in the Telugu and Oriya country to establish a custom.

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The general evidence consisted in a number of statements, Exhibit HH series. But it was inconclusive in the case of two witnesses, who merely said that the adoption of a sister's son was avoided in their families on occasions on which it would have been possible, as contrary to law and custom. In other cases, it consisted only in assertions by persons described as pandits, who, if their competence in this branch of knowledge is presumed, would ordinarily be prone to deprecate any preference for custom over adherence to the injunctions of the texts, by the study of which they live. In fact, some of them, Dasaradha Padhi, Appanna Sastri, Lokhanada Misra and Ananta Doss, mentioned instances of the adoption of a sister's son without referring to any consequent social or religious stigma being imposed. Nothing of any value was established by these witnesses.

The lower Court has dealt with the evidence relating to the instances relied on by the second defendant with great caution, and no objection has been taken to its conclusion that twenty-seven cases of adoption of a daughter's son in the Telugu districts have been proved. It is said that some of these cases are inconclusive, because they are recent. But the proportion of recent cases is not unduly high in view of the greater ease with which evidence relating to them would be obtainable; and there is no suggestion that in any the adoption was made to create evidence for this trial. It is pointed out next that in some cases there was, besides the adoption, a document transferring property to the adopted son, consistently with the existence of doubt as to his position. But it is possible that this was due to a desire to prevent future litigation, and this is probable in at least three cases in which the adoptive fathers were persons of marked respectability, a member of the Legislative Council, a well-known vakil, and a person on whom Government had conferred the title of Diwan Bahadur. Then it is argued that some, who speak to these adoptions, describe them as authorized by law, not custom. But these descriptions are so plainly wrong, and the competence of those concerned to give them so small, that they may safely be ascribed to a natural and very ordinary desire to make no

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explicit innovation and to their inability as laymen to draw a legal distinction. Lastly, in six cases there is the objection that the families in question are those of Tamil immigrants into Telugu country and that, as they have brought their Tamil customs with them, their adoptions add nothing to the argument from the instances afforded by Telugu families proper. It does not however appear from the evidence that in any case the immigration was recent or that the adoptions in question were regarded with dislike or suspicion in their Telugu surroundings. Such a custom would be followed only at long intervals and on rare occasions. There is, therefore, no sufficient reason for discarding these six cases from consideration.

Argument has next been directed against the relevancy and weight of the remaining twenty-two instances relied on, on the ground that they occurred, not in Telugu, but in Oriya families; and a similar argument has been attempted against the relevancy of the fact that adoptions of a daughter's son were held to be authorized by custom in the Tamil districts in *Vayidinada v. Appu*(1). The exhaustive judgment in that case no doubt dealt statedly only with the southern districts; and reference has also been made to the fact that it was to some extent founded on the commentary of Vydiannadha Dikshitar, a work alleged to be authoritative only in them. But there is no reason for supposing that the scope of the decision was limited to the southern districts for any reason but that the case before the Court came from Tanjore, and there had naturally to be some limit to the collection of instances in support of the custom relied on; the argument from the reference to Vydiannadha Dikshitar is answered by the observation that his commentary was afterwards treated as authoritative in *Brindavana v. Radhamani*(2), a case from Ganjam, a Telugu and Oriya district; and in fact in *Vayidinada v. Appu*(1) one instance relied on was from another Telugu district, Cuddapah. As regards the Oriya instances before us, there is nothing to support a distinction between the custom they support and that of the Telugu country. It has been pointed out that the territorial division between Telugus and Oriyas is particularly indefinite. The witnesses for plaintiff, of whom Dasaradhi Padhi already referred to is the clearest, refer

(1) (1886) I.L.R., 9 Mad., 44 (F.B.). (2) (1889) I.L.R., 12 Mad., 72.

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only to differences in ritual, to marriage with maternal uncle's daughter and to fish diet as peculiar to Oriyas, not to anything of significance in the present connexion. Although Tamil, Telugu and Oriya Brahmans differ in language and residence, all alike, so far as we have been shown, agree in acceptance of Hindunism and of the Mitakshara Law; and we can see no reason why the judicial recognition in *Vayidinadha v. Appu*(1) of the custom now in issue as binding on the first mentioned, and the evidence of instances in which it has been followed among the last, are not relevant and are not of material weight.

It remains to refer to six instances of adoption of a brother's daughter's son, which have also been proved. We need say only that the validity of such adoptions was regarded as standing on the same footing as that of adoptions of a daughter's son in *Vayidinadha v. Appu*(1) and that in both the natural mother would be equally debarred from marriage with the adoptive father.

We, therefore, accept all the fifty-five instances, which the Lower Court held to be established, as relevant and, in the absence of anything to rebut the inference from them, we regard them as sufficient to prove the custom alleged. It should be added that this conclusion is in accordance with the opinion in placitum 88, Strange's Manual of Hindu Law, 2nd Edition, page 22, the learned author abandoning therein the limitation to South India expressed in placitum 92 of the first edition of his work, page 17, and referring to a proceeding of the Sadr Court as his authority. We accept the Lower Court's finding, and therefore we allow the appeal, dismissing the suit with costs throughout.

N.B.

(1) (1886) I.L.R., 9 Mad., 44 (F.B.).

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Seshagiri Ayyar.

1920,
July 12.

RAJA VENKATARANGAYYA APPA RAO AND TWO OTHERS
(DEFENDANTS NOS. 1, 2 AND 4), APPELLANTS,

v.

RAJA VARAPRASADA RAO NAIDU AND ANOTHER
(PLAINTIFF AND THIRD DEFENDANT), RESPONDENTS.*

*Costs—Vendor and purchaser—Covenant to indemnify against defective title—
Attack on title—Liability of vendor to pay not merely taxed costs but all
reasonable costs as between vakil and client.*

Upon a covenant by a vendor of lands to indemnify the purchaser against all losses that the latter might be put to in defending his title or enjoyment of the lands, from adverse claims, the vendor is bound to pay the purchaser not merely taxed costs as between party and party, of a suit in which he had to defend his title, but the actual costs which he had to pay to his legal advisers, and which are reasonable in the circumstances of the case. *Smith v. Compton* (1832) 3 B. & Ad., 407, followed.

APPEAL against the decree of K. SAMBASIVA RAO NAYUDU, Temporary Subordinate Judge, Bezwada, in Original Suit No. 28 of 1917.

The second defendant sold, in 1903, a village called Pedavegi, for about two lakhs of rupees, to plaintiff's father, and as there was some doubt as to her title to the village she inserted in the sale deed a clause agreeing to indemnify the plaintiff's father against all losses that he might sustain by third parties claiming the village. She also had an indemnity bond executed in favour of the plaintiff's father by her husband, the first defendant, and by her sons, the third and fourth defendants in the suit. The clauses relating to indemnity in both these deeds are set out in full in the judgment of the High Court. In 1907 certain third parties filed a suit against the plaintiff to recover the village. The plaintiff defended the suit and in the course of the suit he gave notice to the second defendant of the institution of the suit, and intimated that she might make herself a party to the suit and defend the title. The second

defendant did not make herself a party, but kept herself informed of all the proceedings in the suit, and also helped the plaintiff with oral and documentary evidence. When, during the course of the suit, the vakil engaged by the plaintiff, viz., the Hon'ble Mr. V. Krishnaswami Ayyar, was made a Judge of the High Court, she requested the plaintiff to engage an able vakil in his place. The suit was eventually dismissed and an appeal to the High Court was also dismissed. In the shape of fees to the vakils engaged, the plaintiff incurred expenses which were much greater than the amount allowed by the Court as costs. Hence the plaintiff filed this suit to recover the difference, with interest thereon at 9 per cent per annum, from the defendants. The Subordinate Judge passed a decree as prayed for. The defendants preferred this appeal.

V. Ramesam, with V. Suryanarayana, for the appellants.—In cases of indemnity, the indemnifier is liable to pay the promisee only taxed costs as between party and party, and not all the costs incurred, i.e., as between solicitor and client: *Howard v. Lovegrove*(1) and *Maxwell v. British Thomson Houston Company*(2). No interest on the losses can be awarded as no demand was made. At any rate it ought not to exceed 6 per cent.

S. Srinivasa Ayyangar for the respondents.—In cases where there is an express contract to indemnify, costs must be as between solicitor and client: *Great Western Railway v. Fisher* (3), *Smith v. Compton*(4) and *Born v. Turner*(5).

The JUDGMENT of the Court was delivered by

WALLIS, C.J.—This is an appeal from the judgment of WALLIS, C.J. the Subordinate Judge of Bezwada in a suit brought by the Zamindar of South Vallur against the defendants, from one of whom he had purchased a certain village, to recover the costs which he was put to in defending his title to the village against a third party. He bases his claim upon an indemnity contained in a deed of sale executed by the second defendant who was the actual vendor, and also on a covenant contained in an indemnity bond executed by the first, third and fourth defendants, her husband and two sons respectively.

(1) (1870) L.R., 6 Ex., 43.

(2) [1904] 2 K.B., 342.

(3) [1905] 1 Ch., 318.

(4) (1832) 3 B. & Ad., 407.

(5) [1900] 2 Ch., 211.

* Appeal No. 807 of 1919.

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The Subordinate Judge has given judgment for the plaintiff, and we think he is right. The covenants in the deed of sale and in the indemnity bond are practically the same, and the covenant in the sale deed is accurately translated in paragraph 8 of the Subordinate Judge's judgment. It says :

"If the previous owners or any others setting up any rights by transfer from them or any others claiming themselves to be their heirs or any others claiming under any other title should lay any claim or file any suit regarding the title and interest of the property sold and if by such claim or suit any sort of loss should accrue to your title or enjoyment all such obstructions we will remove at our cost and secure to you absolute right and enjoyment."

Now, although the language used here is somewhat cumbersome, we agree with the learned Subordinate Judge that the effect of these words is to impose upon the covenantor the duty of indemnifying the plaintiff from costs in suits like this in which he was obliged to defend his title to the village. However, the case does not stop there, because the deed goes on :

"Hereafterwards, (b) if anybody should file a suit, or (c) if there should be any dispute regarding the nature of the grant or of the tenure of the village from the Government or from any others and if there should accrue any losses on that account, all those also we will remove at our cost and will secure to you absolute right and enjoyment."

Now, we are clearly of opinion that, even if the first covenant is not clear, these words are sufficiently wide to cover the present claim, because a suit has been filed and loss has accrued on that account to the plaintiff who has had to defend the suit at great expense. Therefore, we hold that both the clauses contain a covenant of indemnity which the plaintiff is entitled to enforce in this suit.

The only other question which has been argued before us is whether the plaintiff is entitled to recover only the taxed costs, or costs between solicitor and client, or what corresponds to that in this country, the actual costs which he has had to pay to his own legal adviser. We are only concerned in this case with the practice in cases of indemnity such as the present, and with regard to such practice it appears to be well-settled law in England that a party is entitled to recover costs as between solicitor and client, and it obviously must be so, because unless it were so

there would be really no indemnity at all. That has been laid down by the high authority of Lord TENTERDEN in *Smith v. Comp-ton*(1), by KELLY, C.B., and MARTIN, B. and PIGOTT, B., in *Howard v. Lovegrove*(2), and by BUCKLEY, J., as he then was, in *Great Western Railway v. Fisher*(3). The system of awarding costs in litigation is somewhat different in England from what it is in India. There is no system here of taxing costs as between a client and his vakil. We do not lay down that under such contracts anything which a party had agreed to pay, or actually paid, could be recovered without regard to whether his conduct was reasonable or not; there can be no question here that what was paid was reasonable having regard to the condition of things prevailing here, and was such a payment as would have been allowed if there were taxation here as between client and vakil corresponding to taxation between solicitor and client in England. No better proof of that need be mentioned than the fact that the defendants approved of the engagement of the late Mr. V. Krishnaswami Ayyar, one of the leaders of the Bar in Madras, and when he became a judge they suggested to the plaintiff that he ought to get another vakil of the same position at the Bar, which of course meant that he should be retained upon somewhat similar terms. It cannot be suggested that there was anything unreasonable in the conduct of the plaintiff, or that he incurred any expense which he ought not to recover under his contract of indemnity.

We may also mention as regards this point that notice was given at a very early date to the defendants in this suit of the suit which had been instituted against the plaintiff, inviting them if they liked to come in and conduct the defence.

The only other point is as regards interest. The plaintiff has claimed and the Subordinate Judge has allowed interest at 9 per cent. Having regard to the position of the parties and the general circumstances of the case, we think that the rate of 6 per cent is quite adequate, and we accordingly vary the lower Court's decree by giving 6 per cent instead of 9 per cent; otherwise the appeal is dismissed with costs.

N.B.

(1) (1882) 8 B. & Ad., 407.

(2) (1870) L.R., 6 Ex., 48.

(3) [1905] 1 Ch. 816.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

B. F. SALDANHA (RESPONDENT—APPELLANT), PETITIONER,

v.

HENRY HART (PETITIONER—SECOND RESPONDENT),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 10—Security for costs—Pauper appellant—Jurisdiction of Court to order a pauper appellant to furnish security for costs of respondent.

✓ The Court has jurisdiction to order an appellant, who has been given leave to appeal *in forma pauperis*, to furnish security for the costs of the respondent under Order XLI, Rule 10, Civil Procedure Code.

Seshayyengar v. Jainulavadin (1880) I.L.R., 8 Mad., 66, followed.

Khemraj Shrikrishnadas v. Kisanlala Surajmal (1918) I.L.R., 42 Bom., 5, dissented from.

PETITION under section 15 of Act V of 1908 praying the High Court to revise the order of A. NARAYANA NAMBIYAR, acting District Judge of South Kanara, in I.A. No. 264 of 1919 (in Appeal Suit No. 223 of 1919).

The material facts appear from the Judgment.

K. Ramanatha Shenai for the petitioner.

B. Silarama Rao for the respondent.

The JUDGMENT of the Court was delivered by

AYLING, J.—Following the decisions in *Seshayyengar v. Jainulavadin*(1) and *Srinivasa Sastri v. Subramania Aiyer*(2) we must hold that the order of the District Judge calling for security from the pauper appellant under Order XLI, Rule 10, was not without jurisdiction. We have been referred to the decision of the Bombay High Court in *Khemraj Shrikrishnadas v. Kisanlala Surajmal*(3) but we see no reason to question the decision of this Court in *Seshayyengar v. Jainulavadin*(1) the correctness of which apparently has never been doubted by later Benches of this Court, and with which we are also disposed to agree.

This petition is dismissed with costs.

K.R.

* Civil Revision Petition No. 54 of 1920.

(1) (1880) I.L.R., 8 Mad., 66. (2) (1907) 17 M.L.J., 583.

(3) (1918) I.L.R., 42 Bom., 5.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

W. KRISHNAMACHARI (DEFENDANT), PETITIONER,

v.

W. KOMALAMMAL (PLAINTIFF), RESPONDENT.*

Presidency Small Cause Courts Act (XV of 1882), sec. 19 (g)—Suit for stones of a well or their value—Title to the well questioned—Jurisdiction of the Small Cause Court.

A suit to recover stones forming part of a well and said to have been wrongfully removed by the defendant, or their value is cognisable by the Presidency Small Causes Court, in spite of the fact that it is necessary to determine the question of title to the well.

Puttangowda v. Nilkanth Kalo Deshpande (1913) I.L.R., 37 Bom., 675 (F.B.), followed. *Tirupati Raju v. Vissam Raju* (1897) I.L.R., 20 Mad., 155, considered and distinguished.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act for revising the order of the Full Bench of the Presidency Small Cause Court at Madras in Full Bench Application 156 of 1919 in Small Cause Suit No. 7801 of 1919.

The necessary facts are given in the Judgment.

The defendant preferred this Revision Petition to the High Court.

P. Duraiswami Ayyangar and S. Rangaswami Ayyangar for petitioner.

K. Raja Ayyar for respondent.

The JUDGMENT of the Court was delivered by

AYLING, J.—The question for our decision is whether the AYLING, J. Small Cause Court had jurisdiction to dispose of this case or whether it falls under clause (g) of section 19, Presidency Small Cause Courts Act (XV of 1882).

We agree with the learned Judges of the Small Cause Court that it does not. The suit as framed is certainly not one for the determination of a right or interest in immoveable property, but simply to recover certain stones forming part of a well and

* Civil Revision Petition No. 1094 of 1919.

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said to have been wrongfully removed, or to recover their value. Defendant claimed title in the well and the land in which it was situate, and it was doubtless necessary to determine this question of title in order to dispose of the suit. But we do not think this affects the character of the suit or brings it within the scope of section 19 (g)—vide the decision of a Full Bench of the Bombay High Court, *Puttangowda v. Nilkanth Kalo Deshpande*(1).

We have been referred to a case of this Court: *Tirupati Raju v. Vissam Raju*(2). The suit was of a totally different nature and appellant relies simply on a single phrase of the Judgment, in which the learned Judges speak of the suit as involving 'not incidentally but necessarily' the determination of a title to land and as consequently falling under article 11 of Schedule II of the Provincial Small Cause Courts Act, which corresponds to section 19 (g). With all respect we have great difficulty in understanding the distinction suggested: unless the disposal of a suit necessarily involves the determination of a title, it is difficult to see why the title should be determined at all. But whatever may have been the meaning of the learned Judges, the practice and the current of decisions in Madras have been consistent with *Puttangowda v. Nilkanth Kalo Deshpande*(1), and we need only refer to three decisions of this Court: *Chintala Ragava Reddi v. Chintala Krishna Reddi*(3), *Vema Rangiah Chetty v. Vajravelu Mudaliar*(4) and *In re Venkaturama Chetty*(5).

We consider that the Small Cause Court had jurisdiction and we dismiss this petition with costs.

N.R.

(1) (1913) I.L.R., 37 Bom., 675 (F.B.). (2) (1897) I.L.R., 20 Mad., 155.

(3) (1912) 16 I.C., 201.

(4) (1917) 40 I.C., 653.

(5) (1918) 7 L.W., 610.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

THE SOUTH INDIAN RAILWAY Co., LTD., BY ITS AGENT
(PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL, TRICHINOPOLY
(DEFENDANT), RESPONDENT. *

1920,
July 16, 21,
22 and 28.

Madras District Municipalities Act (V of 1834), ss. 218 to 221—Duty of Municipality to carry nightsoil from houses to Municipal depots—No right in the municipality to levy fees from house owners.

A Municipality constituted under the Madras District Municipalities Act (V of 1834) has no power to levy fees from owners or occupiers of houses and buildings within the Municipality, for carrying nightsoil and other offensive matter accumulating on their premises from outside those premises to the Municipal depots wherever situated, such duty being cast on the Municipality by the Act.

SECOND APPEAL from the decree of J. G. BURN, District Judge of Trichinopoly, in Appeal No. 430 of 1917, filed against the decree of A. S. BALASUBRAHMANYA AYYAR, Subordinate Judge of Trichinopoly, in Original Suit No. 46 of 1916.

The facts are given in the Judgment of SADASIVA AYYAR, J.

D. Chamier instructed by Brightwell and Moresby for appellant.

V. Ramesam for respondent.

SADASIVA AYYAR, J.—The plaintiff, the South Indian Railway Company, Ltd., is the appellant before us. The suit was brought for recovery back of the total of the sums paid by the Railway Company to the Municipal Council of Trichinopoly, between March 1912 and November 1914, for what are called private scavenging services performed by the Municipality for the Railway Company. I find that they are called 'scavenging fees' in the relevant notices, reports and bills (see for example Exhibit J).

The Railway Company owns stations and offices at the Junction and Fort of Trichinopoly. There are several latrines and urinals in these places, and the washings and the nightsoil

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are collected by the railway authorities through the railway coolies into certain receptacles and a repository and into cisterns, the urinals being drained into cisterns. The Municipality owns carts and bulls, and employs drivers to drive the carts to the Municipal nightsoil depot which is situated at a distance of $5\frac{1}{2}$ or 6 miles from the junction station. The so-called scavenging fees recovered from the Company seem to be the hire charged for the supply of the nightsoil carts and urinal carts with bulls and drivers. Three nightsoil carts and four urinal carts seem to have been usually supplied in the year 1913, and the hire charged for the three nightsoil carts is Rs. 55 a month, and for the four urinal carts Rs. 62 a month. (See Exhibit A2.) (The requirements in previous and subsequent years have of course varied from what they were in 1913.) The second paragraph of Exhibit A2 says :

"The nature of the service rendered is carting away the nightsoil and urine collected by the Railway scavengers and kept in readiness in receptacles for removal."

After going through the records carefully I am satisfied that the claim of the Municipality relates to the cost of transport to the Municipal depot from just outside the railway premises, and that the removal of the nightsoil and urine in the receptacles and cisterns from within the railway compounds to just outside the compounds was treated as a negligible preliminary, to the main work of transport to the depot. It may be that the hired carts proceed some distance into the Railway premises to receive the offensive matter and then go out to the municipal road outside the premises and are then driven off to the Municipal depot at a distance of six miles; but the transport from inside the railway premises to just outside those premises, assuming that it is done in the municipal carts, does not seem to have been considered as a separate service chargeable by itself, any more than a cart driver charges for removing things from the verandah of a bungalow to the gate separately from the charge for conveyance to the Railway station. It is the employment of the carts, bulls and drivers in transporting the stuff to a distance of six miles which is the service which has been charged for and objected to in this case.

The plaintiff (Railway company) contends in paragraph 6 of the plaint that the provisions of the District Municipalities

Act do not entitle the Municipal Council to charge fees for the transport of nightsoil, etc., to their rubbish depot; and also that in levying the fees in dispute from the Railway Company, the Municipality has not complied in substance and effect with any of the provisions of the District Municipalities Act. The Council in their written statement contended, among other defences which are unsustainable and which therefore need not be further noticed :

"(a) The services rendered are such that the defendant council is not in any view of the law bound to do the same free of charge. These services have been rendered throughout by special agreement between the parties and the defendant council avers that it would not have rendered them but for such agreement; (b) from the year 1889, the defendant council has been doing the work of removal in and from the premises of the plaintiff Company under special agreements between the parties by which the plaintiff requested such specific services to be done in the manner and to the extent required by the plaintiff Company to suit their own convenience and by which they agreed to pay the defendant council specified sums per mensem; . . . (c) the defendant council submits that the above-said agreements are legal and binding on the parties and are further in substantial compliance with the provisions of the District Municipalities Act; . . . (d) the suit is barred by limitation."

As regards the removal 'in the premises' as distinguished from removal from the premises of the Railway Company, I have already stated that the charge was not intended for removal 'in the premises' themselves.

The learned Subordinate Judge's findings and the reasons for his findings are as follows: (a) under section 216 of the District Municipalities Act V of 1834 (as amended in 1897) the duty of making arrangements for the regular removal from the latrines and private houses of nightsoil and other offensive matter is cast on the Municipality. The clause in section 216, 'so far as the funds at their disposal permits,' does not in any way detract from the duty of the Municipality laid down in the section, but has reference only to the extent to which the Municipality ought to make arrangements for the regular removal. The latter part of the section directs the Municipality to provide depots for the deposit of nightsoil and other offensive matter 'and also covered vehicles or vessels for the removal of

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the same.' The duty of providing carriers, drivers and bulls, if required for the removal of the nightsoil and offensive matter from latrines and premises is also clearly laid on the Municipality in the discharge of the duty laid down in general terms in section 216. There is no duty laid on the rate-payers to provide their own bulls, carriers and drivers at their own cost for the removal of the nightsoil and other offensive matter from their latrines and premises to the distant Municipal depots, and the contention of the Municipality that such a burden is placed primarily on the ratepayers is (to use the words of the Subordinate Judge himself) 'as absurd as it is ingenious.' (b) The contention of the Municipality that there was an agreement between the Railway Company and the Municipality for payment of the charge is unsustainable. No such contract has been proved and the contract set up is also unlawful as a contract about scavenging fees can be made by the Municipal Council only under section 218 of the Act (as amended in 1897) and the payment of fees under such contract could be demanded only at such rate or rates as the Municipal Council may have prescribed with the approval of the Governor in Council; and as the approval of the Governor in Council has not been obtained to the rates at which the hire for carts, drivers and bulls in this case has been charged against the Railway Company, the charge was illegal. On these findings the Sub-Judge decreed the claim for the amounts paid within three years before suit dismissing the portion of the claim which related to the amounts paid more than three years before suit as barred by limitation.

On appeal the learned District Judge gave his findings as follows:

"(a) My reading of the effect of the provisions" of the District Municipalities Act "is that the Municipal Council is ordinarily obliged to provide depots for the disposal of nightsoil, means of transport and an agency for assisting occupiers in collecting nightsoil, etc., from their premises." (b) As "occupiers of buildings or land are prohibited from keeping nightsoil for more than twenty-four hours on their premises or land (vide sections 221 and 220) and they are liable to penalties for retaining it for even a shorter period, if it be not kept in proper receptacles," it is the primary duty of the occupier to get rid of

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the nightsoil and "as I understand the Act, he may make his own arrangements to convey it to the place of deposit provided for by the Municipal Council." (c) "It is not disputed that the Railway Company entered into a contract with the Municipal Council under the provisions of the original section 209. It is clear from the correspondence that the charges were levied not for collection only but for transport as well. The charges were varied and increased from time to time. The contract was originally made in 1888 and payments on the basis of this contract continued to be made without objection till long after the amendment of the law by Act III of 1897. The first objections were raised in 1906." Then the Municipality required the Railway Company to enter into contracts under section 218 and was demanding fees for its services under section 218. "They were admittedly paid and there is no proof that the payments were made under protest prior to 1912." "I think it must be held that an implied contract existed between the parties. There was however a defect in that the fees had never received the approval of the Governor in Council. This approval was accorded in pursuance of Government Order No. 1322 of 5th August 1908. I am unable to agree that this approval was inadequate." (d) "It is further urged that the fees are illegal because they were not prescribed by the council. As far as the record goes there is nothing to show that any resolution was passed by the Municipal Council as to the amount of the fees." (e) "I think the provisions of the Act were substantially complied with; a contract was entered into under section 218 and the fees were levied under this agreement."

On these findings which I have noted down mainly in the words of the learned District Judge himself, he allowed the appeal and dismissed the suit with costs throughout.

We have heard elaborate arguments on all the questions in issue in this Second Appeal preferred by the plaintiff company. After careful consideration, I have come to the conclusion that this appeal ought to succeed. I am unable to agree with the learned District Judge that under the provisions of the Act, as amended in 1897, it is the duty of the ratepayers to carry their nightsoil from their premises to the Municipal depot wherever situated. I have compared the provisions of Act V of 1884 as originally passed with the same provisions of that Act as amended

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by the Act of 1897. But it is unnecessary to set out the differences in detail, as the learned District Judge himself does not rely on any contract entered into under the provisions of section 209 of the unamended Act, but only on what he considers the implied contract which he considers to be established under the provisions of section 218 of the amended Act. The whole correspondence in 1888 is not produced in the case, and the single letter Exhibit II written by the Collector as Chairman of the Municipal Council in 1888 states merely that "there should be a contract between the Municipality and the Railway Company to remove their nightsoil and urine at a fixed rate," and that he proposed a rate of Rs. 12 per month for one nightsoil cart, and Rs. 9-12-0 per month for one urinal cart, the rates being liable to variation in future years. Having regard to the language of section 209 of the old Act (which says that "the Chairman may, subject to the approval of the Municipal Council, contract with the owner or occupier of any building or land to supply him on payment with a scavenger for the removal of nightsoil," etc.) and to the fact that the Chairman did not get the approval of the Municipal Council and supplied not a scavenger or scavengers, but carts, bulls and drivers, I do not think that the contract implied by the payment by the Railway Company (or even expressly entered into as is said to have been admitted before the District Judge) at the rates mentioned in Exhibit II between 1888 and 1897 can be treated as made in accordance with any lawful contract or contracts (as the rates have varied) contemplated by section 209. However, as I said, section 209 was omitted when the Act was amended in 1897. The Railway Company objected in 1903 to make any payments thereafter and the District Judge relies therefore not on section 209 of the old Act, but on section 218 of the amended Act, and finds an implied contract established under that section because, between 1906 and 1913 the Railway Company made payments without any formal protest. That section 218 says:

"The Chairman may contract with the occupier of any building or land to remove nightsoil from latrines or cesspools therein or thereon or to remove any other offensive matter or rubbish generally from such building or land, on such terms as to times and periods of removal and other matters as, to the said Chairman, may seem suitable and on payment of fees at such rate or rates as the

Municipal Council may have prescribed with the approval of the Governor in Council."

I am clear that the contract intended under section 218 is an express contract and not an implied contract. Further section 45 of the Act says:

"Every contract made by, or on behalf of, a Municipal Council, whereof the value or amount exceeds Rs. 100, shall be in writing, and except in the case of contract made under the provisions of sub-section (3) of section 44" (which has no reference to the present case) "shall be signed by two Municipal Councillors one of whom shall be the Chairman or Vice-Chairman."

There is no such written contract produced in this case and any contract which contravenes the express provisions of the statute law is clearly illegal, and cannot be enforced.

I am further of opinion that section 218 relates to contract with a rate-payer for removal of offensive matter and rubbish from inside his building or land to outside the building or land, with a view that that matter may be transported in the covered vehicles and vessels mentioned in section 216 (2) (which ought to be provided by the Municipality), and not to the transport of the matter so placed in the municipal covered vehicles or vessels from outside the building or land to the depots mentioned in section 216 (1). Even as regards the removal from within the building or land to the municipal covered vehicles or vessels, fees can be charged only after the approval of the Governor in Council has been obtained. There is nothing to show that such approval was obtained in this case. The learned District Judge refers to G.O. No. 1822 of 5th August 1908 as furnishing an 'adequate' approval by the Governor in Council. That Government Order is not on record, and even if it furnishes adequate sanction and was intended to be a sanction under section 218, the absence of a written contract signed by two councillors and the fact that section 218 does not relate to the transport to the depot which is the contract now in dispute renders the levy illegal.

I am also clear that the District Judge was in error in holding that sections 220 and 221 imply that it is the duty of the occupier of a building or land to remove his nightsoil to the municipal depot. Reading sections 216 to 221 together, I am satisfied that it is the duty of the Municipal Council to remove

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the rubbish and offensive matter from outside the occupier's building or land to the depot which they are bound under the Act to provide, that they are bound also to have the covered vehicles or vessels for the removal of the offensive matter pass by or placed at convenient positions on the road so that when what is collected by the occupants of the buildings or lands is placed by them in convenient spots (outside their buildings or lands) the matter can be taken into such covered vehicles or vessels by the Municipality and transported to the depots, and that it is illegal for the Municipality to charge any fees for transport by such covered vehicles or vessels to the depot. Even a written contract for such transport to the depot would, in my opinion, be void for want of consideration.

In the result, I would reverse the judgment of the District Judge and restore that of the Subordinate Judge with costs here and in the Court below payable by the respondent to the appellant.

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NAPIER, J.—This Second Appeal arises out of a suit by the South Indian Railway Company to recover from the Municipal Council of Trichinopoly sums levied from them as scavenging fees and paid by the company under protest. The Subordinate Judge gave a decree for Rs. 2,457 with interest. The decree was reversed by the District Judge. Hence this Second Appeal.

It is clear from the judgments in the case that the fees were levied for removal of nightsoil from the premises of the plaintiffs to a municipal depot about 6 or 7 miles from the town and it is admitted that unless the levy of these fees can be justified under section 218 of the District Municipalities Act, it was illegal. The Lower Appellate Court has suggested that they were payable under an implied contract. But no attempt has been made in this Court to support this view. The Subordinate Judge in a long and elaborate judgment has found that the Municipality have no right under the Act to charge the plaintiffs for removing nightsoil to their depot and in this view I entirely concur.

A minor question has arisen during the hearing as to whether the Municipality could charge the Railway Company for carting nightsoil over their premises as far as the public road. I do not think it necessary to express any final opinion

on this point, because Mr. Chamier for the appellants stated that the Railway Company would have no objection in coming to an arrangement with the Municipality for this limited work or, if such an arrangement could not be made, would be prepared themselves to place the nightsoil in convenient access to the public road.

As far as we can ascertain, the basis on which these fees were calculated was the supply of a certain number of Municipal carts and drivers for the removal of nightsoil to the depot above referred to. We have not got any account showing exactly how the figure was arrived at, but it appears from the previous correspondence, and from previous payments, that this was the basis. Mr. Chamier contended that under section 216 it was the duty of the Municipality themselves to remove the nightsoil to any place they chose over the public roads. Mr. Ramesam on behalf of the respondent stated two propositions: (1) that the Act intended to impose upon the householders in a Municipality the primary duty of removing nightsoil to any place, I assume, within reasonable limits chosen by the Municipality and that the Act threw no duty whatsoever on the Municipal Council in connexion with the removal of nightsoil even though the funds at their disposal permitted. It is sufficient to say that an examination of the scheme of the Chapter containing the provision which we have to construe negatives these contentions completely. Chapter II of the District Municipalities Act, 1884, as amended, creates Municipal Councils, vests property in them, and states their mode of doing business, and Chapter III permits the levying of certain taxes and tolls, and provides the mode of realizing them. Chapter IV lays down the purposes to which the funds raised under this Act shall be applied. We are concerned with the sections in this Chapter IV. Section 113 says:

"The funds raised under this Act shall . . . be applicable within the municipalities in which they are raised" to certain purposes one of which is "measures of public utility calculated to promote the safety, health, comfort, or convenience of the people."

From section 117 onwards are a series of specific provisions for the application of municipal funds. Some of them are compulsory and some are permissive and all of them are so far as the funds at their disposal may admit. The purposes are education, medical relief, vaccination, water-supply, repair of public streets and

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bridges, erection of buildings, provision of slaughter-houses and markets and public latrines and construction of drains. The 12th clause beginning with section 216 is headed 'General Sanitary Regulations' and section 216 is in the following terms:

"The Municipal Council shall so far as the funds at their disposal permit, make arrangements for (a) the regular sweeping and cleaning of the streets: (b) the regular removal from latrines and private houses of nightsoil, the carcasses of animals and other offensive matter; and (c) the regular removal from dustbins and private houses of dust, ashes, kitchen refuse and other similar inoffensive matter."

It is to be noted that the removal from the latrines and private houses of nightsoil is put in the same classification as regular sweeping and cleansing of the streets. Therefore, unless the Municipality can show that the funds at their disposal do not admit of their doing the work of removal of nightsoil, they are by statute required to do this work just as they are required to sweep and clean the streets. The section continues as follows:

"and with this object, they shall, so far as the funds at their disposal permit, provide depots for the deposit of street sweepings, or nightsoil, the carcasses of animals and other offensive matter, and of dust, ashes, kitchen refuse and other similar inoffensive matter."

These are the three classes referred to in the previous subsections. They shall also provide

"covered vehicles or vessels for the removal of night-soil and other offensive matter; vehicles or other suitable means for the removal of the carcasses of large animals and of dust, ashes, kitchen refuse and other similar inoffensive matter."

This provision covers also the classes above referred to. And lastly they shall provide

"dust-bins for the temporary deposit of dust . . . and other similar inoffensive matter."

This last provision applies only to one of the above-mentioned classes. So that there is no duty under the section thrown on the Municipality to provide receptacles for nightsoil, carcasses of animals and other offensive matter, their duty being only to provide suitable vehicles for the removal. Then comes section 217, under which the Municipal Council may, by

notification, require all occupiers of buildings to provide within a period specified in such notification moveable receptacles for the temporary deposit of nightsoil or other offensive matter. This section gives the Municipality the right to compel house-owners to provide receptacles for offensive matter, whereas under the previous section they are themselves compelled to provide dust-bins for inoffensive matter. They may further, under section 217, require that

"such receptacles shall be in readiness, screened from public view, for the removal of the contents thereof, free of charge, by the municipal servants."

These provisions in section 217 are alternative to the Council having made a contract with a householder for the removal of night-soil or other offensive matter. It was suggested that though section 217 might throw on the Municipality the duty of removing over the public streets night-soil kept in temporary receptacles yet if they did not choose to make any such notification the whole burden of such removal was thrown on the occupier. And in aid of this construction, reliance is placed on section 218 which is the alternative to section 217, the language of which is as follows:

"The chairman may contract with the occupier of any building or land to remove nightsoil from latrines or cesspools therein or thereon, or to remove any other offensive matter or rubbish generally from such building or land, on such terms as to times and periods of removal and other matters as to the said Chairman seem suitable and on payment of fees, etc."

I am quite clear that sections, 217 and 218 cover the same ground and that it is impossible to infer from section 218 that if the chairman does not contract and if he does not by notification require under section 217, the duty is cast on the occupier of the building of removing nightsoil along the public road in spite of the fact that this duty is thrown on the Municipality by section 216.

Another section relied on by the respondent is section 221 which provides that

"Every occupier of a building or land who keeps for more than twenty-four hours, or otherwise than in a proper receptacle, any nightsoil or other offensive matter in such building or on the roof thereof, or in any out-building or yard, or on any pavement or

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verandah attached or belonging to such building, or on such land, shall be liable to a fine."

This is the section relied on by Mr. Ramesam as being the legislative provision for which this portion of the Act headed 'General Sanitary Regulations' was enacted. As was pointed out above, this method of construction ignores the scheme of the Act and it is necessary therefore to read the section in such a manner as not to conflict with section 216, the opening section of this group of 'General Sanitary Regulations.' There is no difficulty in doing this. The duty of removal being thrown on the Municipality by section 216, the object of this section is to penalize persons who do not make arrangements necessary for the Municipalities carrying into effect their duty of removal. It also punishes the improper deposit of nightsoil in any building which is offensive to public health. Section 220, which immediately precedes it, indicates that section 221 must have a limited meaning, for section 220 enacts that when a notification has been issued under section 217 and the householder has provided a moveable receptacle, as required by the Municipality, then if he does not deposit therein all nightsoil or other offensive matter or keep the same in readiness, screened from public view, he shall be liable to fine. Section 220 having provided for cases arising after notification, section 221 applies to cases where no contract has been given for the removal from a building or land and also, I have no doubt, for cases where such a contract has been made. It would be impossible to contend that where a notification under section 217 has been issued and a suitable moveable receptacle supplied and kept in readiness, screened from public view, there still remained the duty on the householder of removing the nightsoil from such receptacle over the public road. This has not been suggested, but the alternative suggestion is, to my mind, as great a violation of the provisions, as this would be, for it amounts to this that where a municipality has not issued such a notification for the provision of the receptacle there is cast on the public the duty of removing the nightsoil from the latrines the whole way to the depot. It is obvious that if such a duty had been intended by the Act no Municipality would be so foolish as to incur the liability for carrying the nightsoil from the private premises to the depot in return for a provision by the householder of a

moveable receptacle kept in readiness. I have little doubt that section 217 was intended to make the execution of the duty cast on the Municipality under section 216 of removal from latrines more simple in operation and I am clear that if the Municipalities do not choose to issue such a notification they cannot impose upon the occupier of the building a higher liability. Where no such notification has been issued then there remains the duty cast on the householder of making such arrangements as will enable the Municipality to perform the duties cast on them by section 216. This can be done either through a contract by the householder with the Municipality under section 218 or in the absence of such a contract the householder may by himself make such a provision. Whether the municipality, in the absence of a notification under section 217, can be compelled to enter the premises and remove the nightsoil, etc., over the private land of a householder is a matter I do not propose to decide at present. But bearing in mind that section 218 enables the Municipality to contract for this work I am inclined to think that a householder cannot even under the wide words of section 216 throw this duty on the Municipality. Where we find two provisions, sections 217 and 221, under which a Municipality may by notification give directions for the removal of nightsoil to a place of access by carts and where under section 218 the householder can enter into a contract for this work with the Municipality it would be strange if, in the absence of such a notification and in the absence of a contract, this duty was imposed on the Municipality. This question is not, however, before us and I express no final opinion on it. The fees were admittedly levied for the removal over the public roads to a municipal depot and I am clear that the levy of such fees is beyond the powers of the Municipality. I agree therefore with the Subordinate Judge that the plaintiffs are entitled to recover three years' fees paid under protest and would restore his decree with cost of the plaintiffs throughout here and in the Lower Appellate Court.

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